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THE

JURISDICTION, PRACTICE & PROCEDURE

OF

THE QUARTER SESSIONS

IN

Judicial Matters

CRIMINAL, CIVIL AND APPELLATE.

BY

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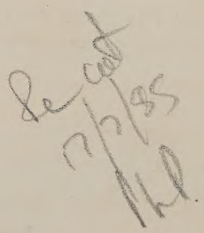

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PREFACE

It is not without a sense of his own inefficiency that the Editor of the present Work attempts to supply a want which a practice of many years at Quarter Sessions has led him to believe to exist. The well-known work entitled "Dickinson's Guide to the Quarter Sessions and other Sessions of the Peace," formerly supplied this want, but a period equal to that allotted to a generation of men has passed away since the last edition of that work was published under the editorship of the late Mr. Justice Talfourd. The manifold and extensive statutory amendments and alterations which have been made since that time in all branches of the subject comprised within that work, and the numerous judicial decisions which have added to the previous law, have rendered it useless to the practitioner of the present day. Further, the absence of a fresh edition of the highly esteemed work of Messrs. Leeming and Cross has left a void in the space formerly covered by that treatise. For these reasons, and to supply the wants thus created, the Editor has applied himself to build the present Volume on the lines of Mr. Dickinson's work; but he has found it impossible to make clear the distinction between the portion of Mr. Dickinson's work retained and the fresh matter which is interwoven with the old. It has, also, been found impracticable to adopt the plan used in that work, or to cover the ground taken in by

Mr. Dickinson's work, so far as it related to other Sessions than the Quarter Sessions, to which latter jurisdiction this Work is strictly confined.

The comparative rarity of removals of paupers in the present day has been deemed to justify the condensation of the portion of the work relating to that subject into a much smaller space than it would formerly have occupied, whilst, however, the increase in the amount and importance of the cases decided on the rating of property to the poor and other rates has lengthened the part allotted to that matter.

Though every effort has been made to moderate the bulk of the volume, it has nevertheless swollen to the present large size, but the division of the work at the second part is intended to afford a convenient opportunity of dividing the work for the purpose of binding for such as may so desire to do.

The merit of the Index, which is a portion of the Work of considerable importance in a treatise of this description, must be attributed to the accuracy and industry of the Editor's friend, Mr. R. H. Spearman, of the Oxford Circuit.

In conclusion, the Editor can only express a hope that his labours may be thought to deserve the lenient judgment of the profession.

3, Dr. Johnson's Buildings, Temple.
March, 1875.

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ERRATA.

Page 35, in note (*e*), *for* "1 Will. & M. sess. 2, c. 21, s. 4," *read* "sess. 1."
„ 83. As to Juries Act, 1874, *see post*, "Addenda."
„ 122, 8th line, *for* "pp. 134, 135," *read* "p. 130."
„ 126, n. (*h*), *after* "Id." *read* "s. 64."
„ 225. The heading of Sect. 2 should be transposed to p. 224, line 31.
„ 244, 37th line, *for* "prosecutor" *read* "prisoner."
„ 268, note (*q*), *add reference* "L. R., 2 C. C. R. 116."
„ 270, line 32, *for* "p. 291" *read* "p. 293."
„ 280, note (*b*), *for* "149" *read* "349."
„ 297, note (*x*), *for* "p. 151" *read* "p. 97, note (*i*)."
„ 302, line 25, *for* "asssits" *read* "assists."
„ 304, note (*d*), *for* "p. 291" *read* "292."
„ 316, line 13 from the bottom, *after* "larceny" *insert* "see the statute below."
„ 333, line 11 from bottom, *for* "s. 107" *read* "s. 1."
„ 339, line 29, *for* "p. 386" *read* "390."
„ 355, line 33, *for* "on" *read* "or."
„ 397. "Form of indictment for dredging for oysters" should be omitted, and inserted at p. 551.
„ 410, note (*k*), *for* "s. 3" *read* "s. 31."
„ 414, line 9, *for* "uninclosed" *read* "inclosed."
„ 427, last line, *transpose* "property," *and read it after* "purloined," in 2nd line above.
„ 431, line 11, *for* "larceny" *read* "embezzlement."
„ 445, note (*c*), *for* "Pollock, B.," *read* "Pollock, C. B."
„ 457, line 3 of sect. 56, *for* "after" *read* "before."
„ 551. *Insert* "Indictment for dredging oysters," from p. 397.
„ 560, line 12, *after* "&c" *insert a* "full stop."
„ „ line 14, *dele* "full stop."
„ 571, note (*s*), line 4, *for* "c. 58" *read* "c. 59."
„ 649, line 6 from bottom, *for* "c. 9" *read* "c. 19."
„ 654, line 27, *for* "grant" *read* "renew."
„ 681, last line, *after* "sessions" *insert* "full stop"—*dele* "or."
„ 686, 4th line from bottom, *after* "prove" *insert* "their case;" *after* "referred" *insert* "to."
„ 700, line 7, *for* "4 & 5 Will." *read* "5 & 6 Will."
„ 738, *for* "3 Car. 2, c. 4, s. 15," *read* "13 & 14 Car. 2, c. 12, s. 19."
„ 766, lines 3 and 4 from bottom, *dele* "not only" *to* "but also."
„ „ note (*h*), *after* "*Reg.* v. *Harvey*," *insert* "L. R., 10 Q. B. 46; 44 L. J., M. C. 1."
„ 805, line 17, *dele* "comma" *after* "adjourn."
„ „ line 18, *after* "appeal" *insert* "comma."
„ 806, line 5, *after* "of" *read* "there;" *and after* "having" *read* "been."
„ 817, line 10, *after* "section" *add* "of 25 & 26 Vict. c. 103."
„ 848, line 28, *dele* "semicolon" *insert* "comma."

Page 848, line 36, *dele* "semicolon."
„ „ line 37, *insert* "semicolon" *after* "1853."
„ 884, last line but one, *after* "union" *insert the words* "the order for expenses may."
„ 885, line 3, *dele* "comma" *insert* "semicolon."
„ „ line 4, *after* "manner" *insert* "as in the case of parishes."
„ 891, last line but one, *dele* "comma" *after* "made."
„ 1024, line 21 from bottom, *for* "34 & 35 Vict." *read* "35 & 36 Vict."
„ 1102, line 9, *for* "11 & 12 Vict." *read* "12 & 13 Vict."
„ „ note (*o*) *for* "s. 34," *read* "s. 3."

ADDENDA.

Page 83. The contemplated Juries Act, 1874, did not ultimately succeed in passing.

Page 390. Where any prisoner shall be convicted either summarily or otherwise of larceny or other offence which includes the stealing of any property, and it shall appear to the court by the evidence that the prisoner has sold the stolen property to any person, and that such person had no knowledge that the same was stolen, and that any monies have been taken from the prisoner on his apprehension, it shall be lawful for the court, on the application of such purchaser, and on the restitution of the stolen property to the prosecutor, to order that out of such monies a sum not exceeding the amount of the proceeds of the said sale be delivered to the said purchaser (30 & 31 Vict. c. 35, s. 9).

Page 413. 24 & 25 Vict. c. 96, s. 36, enacts, that "whosoever shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

Page 598. Delivering to carrier, or sending by railway or ships, or depositing in a warehouse or on a quay, nitro-glycerine or glonoine oil, or other specially dangerous goods, without marking or notice in writing, is punishable in a penalty not exceeding 500*l*., or imprisonment, with or without hard labour, for two years (29 & 30 Vict. c. 69, s. 3).

Page 772, n. (*q*). The Local Government Acts shall be deemed to be in force within the district of every urban authority constituted under the Public Health Act, 1872, and all the powers, rights, duties, capacities, liabilities and obligations within such district exerciseable, or attaching to a local board under the Local Government Acts, shall be transferred and attach to such urban authority to the exclusion of any other authority within the district (35 & 36 Vict. c. 79, s. 7).

Page 780. Note (*f*), see *Reg.* v. *Bagge and another* (*Justices of Norfolk*), 44 L. J., M. C. 45.

Quarter Sessions' Practice.

PART I.

OF THE CRIMINAL JURISDICTION & PROCEDURE.

CHAPTER I.

GENERALLY OF THE SESSIONS OF THE PEACE.

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SECTION 1.

OF THE DIFFERENT KINDS OF SESSIONS OF THE PEACE.

Sessions of the Peace—what.

THE term "session of the peace" is used to designate a sitting of justices of the peace for the execution of those powers which are confided to them by their commission, by charter, or by numerous acts of parliament. All jurisdictions granted by charter to any borough were, however, made to cease by 5 & 6 Will. 4, c. 76, s. 107 (*a*). Of these sessions there are four kinds —petit, special, quarter sessions and general sessions. The first of which, in counties, is a meeting of two or more justices of the same district or division for the execution of some power vested in them by law, either had on their own motion or summoned on the requisition of any party entitled to require their attendance, to discharge some duty required to be performed by two or more justices. The county is divided into districts or divisions for petty sessional purposes by the quarter sessions (*b*).

Petty Sessions.

(*a*) See *post*, p. 14.

(*b*) See *post*, Part IV.

Petty Sessions —what.

In cities, boroughs or towns corporate, having a separate commission of the peace, or any part thereof, by 12 & 13 Vict. c. 18, s. 1, every sitting and acting of justices of the peace, or of a stipendiary magistrate, either in a police court or other place appointed in that behalf, is to be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division. The special sessions is a "petty sessions" summoned, after notice, to the justices of the division of the purpose of the meeting, for certain particular defined purposes (*c*)—such as the licensing of alehouses, appointing overseers of a parish, or the like (*d*). Quarter sessions and general sessions of the peace is a court of record holden before two or more justices, whereof one is of the quorum, for execution of the authority given them by the commission of the peace and certain statutes (*e*).

Special Sessions.

Quarter Sessions.

General Sessions.

Distinction between General, Quarter and Special Sessions.

According to Lambard, general and quarter sessions are synonymous terms, for he makes no distinction between them. This, however, is erroneous; for it seems that quarter sessions are a species only of the general sessions, and that such sessions only are properly called general quarter sessions which are holden in the four quarters of the year, in pursuance of 2 Hen. 5, and that any other sessions holden at any other time for the general execution of the justices' authority, which by the said statute they are authorized to hold oftener than at the times therein specified if need be, may properly be called general sessions, and those holden on a special occasion for the execution of some particular branch of their authority, may properly be called special sessions (*f*).

General Sessions, when holden.

The only description of general sessions which is usually holden in modern times, is the court of general quarter sessions; but in the county of Middlesex, besides the four quarter sessions, four general sessions are held in the intervals, and original intermediate sessions also occasionally take place. As the statutes requiring general sessions to be held at particular times are merely directory, there is no ground for the doubt at one time expressed, whether by law justices have power to hold sessions more frequently than once a quarter; for sessions so held are clearly legal; indeed, 2 Hen. 5, st. 1, c. 4, s. 2, after pointing out at what parts of the year the four sessions shall be held, adds, "and more often if need be." But in counties where, from the occasional arrear of business, particularly of smaller offences before the spring and summer circuits, it is desirable that sessions shall take place more frequently than once a quarter, it is the modern practice to adjourn the last

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(*c*) 2 Hawk. P. C. 8, s. 18. *R.* v. *Justices of Worcestershire*, per *Bayley*, J., 2 B. & A. 228.

(*d*) See also as to divisions of counties for these purposes, *post*, Part IV.

(*e*) Dalt, c. 185. According to Lambard, 379, it is a meeting of justices for the execution of their general authority, &c.

(*f*) Burn's Justice, 30th ed., *tit. Sessions*, p. 335; 2 Hawk. c. 8, s. 18.

preceding quarter session to some intermediate day before the time for holding the next original quarter session, instead of holding an extra original general session (*g*). It has also been decided that the holding original intermediate sessions without adjournment of the last preceding quarter session, is perfectly legal, upon issuing a new precept to the sheriff, and new summonses to the jurors (*h*). *General Sessions, when holden.*

The court of quarter sessions, being an aggregate meeting of individual justices for the purpose of exercising their powers in quarter sessions assembled, we must look to the powers conferred on the individual justices to ascertain the jurisdiction of the court.

Section 2.

Jurisdiction of the General and Quarter Sessions in Counties.

The jurisdiction of the sessions of the peace is determined in the commission of the peace granted by the crown to the individual justices; and such commission may extend over the whole county or to a portion of a county, as a liberty or franchise, either with concurrent or exclusive powers; but the jurisdiction of justices, under a commission for the county, extends over a liberty or franchise created in the county which has a separate commission, unless their authority is taken away by the express provisions of the charter constituting the liberty, or some act of parliament (*i*),—or by act of parliament, as the Bishop of Ely and his successors, the Archbishop of York and the Bishop of Durham, under 27 Hen. 8, c. 24, ss. 20, 21, 22,—or by charter or grant made by the Queen under the great seal as to mayors and chief officers in certain corporate towns and boroughs not mentioned in the schedules to the Municipal Corporation Act, 5 & 6 Will. 4, c. 76. This last is in the nature of a perpetual commission, the powers of which are exercised successively by the different persons who fill certain offices designated by the charter (*k*). Jurisdiction of Justices.

The commission of the peace, under which the magistrates of a county derive their powers, dates from about the year 1327, the earliest statute on the subject to be found on the parliamentary roll being the 1 Edw. 3, c. 16, from which act we are to date the final alteration in our constitution, whereby the election of conservators of the peace were taken from the By Statute.

(*g*) Dick. Q. S., 4th ed. 44, and see note.
(*h*) *R.* v. *Mullaney*, 6 C. & P. 96; see 4 & 5 Will. 4, c. 47, *post*, p. 23.
(*i*) *Arnold* v. *Gaussen*, 8 Exch. 463; *Arnold* v. *Dimsdale*, 2 E. & B. 580. See also 5 & 6 Will. 4, c. 76, s. 111, by which the jurisdiction of county justices is recognized in boroughs not having a court of quarter sessions of their own.
(*k*) *Weatherhead* v. *Drewry*, 11 East, 175.

Jurisdiction of Justices.

By Statute.

people and transferred to the assignment of the Queen (*g*). Prior to that time, besides the ex officio guardians and conservators of the peace, such as king's justices, inferior judges and ministers of justice, as sheriffs, constables, tythingmen, headboroughs and the like, there were conservators of the peace by tenure and prescription, and others elected in full county court in pursuance of the writ directed to the sheriff, besides other extraordinary ones appointed by commission from the king (*h*).

By 1 Edw. 3, c. 16, intituled, "Who shall be assigned justices and keepers of the peace," it is enacted that, "for the better keeping and maintenance of the peace, the king will that in every county good men and lawful, which be no maintainers of evil or barrators in the county, shall be assigned to keep the peace." The next year the form of the commission was enlarged, and continued still further to be enlarged both in that king's reign and in succeeding reigns (*i*).

By 4 Edw. 3, c. 2: (3) Also there shall be assigned good and lawful men in every county to keep the peace; (4) and at the time of the assignments mention shall be made that such as shall be indicted or taken by the said keepers of the peace shall not be let to mainprise by the sheriffs nor by none other ministers, if they be not mainpernable by the law; (5) nor that such as shall be indicted shall not be delivered but at the common law; (6) and the justices assigned to deliver the gaols shall have power to deliver the same gaols of those that shall be indicted before the keepers of the peace; (7) and that the said keepers shall send their indictments before the justices, and they shall have power to inquire of sheriffs, gaolers and others, in whose ward such indicted persons shall be, if they make deliverance or let to mainprise any so indicted which be not mainpernable, and to punish the said sheriffs, gaolers and others if they do anything against this act.

By 18 Edw. 3, st. 2, c. 2: "Two or three of the best of reputation in the counties shall be assigned keepers of the peace by the king's commission, and at what time need shall be the same with other wise and learned in the law shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably according to law and reason and the manner of the deed" (*j*).

By 34 Edw. 3, c. 1 (A.D. 1360), intituled, "What sort of persons shall be justices of the peace and what authority they shall have," it was directed: (1) "That in every county of England shall be assigned for the keeping of the peace one lord,

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(*g*) Lamb. bk. 1, c. 4.

(*h*) Lamb. bk. 1, c. 3.

(*i*) Lamb. bk. 1, c. 9; Burn's Justice, 30th ed., *tit. Justices of the Peace.*

(*j*) By 12 Rich. 2, c. 10, the number is increased to six, and by 14 Rich. 2, c. 11, to eight.

Jurisdiction of Justices.

By Statute.

and with him three or four of the most worthy in the county, with some learned in the law; (2) and they shall have power to restrain the offenders, rioters, and all other barrators, and to pursue, arrest, take and chastise them according to their trespass or offence; (3) and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; (4) and also to inform them and to inquire of all those that have been pillors and robbers in the parts beyond the seas, and he now come again and go wandering, and will not labour as they were wont in times past; (5) and to take and arrest all those that they may find by indictment or by suspicion, and to put them in prison; (6) and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the king and his people, and the other duly to punish to the extent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants nor other passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders; (7) and also to hear and determine at the king's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid; (8) and that writs of oyer and determiner be granted according to the statutes thereof made, and that the justices which shall be thereto assigned be named by the court and not by the party; (9) and the king will that all general inquiries before this time granted within any seigniories for the mischiefs and oppressions which have been done to the people by such inquiries, shall cease utterly and be repealed; (10) and that fines which are to be made before justices for a trespass done by any person be reasonable and just, having regard to the quantity of the trespass and the causes for which they be made." This statute is said by Lord Holt to have made justices of the peace complete judges (*k*), and in pursuance of its direction the commission of the peace issues, under which magistrates for counties act in the several sessions, which we shall hereafter consider. The commission almost in its present form was settled by a conference of the judges in Michaelmas Term, 1590 (*l*), and commanded by the then lord chancellor to be used (*m*).

The Commission of the Peace.

The commission consists of two parts or two different assignments. By the first assignment, any one or more justices have not only all the ancient power touching the peace which the conservators of the peace had at the common law, but also that whole authority which the statutes have since added thereto (*n*). The second assignment defines their powers in sessions.

(*k*) *Harcourt* v. *Fox*, 1 Show. 528.
(*l*) 32 & 33 Eliz.
(*m*) See 1 Br. & B. 552.
(*n*) Dalt. c. 5, p. 15.

The Commission of the Peace.

The form of the commission is as follows :—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To A. B., C. D. (naming all the justices of the county or riding), greeting (*o*):

Know ye that we have assigned you jointly and severally, and every one of you, our justices to keep our peace in our county of W.; and to keep and cause to be kept all ordinances and statutes for the good of the peace, and for preservation of the same, and for the quiet rule and government of our people, made in all and singular their articles in our said county (as well within liberties as without), according to the force, form and effect of the same; and to chastise and punish all persons that offend against the form of those ordinances or statutes, or any of them, in the aforesaid county, as it ought to be done according to the form of those ordinances and statutes; and to cause to come before you, or any of you, all those who, to any one or more of our people concerning their bodies, or the firing of their houses, have used threats, to find sufficient security for the peace, or their good behaviour towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept.

We have also assigned you, and every two or more of you (of whom any one of you, the aforesaid A. B., C. D., &c., we will shall be one), our justices, to inquire the truth more fully, by the oath of good and lawful men of the aforesaid county, by whom the truth of the matter shall be the better known, of all and all manner of felonies, poisonings, enchantments, sorceries, arts magic, trespasses, forestallings, regratings, ingrossings and extortions whatsoever; and of all and singular other crimes and offences of which the justices of our peace may or ought lawfully to inquire, by whomsoever, and after that manner soever, in the said county done or perpetrated, or which shall happen to be there done or attempted; and also of all those who in the aforesaid counties, in companies, against our peace, in disturbance of our people, with armed force, have gone or rode, or hereafter shall presume to go or ride; and also of all those who have there lain in wait, or shall hereafter presume to lie in wait, to maim, or cut, or kill our people; and also of all victuallers, and all and singular other persons who, in abuse of weights and measures, or in selling victuals against the form of the ordinances and statutes, or any one of them, therefore made for the common benefit of England and our people thereof, have offended or attempted, or hereafter shall presume, in the said county, to offend or attempt; and also of all sheriffs, bailiffs, stewards, constables, keepers of gaols, and other officers who, in the execution of their offices about the premises, or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been, or shall happen hereafter to be, careless, remiss or negligent in our aforesaid county; and of all and singular articles and circumstances, and all other things whatsoever that concern the premises or any of them by whomsoever and after what manner soever in our aforesaid county done or perpetrated, or which hereafter shall there happen to be done or attempted in what manner soever; and to inspect all indictments whatsoever so before you or any of you taken, or to be taken, or before others, late our justices of the peace in the aforesaid county, made or taken and not yet determined; and to make and continue processes thereupon against all and singular the persons so indicted, or who before you hereafter shall happen to be indicted, until they can be taken, surrender themselves, or be outlawed; and to hear and determine all and singular the felonies, poisonings, enchantments, sorceries,

(*o*) If any gentleman is afterwards added to the number, which is done by appointment from the lord chancellor, the clerk of the peace sends the commission to London to the proper office, where the name is inserted, and the commission is resealed. (Burn's Justice, 30th ed., vol. iii., *tit. Justices of the Peace.*)

The Commission of the Peace.

arts magic, trespasses, forestallings, regratings, ingrossings (*p*), extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premises, according to the laws and statutes of England, as in the like case it has been accustomed or ought to be done; and the same offenders, and every of them, for their offences, by fines, ransoms, amerciaments, forfeitures, and other means, as according to the law and custom of England, or form of the ordinances and statutes aforesaid, it has been accustomed or ought to be done, to chastise and punish.

Provided always, that if a case of difficulty upon the determination of any of the premises before you, or any two or more of you, shall happen to arise, then let judgment in nowise be given thereon before you, or any two or more of you, unless in the presence of one of our justices of the one or other Bench or of one of our justices appointed to hold the assizes in the aforesaid county.

And therefore we command you and every of you that, to keeping the peace, ordinances, statutes, and all and singular other the premises, you diligently apply yourselves; and that, at certain days and places which you or any such two or more of you as is aforesaid shall appoint for these purposes, into the premises you make inquiries; and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of England; saving to us the amerciaments and other things to us therefrom belonging. And we command by the tenor of these presents our sheriff of W., that at certain days and places which you or any such two or more of you as is aforesaid shall make known to him, he cause to come before you or such two or more of you as aforesaid, so many and such good and lawful men of his bailiwick (as well within liberties as without), by whom the truth of the matter in the premises shall be then known and inquired into.

Lastly, we have assigned to you the aforesaid A. B., keeper of the rolls of our peace in our said county; and therefore you shall cause to be brought before you and your said fellows, at the days and places aforesaid, the writs, precepts, processes and indictments aforesaid, that they may be inspected, and by a due course determined as is aforesaid.

In witness thereof, &c.

Under this commission the justices in quarter and general sessions exercised jurisdiction over felonies with no limitations, except that which sprung up in practice of abstaining from the more difficult and important cases; so that offences punishable capitally or with transportation for life were cognizable by them, though in practice the committing justices, acting upon the caution contained in the commission, sent the more serious cases to the assizes; but instances occurred in which felonies punishable as above were tried and the sentences passed at sessions, of which *Bourne* v. *The King* (*q*) is an example.

Considerations leading to the Limitation of Jurisdiction of the Quarter and General Sessions.

A bench at sessions is never deficient in general information, personal integrity and pure uprightness of purpose; but the jealous and scrutinizing spirit of modern times, seeking to find in persons who preside as justices in intricate cases acquired qualities of a high kind, required more of that legal knowledge and discrimination which presents to a jury the facts of a case from every point of view that its bearings, with respect to the

(*p*) The offences of enchantments, sorceries, and arts magic are abolished by 9 Geo. 2, c. 5; and of forestallings, regratings, and ingrossings, by 7 & 8 Vict. c. 24.

(*q*) In Error, 7 A. & E. 58; 6 L. J. (N. S.) M. C. 129.

Limitation of the Jurisdiction of the Sessions.

law on it, may make desirable, and which, though compassed sometimes by the ability and experience of individual magistrates, is seldom to be expected from less than the labour of a life devoted to legal pursuits. The chance administration of justice presents incalculable evils, particularly in criminal matters. The admission or rejection of evidence on mistaken grounds leads to painful results, and in the more serious cases to serious hardship, or a monstrous failure of justice. Juries might be called on in cases of the highest importance to execute their important duties, subject to the efforts of able counsel, without that sufficient counterpoise from the bench which, with even-minded, impartial and temperate authority, combined with adequate knowledge and experience, should closely watch over the course of examination, and preserve inviolate the rule of evidence and the rights of the contending parties.

The subject of awarding punishment is also one of the utmost difficulty, requiring the exercise of great temper, discrimination, discretion and experience, and the higher the punishment allotted to the offence the greater is the attention of the public bestowed upon the mode in which it is exercised.

These considerations led to a legislative restriction of the jurisdiction of quarter sessions in criminal cases of the more serious description by the definition which is contained in 5 & 6 Vict. c. 38. By that act, "Neither the justices of the peace nor the recorder of any borough shall at any session of the peace, or at any adjournment thereof, try any person or persons for any treason, murder or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life (penal servitude for life being now substituted by 20 & 21 Vict. c. 3, s. 6), or for any of the following offences:

5 & 6 Vict. c. 38.

"1. Misprision of treason;
"2. Offences against the queen's title, prerogative, person or government, or against either house of parliament;
"3. Offences subject to the penalties of præmunire;
"4. Blasphemy and offences against religion;
"5. Administering or taking unlawful oaths;
"6. Perjury and subornation of perjury;
"7. Making or suborning any other person to make a false oath, affirmation or declaration punishable as perjury, or as a misdemeanor;
"8. Forgery;
"9. Unlawfully and maliciously setting fire to crops of corn, grain or pulse, or to any part of a wood, coppice or plantation of trees, or to any heath, gorse, furze or fern;
"10. Bigamy and offences against the laws relating to marriage;
"11. Abduction of women and girls;
"12. Endeavouring to conceal the birth of a child;
"13. *Offences against the bankrupt and insolvent laws;*

"14. Composing, printing or publishing blasphemous, seditious or defamatory libels;
"15. Bribery;
"16. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person;
"17. Stealing or fraudulently taking or injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein.
"18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate or any interest in lands, tenements or hereditaments."

Limitation of the Jurisdiction of the Sessions.

No. 13, relating to offences against the bankrupt and insolvent laws, has been repealed by the 32 & 33 Vict. c. 62, and any offence against that act (The Debtors Act, 1869) is expressly enacted to be deemed to be within the jurisdiction of such justices and recorders by sect. 20.

Bankrupt's offences.

The above 5 & 6 Vict. c. 38, s. 1, also contained a proviso that nothing in that act was to interfere with the Central Criminal Court jurisdiction under the provisions of the 4 & 5 Will. 4, c. 36.

Then under 24 & 25 Vict. c. 96, s. 87, no misdemeanor against any of the last twelve preceding sections of this act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

Frauds by Bankers, &c.

Those sections relate to frauds by agents, bankers or factors, and are the offences of agents, bankers or factors in embezzling money or selling securities, &c. intrusted to them under directions in writing, or chattels or valuable security held for safe custody or special purposes.

Of bankers, &c. in selling property intrusted to them for safe custody;
Of persons under powers of attorney in fraudulently selling property;
Of factors in obtaining advances on the property of their principals and by their clerks wilfully assisting the same;
Of trustees in fraudulently disposing of property;
Of directors of any body corporate or public company for fraudulently appropriating property;
Of directors and public officers of any body corporate for keeping fraudulent accounts;
Of directors and public officers of any body corporate for wilfully destroying books;
Of directors and public officers of any body corporate for publishing fraudulent statements.

The making a false oath in an affidavit sworn before a commissioner for entering affidavits in the Queen's Bench under the Bills of Sale Act, 1854, for the purpose of procuring the

Limitation of the Jurisdiction of the Sessions.

registration of a bill of sale, is not perjury but is a misdemeanor punishable as such (*r*); and would, therefore, not be triable at quarter sessions under the 7th exception of the statute. So the same exception would now seem to include an indictment for

False oaths.

taking a false oath before a surrogate in order to procure a marriage licence, by which the licence is procured and marriage had (*s*).

Attempts to commit felonies.

The jurisdiction of the courts of quarter sessions to try a person for the common law misdemeanor of attempting to commit suicide is not taken away by the statute 24 & 25 Vict. c. 100, for attempting to kill oneself is not attempting to commit murder within the meaning of that statute (*t*). So the attempt to commit the felony of having carnal connection with a girl under the age of ten years is triable at sessions, though the complete offence is not so triable (*u*).

Setting fire to buildings, &c.

Arson is not generally triable at quarter session, but in certain instances, under the consolidating statute 24 & 25 Vict. c. 97, the setting fire to certain buildings, &c., is triable at quarter sessions; but the statutes relating to such offences will be found, *post*, Chap. VIII., *Of Particular Offences.*

Disorderly houses.

A court of quarter sessions for a borough has jurisdiction to try an indictment against a person for keeping a disorderly house under 25 Geo. 2, c. 36 (*v*).

Perjury, forgery or night poaching the court of quarter sessions have no jurisdiction to inquire into, much less hear and determine, and therefore an indictment found for such an offence is void; and though removed by certiorari into the

Bills found at sessions and transmitted to the assizes.

Queen's Bench, and sent down for trial at the assizes, cannot be tried and will be quashed (*x*). And where no certiorari has been obtained, a writ of error would lie if the sessions tried such an offence and gave judgment upon it; but where an indictment for a misdemeanor is properly found at the sessions and transmitted by them to the assizes, with a certificate of the clerk of the peace of its being so found, and indorsed a true bill by the foreman of the grand jury at the sessions, it should be tried at the assizes without a new bill being preferred (*y*).

Apart from the above statute 5 & 6 Vict. c. 38, and where that statute does not apply, if an offence be created, and declared a misdemeanor by a statute passed since the institution of the office of a justice of the peace, it may be tried by a court of quarter sessions, unless there is some special direction that it shall be heard and determined by another court (*z*). Thus,

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(*r*) *Reg.* v. *Hodgkiss*, L. R., 1 C. C. R. 212; 39 L. J., M. C. 14.
(*s*) See *R.* v. *Foster*, Russ. & Ry. 459.
(*t*) *Reg.* v. *Burgess*, 32 L. J., M. C. 55; L. & C. 258.
(*u*) *Reg.* v. *Beale*, 35 L. J., M. C. 60; L. R., 1 C. C. R. 10.
(*v*) *Reg.* v. *Charles*, L. & C. 90; 31 L. J., M. C. 69.
(*x*) *Reg.* v. *Haynes*, Ry. & Moo. 298; and see *Reg.* v. *Rigby*, 8 C. & P 770; *Smith's case*, Cro. Eliz. 87.
(*y*) *Reg.* v. *Wetherell*, R. & R. 381.
(*z*) See Com. Dig. tit. *Justices* (G 4).

Limitation of the Jurisdiction of the Sessions.

where a statute of 47 Geo. 3, declared lighting fires on the coast at particular times to be a misdemeanor, it was held indictable at quarter sessions, though the act directed that the offender should be committed to the next court of oyer and terminer, great session, or gaol delivery; and in case of indictment found, should forthwith plead and be tried without traverse (*a*); but in that statute it was also provided that the recognizances to be entered into by the prisoner should bind him to appear at the quarter sessions amongst other courts to answer any indictment there found.

Where, indeed, a statute creates a new offence, and limits it to be tried before justices of *oyer and terminer* only, the quarter sessions cannot try it; for though justices of the peace are authorized to hear and determine, they are not what the law intends by justices of oyer and terminer; there being a distinct commission so named (*b*).

Solicitations to commit crimes.

In a case where a question was raised, whether the quarter sessions had power to try an indictment for soliciting a party to steal from another, Lord *Kenyon*, said (*c*), "I am clearly of opinion that it is indictable at the quarter sessions, as falling in with that class of offences which, being violations of the law of the land, have a tendency, as it has been said, to a breach of the peace, and are therefore cognizable by that jurisdiction.

In the result, it appears that the quarter sessions have power to try all indictable offences, whether offences at common law, or created by statute; with the exceptions contained in 5 & 6 Vict. c. 38, as amended by the Debtors Act, 1869, and 24 & 25 Vict. c. 96, s. 87—treason, premunire, forgery, and perjury at common law, and perhaps usury.

Number of Justices to form Court.

To compose a general or quarter session of the peace, there must be at least two justices, one of whom must be of the *quorum* (*d*), or of the number whose names are repeated in the clause "*of whom* some one of any of you the aforesaid" A. B., &c., "we will shall be one." In former times this clause imparted a substantial distinction, as only a select number, supposed to possess higher qualifications for the office than their companions, were enumerated in this clause, without the presence of one of whom others could not act in session (*e*). But progressive changes in the state of society gradually made this distinction unnecessary and invidious; and it was narrowed both by statute, and by the mode of framing the commission.

As to the Quorum Clause.

Effect of Quorum Clause gradually abolished by statute.

Thus by 26 Geo. 2, c. 27, it was enacted, that no act, order, adjudication, warrant, indenture of apprenticeship, or other instrument, done or executed by two or more justices, which

(*a*) See *R.* v. *Cock*, 4 M. & S. 71, decided on 47 Geo. 3, sess. 2, c. 66, s. 34.

(*b*) Com. Dig. tit. *Justices* (G 2); 2 Hale's P. C. 44. See *Reg.* v. *Ipstones*, 37 L. J., M. C. 37; L. R., 3 Q. B. 216.

(*c*) *R.* v. *Higgins*, 2 East, 18.

(*d*) Lamb. bk. 4, p. 378.

(*e*) 1 Bla. Com. 351.

Number of Justices to form Court.

doth not express that one or more of them is of the *quorum* (although the statutes respectively require that one of the justices shall be of the *quorum*) shall be impeached, set aside, or vacated for that defect only. By a subsequent statute (*g*), in cities, boroughs, towns corporate, franchises, and liberties, which have only one justice of the *quorum*, all acts, orders, adjudications, warrants, indentures of apprenticeships, or other instruments done or executed by two or more justices, qualified to act therein, shall be valid, although neither of the said justices shall be of the *quorum*. And by 4 Geo. 4, c. 27, that act is extended to cities, boroughs, towns corporate, franchises, liberties, or other local jurisdictions where the number of justices of the peace is limited, and any one, two or more of such justices only are of the *quorum*. And further it has been held that since the 35 Geo. 3, c. 101, s. 1, orders of removal need not be made by justices of the *quorum* (*h*).

Effect of the Quorum Clause.

But now, it is the practice to include all the magistrates in the *quorum* clause, enumerating the whole of the names of those who by the previous clauses have been constituted justices. It may therefore now be assumed, that *any two*, or more, of the persons named in the commission of the peace for any county, division, riding, or liberty, possessing the qualification, and having complied with the form required by law, are competent to hold a general quarter session of the peace, for the district over which their commission extends.

Nature of the Court of Quarter Sessions in Counties.

General quarter sessions of the peace being that species of general sessions which is held under authority of the commission of the peace by two or more justices (one being of the quorum), at some place within the county fixed by their precept once in every quarter of the year, as directed by various statutes, the whole body of the justices constitute the court, which is one court under one commission, and holding its sittings four times a year (*i*). In each sitting as judges of oyer and terminer, and under their commission, they are empowered to continue processes.

It is a continuing Court.

It is a continuing court which has only one commission, and not a new commission from time to time, so that justices have power to adjourn a case from one court to another, and can respite judgment from one session to another, and bind the defendant upon an indictment to come up for judgment when called upon, on the ground they are not advised what judgment to pass, without any adjournment of the sessions (*k*); or they

Power of adjournment.

can adjourn the consideration of a matter from one session to a future session, not necessarily the next subsequent one (*l*), un-

(*g*) 7 Geo. 3, c. 21.

(*h*) *Reg.* v. *Llangian*, 4 B. & S. 249; 32 L. J., M. C. 225.

(*i*) *Per Blackburn*, J., in *R.* v. *Justices of Westmoreland*, 37 L. J., M. C. 115, 119; L. R., 3 Q. B. 457.

(*k*) *Keen* v. *The Queen*, 10 Q. B. 928; 16 L. J., M. C. 180; *Campbell* v. *Reg.*, 11 Q. B. 841.

(*l*) *R.* v. *Justices of Bucks*, 6 D. & R. 142; *Reg.* v. *Justices of Westmoreland*, 37 L. J., M. C. 115; L. R., 3 Q. B. 457.

Nature of Court of Quarter Sessions.

less a statute requires the court to hear and determine the matter at the next session or next subsequent session, as under the Licensing Act (9 Geo. 4, c. 61), in which case however, though they cannot adjourn the case to a subsequent original session, they may adjourn the same session to a subsequent day (*m*). It is a court of oyer and terminer, and not an inferior court in the sense of that term, where it is said that a writ of venire de novo can not go to an inferior court (*n*); and therefore a court of error will award a venire de novo to a subsequent session where there has been a defective trial and judgment at a prior one. And it was called a court of oyer and terminer and court of record as distinguished from an inferior court in *R.* v. *Smith* (*o*), where it was held not to be sufficient to prove the finding of an indictment by the grand jury, by the minute book of the clerk of the peace. It is a continuing court also for other purposes than that a venire de novo can be awarded to it, for it may order the estreat of recognizances forfeited at a prior sessions, as where a recognizance was entered into under the 9 Geo. 4, c. 61, to try an appeal and pay such costs as the court might award, and the court at which the appeal was tried ordered the appellant to pay a certain amount for costs forthwith, it was held under 3 Geo. 4, c. 26, that there was no forfeiture of the recognizances till the sessions were over and default made in payment, and that the next sessions had power to order the estreat (*p*).

Not an inferior court.

Not superseded by the Commission of the Justices of Assize.

But the commission is not, like the commission of oyer and terminer, superseded by the issuing of a subsequent commission of oyer and terminer for the same county, so that the commission issued to the judges of assize does not supersede the commission of the justices upon the opening of such commission in the county; and therefore there is nothing in law, though it is undesirable in practice, to prevent the exercise of the jurisdiction of the quarter sessions in the trial of prisoners, notwithstanding the operation of the commission of the judges of assize at the same time in the county (*q*).

Jurisdiction of the Justices in Boroughs.

So a commission may be and is granted to justices to act for boroughs and counties of cities and towns, either under a charter or by virtue of their municipal corporation act. To exclude the jurisdiction of the county justices from places within a charter, or in places to which the municipal corporation act does not extend, there must be a non intromittant clause, which must be expressed in clear and ample terms (*r*). And by the

(*m*) *Rawnsley* v. *Hutchinson*, 40 L. J., M. C. 97; L. R., 6 Q. B. 305.
(*n*) *Campbell* v. *The Queen*, 11 Q. B. 841.
(*o*) 8 B. & C. 343.
(*p*) *Reg.* v. *Bishop of Ely*, 5 E. & B. 489.
(*q*) *Smith* v. *Reg.*, 18 L. J., M. C. 207. See *Reg.* v. *Justices of Middlesex*, 17 L. J., M. C. 111; 5 D. & L. 581.
(*r*) *Blankley* v. *Winstanley*, 3 T. R. 279; *R.* v. *Sainsbury*, 4 T. R. 451; *Bates* v. *Winstanley*, 4 M. & S. 429; *Weatherhead* v. *Drewry*, 11 East, 176; *R.* v. *Mayor of East Looe*, 31 L. J., M. C. 245; *Mercer* v.

Jurisdiction of Justices.

Assignment of Justices for Boroughs.

Residence within the Borough.

Jurisdiction over offences against local acts.

Ancient criminal jurisdictions to cease.

Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 98, for the assignment of justices or grant of a commission of the peace in boroughs within that act, it is enacted, "That it shall be lawful for his majesty from time to time to assign to so many persons as he shall think proper, his majesty's commission to act as justices of the peace in and for each borough, and in and for each of the counties of cities and towns respectively named in the said schedule (A.), and in and for such of the boroughs in the said schedule (B.) to which his majesty may be pleased, upon the petition of the council thereof, to grant a commission of the peace: provided nevertheless, that every person so to be assigned shall reside within the borough for which he shall be so assigned, or within seven miles of such borough or of some part thereof, during such time as he shall act as a justice of the peace in and for such borough," and by 24 & 25 Vict. c. 75, s. 3, every such justice shall be deemed to reside within such borough if he occupies any house, shop, warehouse or other premises within the same.

In boroughs all offences under the Municipal Corporation Act (7 Will. 4 & 1 Vict. c. 78), committed within any borough or the precincts thereof against the provisions of any local act of parliament, shall be cognizable by the justices of such borough; and such justices shall possess all the powers and jurisdiction with respect to such offences which were heretofore possessed by the justices of any county, riding, division, liberty or jurisdiction by virtue of any such local act (sect. 31).

Non-payment of paving rates assessed under a local act on the occupiers of houses within a borough is an offence cognizable by borough justices under the above section (*s*). By 5 & 6 Will. 4, c. 76, s. 107, all powers and jurisdictions to try treasons, capital felonies and all other criminal jurisdictions whatsoever granted or confirmed by any law, statute, letters-patent, grant or charter whatsoever, to any mayor, bailiff, alderman, recorder or other corporate or chartered officer, or corporate or chartered justice of the peace whomsoever in any borough, and all right of any body corporate in any borough or any of the members thereof by virtue of any law, statute, letters-patent, grant or charter whatsoever to elect or nominate any justices to keep the peace in and for any borough or by any members of any such corporate body to act as such justices of the peace in and for any of the last-named boroughs other than is herein declared, shall cease; and by sect. 108, all laws, charters, commissions, &c. whereby any such borough or place within it claims to be exempted and released from the jurisdiction of the Lord High Admiral of England or of the High Court of Admiralty of England are repealed; but the jurisdic-

Davis, 10 B. & C. 617; *R.* v. *Shepherd*, 2 A. & E. 298; *Wise* v. *Clerk of the Peace of Devon*, 34 L. J., M. C. 47; *R.* v. *Hayward*, 6 A. & E. 590; *R.* v. *Clark*, 5 B. & A 665.

(*s*) *In re Bathwick Paving Act*, 18 L. J., Q. B. 301.

In Boroughs.

tion of the cinque ports is preserved as well by that section as by sects. 134 and 135 of the same act.

By sect. 111, "the justices assigned to keep the peace in and for the county in which any borough is situated, to which his majesty shall not have granted that a separate court of quarter sessions of the peace shall be holden in and for the same, shall exercise the jurisdiction of justices of the peace in and for such borough as fully as by law they and each of them can or ought to do in and for the said county; and no part of any borough in and for which a separate court of quarter sessions of the peace shall be holden shall be within the jurisdiction of the justices of any county from which such borough before the passing of this act was exempt, any law, statute, letters-patent, charter, grant or custom to the contrary notwithstanding."

County Justices excluded from Boroughs having a separate Court of Quarter Sessions.

By 7 Will. 4 & 1 Vict. c. 78, s. 30, all matters cognizable by virtue of any local act or otherwise by any justices of the peace or by the general or quarter sessions of the peace having jurisdiction within any place which, since the passing of the said act for regulating corporations or of an act passed in the 6 & 7 Will. 4, c. 103, has ceased, or which under any future act may cease to be within and to be part of any borough or the liberties thereof, shall be cognizable by the justices of the peace of the general or quarter sessions of the county, riding or division, liberty or jurisdiction within which such place is situate, in the same manner and subject to the same provisions as if the same were within the jurisdiction of the justices of the peace for that borough or place or of the general or quarter sessions of the same.

Of the Grant of a Court of Quarter Sessions for a Borough.

By the 5 & 6 Will. 4, c. 76, s. 103, the council of every borough which shall be desirous that a separate court of quarter sessions of the peace shall be, or continue to be, holden in and for such borough, shall signify the same by petition to his majesty in council, setting forth the grounds of the application, the state of the gaol, and the salary which they are willing to pay to the recorder in that behalf; and it shall be lawful for his majesty, if he shall be pleased thereupon to grant that a separate court of quarter sessions of the peace shall be thenceforward holden in and for such borough, to appoint for such borough, or for any two or more of such boroughs conjointly, a fit person, being a barrister at law of not less than five years' standing, who shall be and be called the recorder of such borough or boroughs, and shall hold such office during his good behaviour; and upon any vacancy in any such office to appoint another fit person, being a barrister at law of not less than five years' standing, to be the recorder in the place of the person so making such vacancy: and the council of every such borough shall appoint a fit person to be clerk of the peace during his good behaviour; and the recorder for the time being of any borough shall be a justice of the peace of and for such borough, although he may not have such qualification by estate as is required by law in the case of any other person

Qualification of Recorder.

Appointment of Clerk of the Peace.

Grant of Court of Quarter Sessions.

being a justice of the peace for a county; and such recorder shall have precedence, in all places within the borough of which he may be the recorder, next after the mayor thereof; and in such case it shall be lawful for his majesty to direct that an annual salary, not exceeding the sum stated in the petition of the council, shall be paid to such recorder by the treasurer of such borough out of the borough fund. Provided always, that no person, being such recorder as aforesaid, shall be eligible to serve in parliament for such borough, nor shall he be an alderman, councillor or police magistrate of such borough. Provided, nevertheless, that nothing in this act contained shall be construed to disqualify any such recorder from being appointed a barrister to revise any list of voters, under the provisions of 2 Will. 4, c. 45, or from being eligible to serve in parliament, otherwise than is hereinbefore provided (*t*). And it has been enacted that in case of sickness or unavoidable absence, the recorder of any borough shall be empowered under his hand and seal, to appoint a deputy-recorder, being a barrister of five years' standing, to act for him at the quarter sessions of the peace then next ensuing or then being held, and no longer, or otherwise. Provided, nevertheless, that such sessions shall not be deemed to have been illegally held, nor the acts of any deputy-recorder invalidated by reason of the cause of the absence of the recorder not being deemed to be unavoidable within the meaning of this act (*u*).

Disabilities of Recorder.

Power to appoint Deputy-Recorder.

Provided, nevertheless, and be it enacted, that no recorder or person assigned to keep the peace within such borough, shall be capable of acting as recorder or justice of the peace within such borough, until he shall have taken the oaths provided to be taken by justices of the peace (except the oath as to qualification by estate), and until he shall have made before the mayor, or before any two or more of the aldermen, or councillors of such borough, who is and are hereby authorized and required to administer the same (a declaration in the following form); that is to say,

Recorder to take oaths.

I, A. B. do hereby declare that I will faithfully and impartially execute the office of recorder [*or* justice of the peace] for the borough of ——— according to the best of my judgment and ability (*t*).

It would seem that the grant of a quarter sessions to a borough dates properly from the time that the grant passes the great seal, and not from the date of a notice from the Home Office to the Town Clerk, that a grant would be made (*v*).

If a grant of quarter sessions be improperly made to a borough, *e. g.* to one which did not possess a gaol, the proper mode of raising the objection is by *scire facias* to repeal the grant, and

(*t*) 5 & 6 Will. 4, c. 76, s. 104.
(*u*) 6 & 7 Vict. c. 89, s. 8.
(*v*) See *Reg.* v. *Grimshaw*, 10 Q. B. 747; 16 L. J., Q. B. 385.

until such proceeding the grant must for collateral purposes be taken to be valid (*x*). *Nature of the Court.*

As the court of quarter sessions in counties is a continuing court, so *à fortiori* is a recorder's court, where there is no succession of commissioners changing from sitting to sitting, but the recorder alone presides continuously at sitting after sitting (*y*).

Jurisdiction of sessions.

And by the 105th section, "Such court of quarter sessions of the peace shall be a court of record, and shall have cognizance of all crimes, offences and matters whatsoever cognizable by any court of quarter sessions of the peace for counties in England; and the said recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last-mentioned court. Provided, nevertheless, that no recorder, by virtue of his office, shall have power to make or levy any county rate, or rate in the nature of a county rate, or to grant any licence or authority to any person to keep an inn, ale-house or victualling-house to sell exciseable liquors by retail, or to exercise any of the powers herein specially vested in the council of such borough."

Limitation of jurisdiction.

And by 6 & 7 Will. 4, c. 105, s. 8, no recorder, by virtue of his office, shall have power to allow, apportion, make or levy, or do any act whatsoever with relation to the allowance, apportionment, making or levying any rate whatsoever.

See as to the effect of the grant of a court of quarter sessions in a borough upon the jurisdiction of the county justices, sect. 111, *ante*, p. 15, and see also sects. 107, 108, *ante*, p. 14.

Jurisdiction of borough quarter sessions.

But with respect to appeals against poor rates, overseers' accounts, and rates in nature of county rate in boroughs, such appeals, when allowed within a borough of a city or town corporate, not being a county of itself, seem to stand on a different footing; for in corporations or franchises, not having six justices of peace, nor having jurisdiction over two or more whole parishes or wards contained in such corporation, &c., any person might appeal, in a case mentioned or referred to by 43 Eliz. c. 2, or 17 Geo. 2, c. 38, to the next general or quarter sessions of the peace for the county, riding or division wherein such corporation or franchise is situate (*z*). The enactments on this subject were intended to secure a hearing of the merits by justices not concerned in making the rate; and though the justices of a borough have no longer any criminal jurisdiction at courts of gaol delivery, general or quarter sessions, and the recorder is the sole judge, yet as the liberty to appeal to the sessions of the county is not taken away by express words, it appears to remain in these cases, concurrently with the authority of the recorder (*a*); and under section 111 of the 5 & 6 Will. 4,

(*x*) *Reg.* v. *Bouchier*, 3 Q. B. 641.
(*y*) *Campbell* v. *Reg.*, 11 Q. B. 841; 17 L. J., M. C. 89.
(*z*) See 17 Geo. 2, c. 38, s. 5; 1 Geo. 4, c. 36.
(*a*) See *per Abbott*, J., *R.* v. *Lancashire* (*Justices*), 1 B. & A. 637.

Jurisdiction in Boroughs.

c. 76 (the Municipal Corporation Act), where a borough was not exempt from the jurisdiction of the county justices because it had not more than six justices, the appeal against a poor rate made for the parishes in the borough as well as the county parishes, will be to the county quarter sessions, though the borough has a recorder and court of quarter sessions of its own (*b*).

Rates.

Rates, in nature of county rates, cannot be made or levied within boroughs by the recorder or any other justice of the borough by 6 & 7 Will. 4, c. 105, s. 8 (*ubi sup.*); and as the same section forbids his doing "any act whatsoever, with relation to the allowance, apportionment, making, or levying of any rate whatsoever," these words might seem sufficiently extensive to prevent a recorder from sitting as judge in appeals against any rates imposed within the borough, but were more probably intended to apply merely to the inchoate steps of making and levying them.

Orders of removal.

Appeals against orders of removal made by justices of the county are heard at the sessions for the county, division or riding wherein the parish or place from whence the removal takes place shall lie, and not elsewhere, by 8 & 9 Will. 3, c. 30, s. 6.; and in boroughs having a court of quarter sessions under 5 & 6 Will. 4, c. 76, appeals against orders of removal made by borough justices lie to the recorder and the borough court of quarter sessions exclusively (*c*).

By the 30 & 31 Vict. c. 106, s. 27, "where a union extends into several jurisdictions, every matter, act, charge or complaint by which the guardians thereof are affected, or in which they have any interest, shall, for the purpose of jurisdiction, be deemed to arise or exist equally throughout the union."

Thus, where a union includes parishes in the county, as well as of a borough having a court of quarter sessions, an order of removal from a parish in the county may be obtained from a justice of the borough, and the appeal from an order so obtained lies to the court of quarter sessions for the borough, by virtue of that section (*d*).

Inspectors of weights.

Inspectors of weights and measures for counties, formerly appointed at special sessions under 37 Geo. 3, c. 143, are now appointed in counties by the quarter sessions, pursuant to 5 & 6 Will. 4, c. 63 (*e*).

But in boroughs "either having a court of quarter sessions under 5 & 6 Will. 4, c. 76, or having only a separate commission of the peace and not a quarter sessions, the town council appoint these inspectors of weights and measures" (*f*).

(*b*) *Reg.* v. *Bridgwater*, 10 A. & E. 711.

(*c*) *Reg.* v. *Inhabitants of St. Edmunds, Salisbury*, 2 Q. B. 72; *Reg.* v. *JJ. of Shropshire, ibid.* 85; *Reg.* v. *Recorder of Liverpool*, 15 Q. B. 1070.

(*d*) *Reg.* v. *The Justices of Staffordshire*, 41 L. J., M. C. 78; L. R., 7 Q. B. 288.

(*e*) See Part IV., *post.*

(*f*) 22 & 23 Vict. c. 56, s. 4; 24 & 25 Vict. c. 75, s. 6.

Section 3.

General and quarter sessions, how and by whom convened—(1) in counties, (2) in boroughs.

Quarter sessions—how called together in counties.

A general or quarter session may be called by any two justices within the jurisdiction, one being of the quorum, or by the *custos rotulorum* and one justice; but not by one justice or by the *custos rotulorum* alone (*g*). The presence of two justices is necessary to its being held (*h*), or even adjourned so as to hold it legally (*i*) at another time.

By precept.

The clause in the commission, "that the sheriff shall cause a jury to appear at such days and places as the said justices, or any two or more of them as aforesaid, shall appoint," confers the authority on two justices to convene a general session. This is done by issuing a precept under their hands and seals, addressed to the sheriff, requiring him to summon the proposed session of the peace for general purposes, at some day not less than fifteen days from the date of the precept (*k*), to return a grand and petit jury, and give notice throughout his bailiwick to jurors, coroners, gaolers, stewards, constables and bailiffs of liberties, whose attendance is requisite (*l*). The precept to the sheriff is necessary in order that he may summon all the persons who are bound to attend as constituent parts of a court of criminal jurisdiction, called together by the same instrument. This difference in the object of a general sessions, as distinguished from a special sessions, accounts also for the difference of the mode in which the two courts are assembled. The issue of such a precept to the sheriff is absolutely requisite to compel any person whatever to attend a general session, or to expose them to the penalty of absence. But it is not absolutely necessary to the making of a lawful session that a regular precept should be issued; for if it be irregular, but two or more justices, the jury, and all persons necessary to hold a sessions appear, the proceedings of that sessions, if regularly transacted, will be valid (*m*).

A supersedeas out of Chancery is the only authority capable of superseding a precept duly issued by two justices for holding a general session (*n*); and though it was formerly said that two or more general sessions might lawfully be holden at one time within the same county on precepts issued to the sheriff by

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(*g*) Lambard, 375.

(*h*) 1 Bla. Com. 354, n.; 5 Burn's Justice, 342, 30th ed.

(*i*) *R.* v. *Westrington*, 1 Bott, 733. See 2 Stra. 1264, *R.* v. *Polstead.*

(*k*) Lamb. bk. 4, c. 2; 2 Hawk. bk. 2, c. 8, s. 50; 5 Burn, 30th ed., *tit. Sessions of the Peace*, sect. 2.

(*l*) Dalton, c. 185, gives the form of this precept or warrant. See 2 Hawk. bk. 2, c. 8, s. 49, and as to the attendance of constables, see now 7 & 8 Vict. c. 33, s. 8, *post*, Chap. II. s. 7, *Constables.*

(*m*) Lamb. bk. 4, p. 380, cited and approved in *R.* v. *Corporation of Ipswich*, 2 Lord Raym. 1237, 1238.

(*n*) Com. D. *Justices of Peace* (D. 3); 2 Hawk. bk. 2, c. 8, s. 51.

Convening the Sessions.

different sets of justices, the service at one of which would discharge the juror, &c. from service at the others (*o*), it is very doubtful, since *R.* v. *Sainsbury* (*p*), whether either general session so held would be valid; and it is certain that if attempts to hold such several sessions were made without apparently good reason, or for sinister purposes of harassing parties, &c., &c., the justices issuing them would be liable to indictment or information, and would afford reason to the lord chancellor for striking their names out of the commission (*q*).

Form of precept.

In counties the following may be adopted as the form of—

Precept to the Sheriff (*r*).

County of ——— { We, A. B. and C. D. Esqrs., two of the justices of our Sovereign Lady the Queen, assigned to keep the peace in the county of ——— aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors committed in the same county, one of us being of the quorum (*s*), to the sheriff of the same county, greeting: On behalf of our said sovereign lady the queen, we command you, that you omit not, by reason of any liberty within your county (*t*), but that you enter therein, and that you cause to come before us, or some other justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, on ———, the ——— day of ———, now next ensuing, at the hour of ——— in the forenoon of the same day, at ——— in the said county, twenty and four good and lawful men of the body of the county aforesaid, then and there to inquire, present, do, and perform all and singular such things, which on the behalf of our said sovereign lady the queen shall be enjoined to them; and also twenty-four [*or* forty-eight] other good and lawful men of the county, qualified according to law, then and there to try all such issues as may be joined (*u*);—also that you make known to all coroners, keepers of gaols, and houses of correction, high con-

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(*o*) Lamb. bk. 4, p. 384.

(*p*) 4 T. R. 451.

(*q*) See Dalton, c. 185.

(*r*) See 19 Viner, *tit. Sessions of the Peace* (A); Imp. Off. Sher. 3rd ed. 252; Dalton, c. 185; 6 Geo. 4, c. 50, s. 20, preserves the powers of the sessions to issue precepts as theretofore.

(*s*) See 19 Viner, *tit. Sessions of the Peace* (A), that the precept is necessary in order to compel the sheriff "to cause" the jurors "to come," and to give sessions power to amerce jurors for non-attendance; and see *post*, Chap. II. s. 8, *Jurors*.

(*t*) If there be a liberty, or other franchise in the county, possessing an exclusive jurisdiction, that is to say, a jurisdiction in which the justices of the county at large *are prohibited from interfering*, it will be proper, as it is usual, to add in this place (*except the liberty of ——— within the same*). 4 Chit. C. L. 176, 1st ed. Since 5 & 6 Will. 4, c. 76, s. 111, no part of any borough, in and for which a separate court of quarter sessions of the peace shall be holden, shall be within the jurisdiction of the justices of any county from which such borough before the passing of this act was exempt, any law, statute, letters patent, charter, grant or custom, to the contrary notwithstanding.—In Shropshire—Bridgnorth, Wenlock and Ludlow, are instances of this rule.

(*u*) In practice, forty-eight, seventy-two or more are returned in order to provide for the contingency of challenges, 2 Hale, 263. By the Jury Act, 6 Geo. 4, c. 50, s. 13, every precept for the return of jurors to sessions "shall direct the sheriff to return a *competent number* of good and lawful

stables (*v*) and bailiffs of liberties, within the county aforesaid, that they may be then and there to do and fulfil the things which, by reason of their offices, shall be to be done. Moreover, that you cause to be proclaimed through the said county, in proper places, the aforesaid session of the peace, to be holden at the day and place aforesaid, and do you be then there, to do and execute those things which belong to your office. And have you then and there as well the names of the jurors, coroners, keepers of gaols and houses of correction, high constables and bailiffs, aforesaid, as also this precept. *Convening the Sessions.*

Given under our hands and seals at ———, in the county aforesaid, the ——— day of ———, in the ——— year of the reign of ———.

A. B.
C. D.

This should bear teste fifteen days before the return, and should be delivered forthwith to the sheriff, that he may have enough time to proclaim the sessions and to send his warrants to the bailiffs, &c.

When the sheriff shall have received this precept, it becomes his duty to direct several warrants to the bailiffs of liberties and hundreds, containing the substance of it in the following form :—

Sheriff's Warrant thereupon.

County of ——— { P. Q., Esquire, sheriff of the county aforesaid, to G. H., bailiff of the hundred of ———, in the said county, greeting: By virtue of a precept under the hands and seals of A. B. and C. D. Esquires, two of her Majesty's justices appointed to keep the peace in the said county; and also to hear and determine divers felonies, trespasses, and other misdemeanors, committed in my said county, one of them being of the *quorum*, to me directed : Form of warrant.

These are in her Majesty's name to will and require you, that you forthwith make known by open proclamation, in every market town, and all other places convenient within the hundred of ——— aforesaid, that the next general quarter session of the peace of and for the county aforesaid is to be holden and kept at ———, in the town of ———, in the county aforesaid, on Wednesday, the ——— day of ——— now next ensuing, at the hour of nine of the clock in the forenoon of the same day; and that you give notice to all justices of the peace, coroners, keepers of gaols and houses of correction and high constables of the said hundred, that they be then and there present to do and perform that which to their several offices doth appertain: and that all those who ought to prosecute any prisoner or prisoners in the gaol of the said county, or who are bound over then to appear and answer, be then and there present to prosecute against them according to law: and also that you summon and warn the persons whose names are underwritten, that they be then and there present to serve on the grand jury, and to inquire on her Majesty's behalf, for the body of the county aforesaid, for all such matters and things as shall be then and there given them in charge: and also that you summon and warn the persons underwritten, that they be then and there present to serve on the petty jury for her Majesty's service (*w*); and that yourself be then and there present to make return thereof. And herein neither you nor them may fail at your

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men of the body of his county, qualified according to law." And in boroughs there are not to be less than thirty-six, see 5 & 6 Will. 4, c. 76, s. 121.

(*v*) The duties of high constables in relation to the Jury Act, 1825, have now ceased (25 & 26 Vict. c. 107), and the office itself is virtually abolished by 32 & 33 Vict. c. 47.

(*w*) The sheriff may now summon jurors by post, 25 & 26 Vict. c. 107, s. 11. See *post*, Chap. II. s. 9, *Of the Jurors.*

Sheriff's Warrant upon Precept.

and their perils. Given under the seal of my office the ——— day of ———, in the ——— year of the reign of our sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland queen, defender of the faith, &c., and in the year of our Lord ———.

Then the sheriff makes his return thus :—

Sheriff's Return of Process to the Sessions (x).

The execution of this precept appears in certain panels hereto annexed : I further certify that I have given notice to all coroners, keepers of gaols and houses of correction, high constables and bailiffs of liberties within my county, to be and appear at the time and place within mentioned, to do and perform, &c., and have caused to be proclaimed through my county in proper places the sessions within mentioned.

The answer of ———.

Then on a piece of parchment are written the names of the jurors, thus :—

Grand Jury (*y*): (*or sometimes*, The names of jury to inquire, &c.)	Petty Jury : (*or sometimes*, The names of the jurors to try.)
Sir R. H., Bart.	A. B.
A. B., Esq.	C. D., &c. (*a*).
C. D., Esq. (*naming them*) (*z*).	

Also the names of the justices of peace, coroners, keepers of gaols and houses of correction, high constables, &c.

In boroughs.

The precept in boroughs should go under the hand and seal of the recorder to the clerk of the peace, whose duty is, by the 121st section of the 5 & 6 Will. 4, c. 76, to give public notice of the time and place of holding every such quarter sessions of the peace ten days at the least before the holding thereof ; and seven days at the least before the holding thereof to cause to be summoned a sufficient number of persons, being qualified and liable as aforesaid, to serve as grand jurors at such sessions, and not less then thirty-six nor more than sixty persons, qualified and liable as aforesaid, to serve as jurors at such sessions.

Section 4.

Time and Place for Holding Quarter Sessions.

Time for holding in counties.

With respect to counties, it is enacted that justices shall make or keep their sessions at least four times a year (*b*), and in every quarter of the year (*c*), and the times for holding the

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(*x*) The return to the precept is still to be made in the manner before accustomed, 6 Geo. 4, c. 50, s. 20.

(*y*) *R.* v. *Marsh*, 6 Ad. & E. 236, 241.

(*z*) Not less than *twelve*, nor more than *twenty-three* names. See *post.*

(*a*) With, *at least*, twenty-two, generally forty-six, or even seventy ; and in boroughs, under 5 & 6 Will. 4, c. 76, s. 121, not less than thirty-six, nor more than sixty other names.

(*b*) 25 Edw. 3, stat. 1, c. 7; 2 Hen. 5, stat. 1, c. 4.

(*c*) 12 Rich. 2, c. 10.

same were also fixed by 25 Edw. 3, st. 1, c. 7, 2 Hen. 5, st. 1, c. 4, and 54 Geo. 3, c. 84, and these enactments are still unrepealed; but by 11 Geo. 4 & 1 Will. 4, c. 70 s. 35, after reciting that the general quarter sessions of the peace are now directed to be held in each year in the first week after the 11th day of October, in the first week after the Epiphany, in the first week after the clause of Easter, and the first week after the translation of St. Thomas the Martyr, and that it is expedient that the times for holding the general quarter sessions of the peace should be altered in part, enacts that, the justices of the peace in every county, riding or division, for which quarter sessions of the peace by law ought to be held, shall hold their general quarter sessions of the peace in the first week after the 11th day of October, in the first week after the 28th day of December, in the first week after the 31st day of March, and in the first week after the 24th day of June; and that all acts, matters and things done, performed and transacted at the times appointed by this act for the holding of the general quarter sessions of the peace, shall be as valid and binding to all intents and purposes as if the same had been done, performed and transacted at general quarter sessions of the peace holden at the times by law limited for the holding thereof before the passing of this act.

11 Geo. 4 & 1 Will. 4, c. 70, s. 35.

Then by the 4 & 5 Will. 4, c. 47, entitled An Act for preventing the interference of the spring assizes with the April quarter sessions, reciting 11 Geo. 4 & 1 Will. 4, c. 70, s. 35, and that in some counties of England and Wales the times usually fixed for holding the spring assizes interferes with the due holding of the last-mentioned quarter sessions, and although the justices of the peace have authority to hold general sessions of the peace at other times of the year besides those specified in the said recited act, such sessions are not quarter sessions within the intent of various acts of parliament which give jurisdiction to justices of the peace in their quarter sessions or in their general quarter sessions, and for the purpose of preventing the inconvenience arising from such interference as aforesaid it is expedient to allow to the justices of the peace a discretion as to the time of holding their general quarter sessions, which they are now required to hold in the next week after the 31st day of March, it was declared and enacted, that in every county, riding or division for which general quarter sessions ought to be held, it shall be lawful for the justices assembled in their general quarter sessions in the week next after the 28th day of December in every year to name (if they shall see occasion so to do) two justices of the peace who shall be empowered, as soon as may be after the time for holding the spring assizes shall be appointed, to fix the day for holding the next general quarter sessions of the peace for such county, riding or division, so as such time shall not be earlier than the 7th day of March, nor later than the 22nd day of April,

4 & 5 Will. 4, c. 47.

April quarter sessions.

April Quarter Sessions.

and to give notice of the day so fixed by advertisement in such newspapers as shall be directed by the justices so assembled: and in every such case the general quarter sessions held on the day so fixed and notified shall be valid, and it shall not be necessary to hold any sessions of the peace for such county, riding or division in the week next after the 31st day of March, anything in the said recited act to the contrary notwithstanding: provided always, that in every county, riding or division, where no other day shall be fixed in the manner hereinbefore mentioned, the justices of the peace shall hold their general quarter sessions of the peace in the week next after the 31st day of March, as by the said recited act they are required.

Statute directory as to time.

Under the 54 Geo. 3, c. 84, it has been decided, that though it is provided by that act that the quarter sessions for the Michaelmas quarter should be holden in the first week after the 11th of October instead of the time before then appointed for holding the same, that this act is directory only, and the Michaelmas quarter sessions may be lawfully holden in another week than that so specified by the statute (*b*). The words "in the first week after," the days mentioned in 11 Geo. 4 & 1 Will. 4, mean the first whole week after those days; so that, if the 11th of October, the 28th of December, the 31st of March, or the 24th of June, should fall on a Sunday, the sessions fixed to be held with reference to those days respectively would not be held in that same week, or till the Monday or some other day in the week following (*c*).

Borough sessions.

By the 5 & 6 Will. 4, c. 76, s. 105, the recorder of every borough shall hold, once in every quarter of a year, or at such other and more frequent times as the said recorder in his discretion may think fit, or as his Majesty shall think fit to direct, a court of quarter sessions of the peace in and for such borough.

Place of holding.

The place of holding quarter sessions in counties, divisions, ridings or liberties, not being boroughs affected by the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, is not determined by any statute law; but the justices who issue the precept to summon a quarter sessions may, in their discretion, name any place meet for access within the ambit of the jurisdiction for which it is summoned as that where it is to be holden, and the parties bound to appear at such sessions, by recognizance or by their official situations, will be bound to attend at such place (*d*).

Dalton states the wilfully holding of a sessions on the confines of a county to be punishable; but as in some counties, as Sussex, Suffolk, &c., where large collections of population lie at a distance from the county-town, each session is held, by adjournment (*e*), at two or more of the principal towns within

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(*b*) *R.* v. *Justices of Leicester*, 7 B. & C. 6. See 2 Hale, P. C. 50.
(*c*) 2 Hale, P. C. 49.
(*d*) Jenk. Cent. 212, pl. 49. See Dalton, c. 185; also as to a county created within another county, *ib.*
(*e*) *R.* v. *West Torrington*, Burr. Sett. Ca. 293.

it successively, thus avoiding as far as possible the carrying prisoners from place to place. If the precept name one town, the session may still be held at another, and the presentments at the latter will be good, but no man can be amerced for want of appearance (*f*). *Place of Holding Sessions.*

Section 5.

Of the Caption—Duration of Sessions—Adjournment.

The style is thus:— Style of the quarter sessions in counties.

Shropshire. { The general *quarter* sessions of the peace of our sovereign lady the queen, holden in and for the said county of *Salop* at ———, in the town of ———, in the said county (*g*), on ——— day, the ——— day of ———, in the ——— year of the reign of our sovereign lady Victoria, of the United Kingdom of Great Britain and Ireland queen, defender of the faith, and so forth—before ——— and ——— esquires (*naming at least two of them*) (*h*), and others their fellows [*or* associates], keepers of the peace and justices of our sovereign lady the queen, assigned to preserve the peace in the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, and of the quorum, and so forth.

The proper caption; (*viz.*, the history of the proceedings (*i*),) is formed by prefixing to the above form, The caption.

"Be it remembered that at,"

and adding at the end of it—

"By the oath (*j*) of ——— (*naming at least twelve, and not more than twenty-three* (*k*), *grand jurors who found the bill*) (*l*), good and lawful men of the county aforesaid, sworn and charged to inquire for our said lady the queen, and for the body of the county aforesaid, it is presented that" (*stating the indictment*).

(*f*) Jenk. Cent., *ubi sup.*; Lambard, lib. iv. c. 2, cited 19 Viner, *tit. Sessions of the Peace* (*c*), see *ante*, p. 19.

(*g*) Necessary: *Ludlow's case*, Cro. El. 738.

(*h*) *R.* v. *Almanbury*, Stra. 96; 1 Chit. Cr. L., 1st ed. 331; Cro. El. 738, *Ludlow's case*. If the session be not one of the peace only, but of oyer and terminer, as in Middlesex, where there is also the latter commission, four should be named, *ib.*; *R.* v. *Atkinson*, reported in 1 Saund. 249, note (*a*). The recorder only need be named in the caption of a borough indictment.

(*i*) See 2 Q. B. 1010; Arch. Crim. Pl., 17th ed. 37; 2 Hale, P. C. 165.

(*j*) This includes those who affirm. See 6 & 7 Vict. c. 85.

(*k*) For if a number amounting to two full juries or more should be sworn, a complete jury of twelve might find a bill true, though other twelve or many more than twelve might reject it, which would be contradictory and absurd. See 2 Burr. 1089.

(*l*) It seems that at least the *number* of jurors who find the bill should be stated, and should be not less than twelve. 2 Hale's P. C. 167; and as to this, see appendix to 4 Bla. Com. 1; cited 6 Ad. & E. 240, 243, *R.* v. *Marsh*. However, the insertion of the *names* has been held in Dom. Proc. to be unnecessary, *R.* v. *Aylett*, as reported from Dealtry's MSS., 6 Ad & E. 247, note; *id.* 249; 1 Chit. Cr. L. 333.

Caption of adjourned sessions.

The style of an adjourned session should not run, "At a session held *by adjournment* on" such a day; for as another original session might have intervened, the indictment, order, &c., taken at the adjourned session would be quashed, or judgment arrested (*m*); but after stating the day of meeting of the original sessions, and the meeting as above, it should go on to allege that it was continued by *them* (*n*) from thence to such further day by adjournment, and that it was then holden accordingly by such adjournment (*o*).

The caption is no part of the indictment itself, and is only a copy of the style of the court at which the indictment was found, the time and place where, and the jury by whom it was found: particulars which it must set forth with sufficient certainty. It is however a necessary part of the record, and forms the preamble of it when made up in form as a return into the court of Queen's Bench on *certiorari* (*p*), or to be produced at *nisi prius* to satisfy an averment that a "bill of indictment was preferred at the *quarter sessions* against A. B. which was then and there found a true bill" (*q*). There is but one original general caption for the whole sessions, and from this each particular record is made up (*r*). If upon a *certiorari* the caption appear to be wrong (*e. g.* in not showing that the sessions had jurisdiction, which may be by stating them to have been held on an impossible day (*s*), or in omitting to show that the indictment was found by persons competent to do so), the party indicted may demur, in which case the court looks not to the indictment only, but at the whole record, to see whether they are warranted in giving judgment on it; or error in law may be assigned. But the return of the caption being a ministerial act of the officer of the court, it differed from an indictment in being amendable at common law, according to the truth in case of any omission or mistake (*t*). If no fault ap-

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(*m*) *R.* v. *Fisher*, Stra. 865; *St. Michael, Coslany, Norwich* v. *St. Matthew's, Ipswich*, Stra. 832. See, however, *R.* v. *Chichester*, 3 T. R. 496.

(*n*) As to variance, see *R.* v. *Bellamy*, Ry. & M. N. P. C. 171.

(*o*) *R.* v. *Harrowby*, Burr. S. C. 102; *R.* v. *Heptonstall*, *id.* 88; *R.* v. *Walker*, 2 Sess. Ca. 21.

(*p*) 2 Hale, 165. And, if erroneous, the indictment will be quashed in Queen's Bench. *R.* v. *Roysted*, 1 Lord Ken. 255; *R.* v. *Fearnley*, 1 Leach, C. C. 425; 1 T. R. 316.

(*q*) See *Slack* v. *Wilkin*, 3 Tyr. 158; *R.* v. *Smith and others*, 8 B. & C. 341, *ante*, p. 13; *R.* v. *Thring*, Ry. & M. 171; *Edwards* v. *Williams*, 2 Esp. N. P. Dig. 37; *R.* v. *Ward*, 6 C. & P. 366; *R.* v. *Bellamy*, Ry. & M. N. P. C. 171; *R.* v. *Yeoveley*, 8 Ad. & E. 806. The indictment itself indorsed "true bill" is not evidence to prove the finding a true bill: *Porter* v. *Cooper*, 6 C. & P. 354, per *Patteson*, J.; nor will minute-books of the sessions suffice to prove the finding of an indictment, though the record be afterwards made up from them. See the above cases, and *Cooke* v. *Maxwell*, 2 Stark. C. N. P. 183; *R.* v. *Marsh*, 6 A. & E. 248; *Reg.* v. *Pembridge* (*Inh.*), 1 C. & M. 157; *De Ponthieu* v. *Pennyfeather*, 5 Taunt. 634.

(*r*) Per *Williams* and *Coleridge*, JJ., 6 A. & E. 249.

(*s*) *R.* v. *Fearnley*, 1 T. R. 316; 1 Lea. C. C. 425.

(*t*) 1 Chit. C. L. 334.

pears on the caption, there may yet be ground for assigning error in *fact* (*e.g.* that the number of grand jurors exceeded twenty-three); that is, if by so doing the record be not contradicted (*u*): or, if it should happen that there is reason for arresting the judgment, the course by motion is open; but after a defendant had pleaded to an indictment, removed it by *certiorari*, and been convicted, the court refused to quash it on the ground that the grand jury before which it was taken exceeded twenty-three in number,—an objection which did not appear on the caption (*v*). Assignment of error in fact.

As without the appearance of at least two justices of the peace, one being of the quorum, at the day and place fixed, no quarter session can be holden, it is usually considered as lost for the quarter if two such justices do not appear (*x*); and though a general session might be subsequently held for general purposes, it is doubtful whether, though held in the same quarter, it would operate as a quarter session for disposing of such business as is expressly made cognizable by a court of *quarter* sessions, *e. g.*, appeals against a poor rate (*y*). It is said that the court of quarter session, once dropped for want of sufficient justices, cannot be resumed (*z*) or adjourned (*a*); but this is an inconvenience unlikely to arise since the great increase Losing a sessions.

(*u*) *R.* v. *Carlisle*, 2 B. & Ad. 362; *R.* v. *JJ. of Middlesex*, 5 B. & Ad. 1116.

(*v*) *R.* v. *Marsh*, 6 A. & E. 243. In this case it appeared by affidavit, that more than twenty-three grand jurors (viz., twenty-eight) had been sworn at a general session for Dover, and an indictment was found by them; the defendant having pleaded to it, traversed and removed it by *certiorari*, and was convicted. The caption of the indictment was drawn up by the clerk of the peace from the minutes of sessions, and returned with it to the crown-office. This caption stated the presentment to be made by "the oaths of A. B., C. D., &c. (*naming* twelve grand jurors) and others, good and lawful men," &c. A rule was obtained (with a view to a writ of error), calling on the clerk of the peace to show cause why the caption should not be amended by inserting the true names and number of the grand jury sworn. The clerk of the peace did not deny that more than twenty-three were sworn, but stated that he had no minute or recollection of the names or number. Held, that the caption was not incorrect in omitting to state the number and *all* the names of the grand jury, twelve having been named; and that as there was no minute to amend by, the caption could not be altered. Defendant received judgment. [*N.B.*—It seems best to name in the caption each of the twelve jurors who find the bill; but *semb.* not absolutely necessary; *S.C.* As to rectifying error in caption, see 5 B. & Ad. 1113; 1 C. & P. 470, *R.* v. *Davis*.]

(*x*) 5 Burn's Justice, 30th ed., *tit. Sessions*, 342.

(*y*) See *R.* v. *Polstead*, Stra. 1263. "All that it was necessary to decide in *R.* v. *Polstead* was, that the order of sessions was made without jurisdiction, as the quarter sessions were at an end for want of adjournment; and the court said the session (held subsequently in the same quarter) might be a good *general*, but was not a good *quarter*, session. If such were the decision, we find no fault with it." Per *Patteson*, J., in delivering the opinion of several judges at the Old Bailey in *R.* v. *Mullaney*, 6 C. & P. 100. See *R.* v. *London* (*Justices*), 15 East, 632, *post*.

(*z*) *R.* v. *Polstead*, Stra. 1263; *R.* v. *West Torrington*, Burr. S.C. 293.

(*a*) *R.* v. *Westrington*, 1 Bott, 631.

in the numbers of magistrates. One thing is clear, that where one original session has been in part held in a quarter, a second held within the same quarter (unless by adjournment) is not also good as a quarter session, though it may be as an extra original session (*c*).

Duration of sessions.

The whole session, for whatever number of days it continues by regular adjournments is, in point of law, considered only as one day; and as every proceeding has reference to the first day of the session (*d*), the justices may, before the actual close of the sessions, on whatever day (*e*), alter their orders or sentences; but they cannot do so after the session is closed, *e. g.*, at the next sessions (*f*). Again, if an indictment cannot be disposed of after a verdict of guilty, owing to the justices present being equally divided in opinion as to the sentence, or from any other cause operating on the court (*g*), so that no judgment is given, an adjournment of the session should be entered by the clerk of the peace to some day previous to or not later than that appointed for the next ensuing original general or quarter sessions (*h*); so as to enable the justices to reconsider the question. At the day, hour and place of adjournment any two or more justices may proceed, as they might have done at the original sessions; the adjournment being a continuation of the same session, and *ex vi termini* implying that everything during the time of it remains *in statu quo* (*i*); and where such adjournment of the case is made from session to session, the session to which the adjournment is made is competent to pass the sentence (*k*). But there is a distinction between an adjournment of the *session* (*l*) and an adjournment of the specific matter itself; for in some cases a matter may not be adjourned to a subsequent session, as under the Licensing Act, 9 Geo. 4, c. 61, yet the next session may be adjourned to a subsequent day (*m*), whilst in others, as under the Prisons Act, 1865, where a

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(*c*) *Ante*, p. 2.

(*d*) *R.* v. *Surrey* (*Justices*), 1 M. & S. 479.

(*e*) Per *Holt*, C.J., 2 Salk. 494, *St Andrew's, Holborn* v. *St. Clement Danes.*

(*f*) *R.* v. *Cuckfield*, 2 Salk. 477; *Pridgeon's case*, Cro. Car. 241.

(*g*) See *ante*, p. 12. This is also considered, *post*, Ch. VI., *Of Judgment and Discharge;* and as to adjournment of judgment in appeals, Part III., Ch. I.; *R.* v. *Bucks* (*Justices*), 6 D. & R. 142; *R.* v. *Wilts* (*Justices*), 13 East, 352; and as to style or caption of adjourned sessions, *ante*, p. 26.

(*h*) 2 Hawk. 68; *R.* v. *Grince*, Trin. 4 Geo. 1; 19 Viner, 358; *ante*, p. 3; also *Linfield* v. *Battle*, 2 Salk. 605; *Thurston* v. *Slatford*, Lutw. 911.

(*i*) See this more fully considered, Part III., Ch. I.; and per Lord *Kenyon*, 7 T. R. 108, 109; but if the act on which the adjourned proceeding is founded be repealed before the adjournment day, the above rule does not hold, and the jurisdiction of sessions is at an end. *R.* v. *London* (*Justices*), 3 Burr. 1456.

(*k*) *Keen* v. *The Queen*, 10 Q. B. 928; 16 L. J., M. C. 180.

(*l*) Ca. t. Hardw. 81; and if proceeded on at next sessions, pursuant to such an adjournment, it would be quashed. *R.* v. *West Torrington*, Burr. S. C. 293; *R.* v. *Westmoreland* (*Justices*), 2 Bott, 733.

(*m*) *Rawnsley* v. *Hutchinson*, 40 L. J., M. C. 97; L. R., 6 Q. B. 305.

matter may be adjourned over an intermediate session by a subsequent one (*n*). It may be useful to add, that the adjournment to be valid must be declared by two or more justices, or at least in their presence by the clerk of the peace (*o*); as large a number of them being required to adjourn as to hold a session (*p*). The forms of adjournment are requisite to secure the re-attendance of the jurors after an adjournment at the time and place appointed, and the continuity of the first proceedings till the completion (*q*). Doubts having existed as to the legality of summoning juries for trial of prisoners at adjourned quarter sessions, an act passed to remove them on 23rd December, 1837 (*r*). By this act the justices for any county, riding, division or place within England and Wales, in quarter sessions assembled, and the recorder of any city or borough, at any court of quarter sessions holden in and for the same, when to such justices and recorder respectively it shall seem meet, may direct the clerk of the peace to take the necessary steps for causing juries to be summoned to attend any adjourned court of quarter sessions for the dispatch of its business, in the same manner as they may now be summoned to attend any general quarter sessions; the juries so summoned to attend adjourned quarter sessions having the same duties and powers as if summoned to attend any general quarter sessions. Nothing in the act is to affect any part of the Jury Act, 6 Geo. 4, c. 50.

Mode of adjournment.

Section 6.

OF THE QUARTER AND GENERAL SESSIONS FOR MIDDLESEX, LONDON, AND WESTMINSTER.

The sessions in London and Middlesex were exempted from the directions of 54 Geo. 3, c. 84; they are, therefore, subject to various regulations which differ from those prevailing in other parts of England. And the sessions for the city and liberties of Westminster could not formerly be holden during the sitting of the court of Queen's Bench in Middlesex, as the exercise of the greater jurisdiction in that county suspended that of the inferior. By the 7 & 8 Vict. c. 71, An Act for the better administration of criminal justice in Middlesex, after reciting that it is desirable for the better administration of criminal justice in the county of Middlesex that sessions of the peace for the trial of felonies and misdemeanors committed within the said county should be holden more frequently, and

7 & 8 Vict. c. 71.

(*n*) *Reg.* v. *Westmoreland* (*Justices*), 37 L. J., M. C. 115; L. R., 3 Q. B. 457.

(*o*) *R.* v. *Middlesex* (*Justices*), 3 N. & M. 110; 5 B. & Ad. 1113; 6 C. & P. 90, *S. C.*

(*p*) *R.* v. *Westrington*, 2 Bott, 733.

(*q*) *Reg.* v. *Payn*, 34 L. J., Q. B. 59.

(*r*) 1 Vict. c. 4.

Middlesex Sessions.

that an assistant judge of competent knowledge should be appointed to preside at such sessions: it is enacted, that after the passing of this act there shall be holden, in and for the county of Middlesex, two sessions, or adjourned sessions, of the peace at least in every calendar month, and the first sessions holden in the months of January, April, July and October respectively, shall be the general quarter sessions of the said county.

Two sessions to be held in every month.

Second sessions of four months to be general sessions.

Sect. 2. That the second sessions, or the adjourned sessions, holden in the months of February, May, August and November respectively, and such other sessions as the justices for the county in the first sessions holden in the month of December assembled shall from time to time appoint, shall be general sessions of the peace; and such general sessions shall have power to try and determine all appeals, and all other powers which now or shall hereafter belong to the general quarter sessions.

The jurisdiction, however, given by this section is optional only, and the appellant against an order of maintenance in bastardy is not bound to appeal to adjourned sessions, but may wait and appeal to the general quarter sessions (*s*).

Validity of proceedings at general sessions.

Sect. 3. That all orders heretofore made, and all things heretofore done at any general sessions of the peace for the county of Middlesex, shall be as good in law as if made and done at the general quarter sessions of the peace for the said county.

Adjournments of general quarter sessions.

Sect. 4. That the second sessions holden in the months of January, April, July and October shall be adjournments of the general quarter sessions.

Sect. 5. That after the passing of this act it shall be lawful to begin and continue, or to continue when begun, any session of the peace for the said county so to be holden as aforesaid until the business thereof shall be ended, notwithstanding that her Majesty's Court of Queen's Bench may sit at Westminster or elsewhere in the said county before, or at the beginning, or during the continuance of any such session.

No traverses to be allowed.

Sect. 6. That no person against whom any bill of indictment shall be found for misdemeanor at the Central Criminal Court, or at any session of the peace for the county of Middlesex, shall be entitled to traverse the same to any subsequent sitting of the court, but the court shall forthwith proceed to try the same unless upon good cause to be shown by the person against whom the same is found or the prosecutor, or to be allowed by the court, for the postponement of the trial.

Sect. 7 provides for an allowance out of the county rates to be made to the sheriff for a certain number of years, in addition to the other emoluments of his office in respect of fees for summoning traverse juries.

Sect. 8. That her Majesty, her heirs and successors, may

(*s*) *R.* v. *Middlesex* (*Justices*), 5 D. & L. 581; 17 L. J., M. C. 111.

by sign manual appoint a person, being a serjeant or barrister at law of not less than ten years' standing (and in the commission of the peace for the said county, and qualified by law to act as justice of the peace), to be the assistant judge of the said court of the sessions of the peace, which said assistant judge shall preside at the hearing of all appeals and at the trial of all felonies and misdemeanors in the said court and all matters connected therewith, and shall hold his office during good behaviour; and in case of sickness or unavoidable absence, and on such other occasions as shall be allowed by one of her Majesty's principal secretaries of state, such assistant judge shall be empowered from time to time to appoint a deputy qualified to be appointed assistant judge (only he need not be in the commission of the peace for the county, or qualified by law to act as justice of the peace (14 & 15 Vict. c. 55, s. 14)), who shall have power to act for him for such time as shall be in each case allowed by the secretary of state, not being in any case later than the end of the business of the session of the peace then next but one following: provided always, that nothing in this act contained shall interfere with the appointment of the chairman of the said court for all purposes except the trials of appeals and of felonies and misdemeanors and other matters connected therewith, but such appointments shall remain in the said justices as before the passing of this act: provided also that the said assistant judge, so long as he shall hold the said office, shall not be eligible to sit in parliament. Appointment of assistant judge.

Sect. 9. That the presence of another justice of the peace shall not be essential to the formation of the court in those cases in which it is directed by this act that the assistant judge or his deputy for the time being shall preside; but nothing in this act contained shall lessen the jurisdiction of the justices at the said sessions.

Sect. 10 relates to the salary of the assistant judge; as to which see also 22 & 23 Vict. c. 4.

By sect. 11, after reciting 9 Geo. 4, c. 9 (which has since been repealed by 24 & 25 Vict. c. 101), and that by ancient usage and of right the justices of the peace for Middlesex have constantly holden and may hold their sessions of the peace for the said county within the liberty and city of Westminster, and the holding of sessions for the city and liberty has become unnecessary, it is enacted, that, after the sessions of the peace which shall be holden in and for the said city and liberty next after the passing of this act, sessions of the peace in and for the said city and liberty shall cease to be holden, and the sessions to be holden in and for the said county of Middlesex shall be holden by adjournment within the said city and liberty, and shall have full jurisdiction over all things cognizable by the said city and liberty, and that the inhabitants of the said city and liberty shall not be exempted from serving on juries at the sessions of the peace for the county of Middlesex holden within the said city and liberty.

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Sect. 12. That the persons holding the several offices of high bailiff of Westminster, clerk of the peace, and all other officers of the court of sessions of the peace for the said city and liberty, shall, so long as they shall be entitled to hold their several offices, execute the duties, and be entitled to the emoluments within the said city and liberty of the several offices of sheriff, clerk of the peace and other corresponding officers of the county of Middlesex (*t*): provided always that the records of every sessions of the peace for the said county, holden within the said city and liberty, shall be sent within fourteen days after such session by the clerk of the peace of the said city and liberty, to the clerk of the peace of the said county, and shall be kept by him with the other records of his office.

By sect. 13, the justices of the said county of Middlesex are to have the sole control over the county rate, which was previously vested partly in the justices for the said county and partly in the justices of the said city and liberty.

By sect. 14, justices for the county are to have the sole control over the court house for Westminster; and by sect. 15, the property in the new Bridewell is vested in the justices for the county; and by sect. 16, it is enacted that the new Bridewell shall be a house of correction for the county of Middlesex, and under the management and control of the justices of the said county; and the justices of the said county, the magistrates of the police courts, the judges of the central criminal court, and all persons having by law a right to commit any offender or offenders to the house of correction in Coldbath Fields or to the gaol of Newgate as the common gaols of London and Middlesex, in execution of their judgments, shall have the like power of committal to the said new Bridewell which they have of committing to the said house of correction or the said gaol of Newgate: provided always that nothing in this act contained shall take away the right of the justices for the city and liberty of Westminster and the commissioners (for the executing 23 Geo. 2, c. 27, as to small debts) to commit offenders to the said new Bridewell, or enable any of the aforesaid judges, justices or other persons to commit thereto any offender for any offence committed within the city of London, or elsewhere than in the county of Middlesex.

Power of dividing court.

By 14 & 15 Vict. c. 55, s. 15, the court of quarter or general sessions, or adjourned sessions of the peace for the county of Middlesex, shall possess the same powers for dividing such court of general or quarter or adjourned sessions as are now possessed by the courts of quarter and general and adjourned sessions of the peace in counties in which there is an order in force for the appointment of a permanent chairman and deputy chairman, and whensoever such court shall exercise such power the assistant

(*t*) This does not apply to their successors; *Nicholson* v. *Ellis*, 28 L. J., Q. B. 238, reversing *S. C.*, 27 L. J., Q. B. 369.

judge shall appoint a person qualified to act as deputy assistant judge to preside as chairman with the justices who shall be appointed to sit apart: provided always, that the name of the person who shall be so appointed shall, at some previous time, have been transmitted to and approved of by one of her Majesty's principal secretaries of state as a fit and proper person to be from time to time appointed as such deputy assistant judge. *Assistant Judge may appoint a Deputy.*

Sect. 16. The presence of one of the justices so as aforesaid set apart, shall not be essential to the formation of the court in which such deputy assistant judge shall preside; but the jurisdiction of such justices shall not be in any way lessened by such appointment.

By 22 & 23 Vict. c. 4, s. 3, during any vacancy in the office of such assistant judge, or when and so often as such assistant judge for the time being shall, for reason of mental or bodily infirmity, or of unavoidable absence, or from other cause, be unable to appoint a deputy pursuant to 7 & 8 Vict. c. 71, it shall be lawful for one of her Majesty's principal secretaries of state by writing under his hand to appoint a person, being a serjeant or barrister at law of not less than ten years' standing, to act temporarily as or in the place of such assistant judge until such time as an assistant judge shall be appointed under the said act, or until the assistant judge shall be able to resume his duties, as the case may require; and such person so appointed under this act shall have and exercise all such powers and privileges as are given by the said act to such assistant judge, and shall be paid for his services out of the county rates of the said county any sum not exceeding five guineas per day whilst he shall sit and act as assistant judge. Assistant judge *pro tem.*

Sect. 4. Every general session of the peace for the county of Middlesex, and every adjournment thereof, shall have power to try and determine all appeals and all other powers which do now or shall hereafter belong to the general quarter sessions for the said county; and the said justices may and are hereby authorized to hold such sessions or adjournment thereof at the sessions house at Clerkenwell. General sessions to have powers of quarter sessions.

Sect. 5. It shall be lawful for any court of general or quarter sessions holden in and for the said county of Middlesex to spare or remit, if it shall be thought fit, any fine imposed at a previous session upon any juror for non-attendance or other default.

CHAPTER II.

OF THE PERSONS COMPOSING THE COURT AND THE OFFICERS AND OTHERS ATTENDANT ON THE SESSIONS, THEIR QUALIFICATIONS, RIGHTS, POWERS AND DUTIES.

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Section 1.

OF THE CUSTOS ROTULORUM.

The principal person of the justices and others constituting a court of session of the peace is the *Custos Rotulorum*, or keeper of the records of the county. He is always a justice of the peace of the quorum within the county for which he is appointed, and is its first civil officer, as the lord lieutenant is the chief in such military command as can now be exercised independently of the Mutiny Act (*a*). These offices are frequently holden by the same person, but their appointments are as distinct as their duties. This office is in itself rather ministerial than judicial. He is accordingly referred to in the last clause of the commissions of the peace in these terms:—"Lastly, we have assigned you the aforesaid A. B. Keeper of the Rolls of our peace, in our said county, and therefore you shall cause to be brought before you and your fellows, at the days and places aforesaid, the writs, precepts, processes and indictments aforesaid, that they may be inspected, and by a due course determined, as is aforesaid."

Origin of the office.

The office of *custos rotulorum* is not immemorial, as the commission of the peace itself had its origin within time of legal memory; but it begun in very early times. There is no distinct trace of its first constitution; but it probably arose very soon after the holding of sessions of the peace began,

(*a*) 4 Steph. Black. 5th ed. 399.

from the necessity or convenience of having some high and responsible officer to keep the records, which before were promiscuously dispersed among the justices (*b*). When such necessity arose it belonged of right to the crown to appoint some particular person to have the custody and charge of the records, who might be a person responsible for the safe keeping of them, and to whom the subject might have resort when he had occasion to use them (*c*). So that though in contemplation of law the records are in the possession of all the justices of the court, all *writs of certiorari* and *of error* being addressed to them, yet in fact they are in the custody of the *custos rotulorum;* and if by neglect or misconduct they are lost or miscarry, he is responsible to the crown and the subject for such loss or miscarriage (*d*). In practice the sessions records are kept by the clerk of the peace, who is acting deputy of the *custos*. *Origin of the Office.*

The *custos rotulorum* can only be appointed by "bill signed by the king," on which the lord chancellor issues his commission (*e*); and the saving for the archbishop of York, the bishops of Durham and Ely, and all to whom the king or his progenitors by letters patent had granted any liberty to appoint a *custos rotulorum*, to exercise the power so granted, is repealed as to the above ecclesiastics by statutes of the last reign (*f*). How appointed.

The *custos rotulorum* ought to attend the session by himself or his deputy the clerk of the peace, whom, "being a sufficient person residing within the county," he appoints under 37 Hen. 8, c. 1, s. 3, as often as that office is vacant. He has this appointment at common law as an appendage to his own office, and not by virtue of the statute, which merely points out how he is to exercise his power (*g*); but he may not sell the place directly or indirectly under penalty of forfeiting his own office and double the sum he received (*h*). Duties.

Section 2.

of justices.

The old statutes generally direct respecting justices of the peace, that "they shall be of the most sufficient knights, esquires, and gentlemen of the law" (*i*). They must be resident within In counties—qualification of, by estate.

(*b*) Per *Holt*, C. J., in *Harcourt* v. *Fox*, 1 Shower, 528.
(*c*) *Ibid.*
(*d*) *Ibid.*; Com. Dig. *tit. Justices of Peace* (D. 4).
(*e*) 37 Hen. 8, c. 1, repealed by 3 & 4 Edw. 6, c. 1, and revived by 1 W. & M. sess. 2, c. 21, s. 4.
(*f*) 6 Will. 4, c. 19, s. 3; 6 & 7 Will. 4, c. 87, s. 7.
(*g*) *Harding* v. *Pollock*, 6 Bing. 25.
(*h*) 1 W. & M. sess. 1, c. 21, s. 8.
(*i*) 13 Rich. 2, st. 1, c. 7; and 2 Hen. 5, st. 2, c. 1.

Of the Justices.

Qualification by estate.

the counties for which they act (*k*). And they must be entitled, in law or equity, for their own use in possession, to a freehold, copyhold or customary estate for life, or for some greater estate, or an estate for some long term of years, determinable upon one or more lives, or for a certain term originally created for twenty-one years or more, in lands, tenements or hereditaments, in England or Wales, of the clear yearly value of 100*l.*, above what will discharge all incumbrances affecting the same, and all rents and charges payable out of the same; or be entitled to the immediate reversion or remainder of and in lands, &c. leased for one, two or three lives, or for any term of years determinable on the death of one, two or three lives, upon reserved rents of the clear yearly value of 300*l.*; and if any justice shall act without such qualification, he shall forfeit 100*l.* (*l*).

An estate of more than 300*l.* a-year, held in trust for the wife of the justice for life, with remainder to him for life and remainder to their children, was held not to give a qualification to the justice, for he had no control over the wife's interest (*m*).

A sequestration on a benefice is a charge and incumbrance upon the life estate of the incumbent within 18 Geo. 2, c. 20; but if the incumbent be licensed by the bishop to perform the spiritual duties of the benefice and reside in the parsonage house, his estate for life therein is not affected by the sequestration, and if that be of the value of 100*l.* he will be qualified to act.

Where, however, the incumbent resided upon a house and lands, both together worth more than 100*l.* a-year, but the house was not worth so much, it was held that, as the lands

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(*k*) 2 Hen. 5, st. 2, c. 4; but by 11 & 12 Vict. c. 42, s. 5, where any justice for any county, riding, division, liberty, city, borough or place, shall be also justice of the peace for a county, riding, division, liberty, city or place next adjoining thereto or surrounded thereby, such justice may act in matters and things whatsoever concerning or relating to any or either of the said counties, provided he be resident or happens to be in *one* of them.

And by 11 & 12 Vict. c. 42, s. 6, justices for counties at large who may reside within any place, not being a county of itself, but *having exclusive jurisdiction*, are enabled to act within such place for the county at large in which such place is situate, or which it may adjoin. The above two sections are incorporated with 11 & 12 Vict. c. 43 by s. 6, which is explained further by 26 & 27 Vict. c. 77, s. 1.

And by 2 & 3 Vict. c. 82, justices of peace acting for any *county*, may act in all things whatsoever concerning or in anywise relating to *any detached part of any other county* which is surrounded in whole or in part by the county for which such justices act. Constables are to obey their warrants, and expenses occasioned by any act of such justice in or with respect to such detached part shall be repaid by the county to which it belongs. And this is explained by 11 & 12 Vict. c. 42, s. 7.

(*l*) 18 Geo. 2, c. 20, s. 1. It is not sufficient that the party acting as magistrate be possessed of the qualification required at the time of his taking upon himself the office, but he must continue to possess it as long as he continues to act, or he will incur the penalty. See *Wright* v. *Horton*, Holt, N. P. 458.

(*m*) *Woodward* v. *Watts*, 2 E. & B. 453; *Wright* v. *Horton*, Holt, N. P. 458.

might be disposed of by the sequestration, he was not qualified ; and, further, that the assignment of a salary out of the profits exceeding 100*l.* a-year did not confer a qualification (*n*). *Qualification by Estate.*

In boroughs within the Municipal Corporation Act, the justices assigned under that act may act without having any qualification by estate, provided such person be not disqualified by law to act for any other cause, and although such person may not be a burgess of the borough for which he acts ; but they must reside within the borough, or within seven miles of some part thereof, during the time they shall act (*o*). Qualification in boroughs.

Provided, nevertheless, that no such person, by virtue of such assignment, shall act as a justice of the peace at any court of gaol delivery, or general or quarter sessions, or in making or levying any county rate (*p*).

By the 6 & 7 Vict. c. 73, s. 33, it had been enacted that no attorney or solicitor should be capable of being a justice of the peace for any county in England or Wales during such time as he should continue in the business and practice of an attorney or solicitor. But by sect. 34, the prohibition above contained was not to be construed to extend to any city or town being a county of itself, or to any city, town, cinque port or liberty, having justices of the peace within their respective limits and precincts, by charter, commission or otherwise ; but that in every such city, town, liberty or place, attorneys or solicitors may be capable of being justices of the peace, and in such manner only as they might have been if this act had never been made. Disqualifications. Attorney or solicitor.

But now by 34 Vict. c. 18, the above 33rd sect. and the 5 Geo. 2, s. 2, are repealed ; and it is enacted that no person shall be capable of becoming or being a justice of the peace for any county in England or Wales (not being a county of a city or county of a town) in which he shall practise and carry on the profession or business of an attorney, solicitor or proctor ; and where any person practises and carries on such profession or business in any city or town, being a county of itself, he shall, for the purposes of this act, be deemed to carry on the same in the county within which such city or town, or any part thereof, is situate (*q*).

And, for the purposes of this act, a person shall be deemed to practise and carry on his profession or business in the county, city or town in which he maintains an office or place of business ; and the word "county" shall mean and include a riding or division of a county having a separate commission of the peace (*r*).

And, by sect. 3, this act is not to extend to coroners.

(*n*) *Pack* v. *Tarpley*, 9 A. & E. 468; 8 L. J. (N. S.) M. C. 93.
(*o*) 5 & 6 Will. 4, c. 76, s. 98, *ante*, p. 14.
(*p*) *Ibid.* s. 101. See further, *post*, p. 42.
(*q*) 34 Vict. c. 18, s. 1.
(*r*) *Ibid.* s. 2.

Of Justices.

Disqualification. Bankruptcy.

"If any person, being assigned by her Majesty's commission to act as a justice of the peace, is adjudged a bankrupt, or makes any arrangement or composition with his creditors under the Bankruptcy Act, 1869, he shall be and remain incapable of acting as a justice of the peace until he has been newly assigned by her Majesty in that behalf" (*s*).

Shrievalty.

A sheriff cannot act as a justice during the continuance of his shrievalty (*t*), nor, according to better opinions, can the coroner, although there is no statute to forbid him, on the principle that no one ought to be a judge in a court of which he is an officer (*u*). Moreover, the coroner may, under certain circumstances, be called upon to perform the duties of sheriff.

Interest in matters *sub judice.*

A justice of the peace is disqualified at common law from acting in a judicial matter in which he has a pecuniary interest, however small, unless the parties before him agree to waive any objection of that nature (*v*); but circumstances not amounting to a pecuniary interest, from which a suspicion of favour or bias may arise, would not alone amount to a disqualification, though it would be wrong in such a case of a justice to act (*x*).

In highway matter.

In a case where a justice of the peace was also surveyor of highways, and a matter which concerned his office coming in question at the sessions, he joined in making the order, and his name was put in the caption, it was held that the order was void and it was quashed.

On removal appeals.

So it has been determined, that on an appeal to the sessions against an order of removal, those justices who are rated to the relief of the poor in either of the contending parishes have not a right to vote (*y*); and indeed, if, of two magistrates who signed an order of removal, one be a churchwarden of the removing parish, the order itself is bad on that ground, for he is a party to the complaint upon which the order is made (*z*).

In poor rate appeals.

And where the order of sessions was made upon an appeal against a rate, and three magistrates who were interested took a part in the decision, it was held, that the court was improperly constituted, and the decision invalid (*a*). Where a waterworks company were appellants against a poor rate, an order reducing the rate and taxing the appellants' costs was held bad, because the deputy recorder by whom the appeal was heard and the order made was a shareholder in the appellant's company, though he had in fact sold his shares, but the transfer had

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(*s*) 32 & 33 Vict. c. 62, s. 22.
(*t*) 1 Mar. sess. 2, c. 8.
(*u*) Dalt. c. 3.
(*v*) *Wakefield Local Board of Health* v. *West Riding and Grimsby Rail. Co.*, 35 L. J., M. C. 69; L. R., 1 Q. B. 84.
(*x*) *Reg.* v. *Rand*, 35 L. J., M. C. 157; L. R., 1 Q. B. 230.
(*y*) *R.* v. *Yarpole*, 4 T. R. 71.
(*z*) *R.* v. *Great Yarmouth*, 6 B. & C. 646.
(*a*) *R.* v. *Paving Commissioners of Cheltenham*, 1 Q. B. 467; 10 L. J., M. C. 99.

not been completed (*b*); and also a subsequent order for costs on the same appeal was held bad, because the deputy recorder was a ratepayer in one of the parishes other than the respondent's parish, in the same union, which parishes all contributed to the common fund out of which the costs would be payable (*c*). And in *Reg.* v. *Gutteridge* (*d*), it was held, that a justice of the peace who is a rated inhabitant of a parish cannot vote at sessions upon the determination of an appeal against the allowance of the accounts of the overseers of his parish, or upon the propriety of granting a case for the opinion of the Court of Queen's Bench which is part of the order on the appeal. And where a prosecution was instituted and conducted under the Salmon Fishery Act, 1861, by the agents of an association for the preservation of salmon, and a conviction was obtained before justices who were active members of the association which paid watchers, one of whom laid the information, the conviction was quashed on the ground that the justices who made it were interested in the result and even parties to the prosecution (*e*).

Of Disqualification through Interest in Matters sub Judice.

In prosecutions.

On appeal against a conviction for an offence against a bye-law of a railway company, in which the company were prosecutors, an order of sessions affirming the conviction was held null and void because some of the justices affirming the conviction were shareholders in the company (*f*). And even where no actual vote was given by the interested justice, his presence and interference at the hearing of the appeal by remaining on the bench and communicating with the other justices vitiated the proceedings (*g*). Therefore, it is the duty of an interested justice to voluntarily withdraw from the court when the appeal is called on (*h*).

Duty to withdraw.

In certain cases by statute a justice who is interested in certain matters is allowed to act in such matters, but chiefly out of sessions. Thus, by 16 Geo. 2, c. 18, justices within their jurisdiction may do and execute all acts, matters and things appertaining to their office as justices "so far as the same relates to the laws for the relief, maintenance and settlement of poor persons, for passing and punishing vagrants, for repair of highways, or to any other laws concerning parochial taxes, levies or rates; notwithstanding any such justice or justices is or are rated to or chargeable with the taxes, levies or rates within any such parish, township or place affected by any such act or acts of such justice or justices as aforesaid;" but sect. 3 provides, that this act or anything herein contained shall not authorize or empower any justice or justices of the peace for

Disqualification by interest removed in certain cases.

The removal of disqualification not to extend to appeals.

(*b*) *R.* v. *Recorder of Cambridge*, 8 E. & B. 637; 27 L. J., M. C. 160.
(*c*) *Ibid.*
(*d*) 5 B. & C. 459.
(*e*) *Reg.* v. *Allen*, 33 L. J., M. C. 98; L. R., 1 Q. B. 120.
(*f*) *Re Hopkins*, E. B. & E. 100.
(*g*) *R.* v. *Justices of Suffolk*, 18 Q. B. 416; 21 L. J., M. C. 171; *R.* v. *Justices of Hertfordshire*, 6 Q. B. 753.
(*h*) *R.* v. *Justices of Suffolk*, 18 Q. B. 416; 21 L. J., M. C. 171.

Of Justices.

Their disqualification from acting in certain matters.

any county or riding at large to act in the determination of any appeal to the quarter sessions for any such county or riding from any order, matter or thing relating to any such parish, township or place where such justice or justices of the peace is or are so charged, taxed or chargeable as aforesaid (*h*).

Ex officio guardians.

By the 5 & 6 Vict. c. 57, s. 15, justices may act at petty, special or quarter sessions in matters in which the board of guardians of which he is an ex officio member is interested.

Ex officio member of highway board.

By 27 & 28 Vict. c. 101, s. 46, no justice of the peace shall be disabled from acting as such at any petty or special or general quarter sessions in any matter merely on the ground that he is, by virtue of his office a member of any highway board complaining, interested or concerned in such matter, or has acted as such at any meeting of such board; but by 25 & 26 Vict. c. 61, s. 38, no justice of the peace shall act as such in any matter in which he has already acted as a member of the highway board, and in which the decision of such board is appealed against.

Or on appeals against convictions under acts put in force by local authority.

By the 30 & 31 Vict. c. 115, s. 2, "a justice of the peace shall not be incapable of acting as a justice at any petty or special or general or quarter sessions on the trial of an offence arising under an act to be put in execution by a municipal corporation, or a local board of health, or improvement commissioners or trustees, or any other local authority, by reason only of his being as one of several ratepayers, or as one of any other class of persons, liable in common with the others to contribute to or to be benefited by any fund, to the amount of which the penalty payable in respect of such offence is directed to be carried or of which it will form part, or to contribute to any rate or expenses in diminution of which such penalty will go."

Oath of qualification by estate.

To secure the object of the provisions respecting the qualification by estate, it is enacted, that no person shall be capable of acting as a justice of the peace, for a county, &c., who shall not, before he acts, at some general or quarter session for the county, or division, &c., for which he intends to act, take and subscribe the following:—

Form of oath.

I (*i*), A. B., do swear that I truly and *bonâ fide* have such an estate in law or equity, to and for my own use and benefit, consisting of (*specifying the nature of such estate, whether messuage, land, rent, tithe, office, benefice, or what else*) as doth qualify me to act as a justice of the peace for the county, riding or division of ———, according to the true intent and meaning of an act of parliament made in the eighteenth year of the reign of his Majesty King George the Second, entitled "An act to amend and render more effectual an act passed in the fifth year of his said Majesty's reign, entitled an act for the further qualification of justices of the peace," and that the same (*except where it consists of an office, benefice or ecclesiastical preferment, which it shall be sufficient to ascertain by their known and usual names*) is lying, or being, or issuing out of land, tenements or hereditaments, being within the parish, township or precinct

(*h*) *Reg.* v. *Recorder of Cambridge*, 8 E. & B. 637; 27 L. J., M. C. 160.
(*i*) 18 Geo. 2, c. 20, s. 1.

of ——— (*or* in the several parishes, townships or precincts of ——— and ———) in the county of ——— (*or* in the several counties of ——— and ———) (*as the case may be*) (*k*). *Oath of Qualification by Estate.*

This oath, so taken and subscribed, is to be kept among the records of the sessions, by the clerk of the peace, who is to deliver an attested copy of it to any person requiring the same, on paying 2*s.* for it; and such attested copy will be evidence in any suit brought under the statute which requires the qualification (*l*). Any person who may act as a justice without having taken and subscribed the above oath respecting his qualification, or without being actually qualified according to the declaration contained in it, is liable to a penalty of 100*l.*, one moiety of which is forfeited to the poor of the parish in which he resides, and the other moiety to whoever will sue for the same, in any of the courts of Westminster, within six months after the commission of the offence. No notice of action is necessary (*m*). The acts of a justice as such are not avoided by his not having taken the qualification oath (*n*). Actions for penalties.

On the trial of any action against a justice for acting without a proper qualification, the proof of the qualification lies on the defendant, and he cannot avail himself of any lands, &c. not specified in his oath, unless he deliver a notice of his intention to insist on such property, &c. to the plaintiff or his attorney, in writing, at or before the time of pleading, specifying such lands, and the parish and county where situated, except the qualification be derived from offices, benefices or ecclesiastical preferments, as excepted in the above form (*o*) Notice to insist on qualification not mentioned in the oath.

Where the lands contained in the said oath or notice are, together with other lands, liable to any charges, rents or incumbrances for the purposes of this act, such lands are deemed chargeable only so far as the other lands are insufficient to pay (*p*). And where the qualification, or any part thereof, consists of rent, it is sufficient to specify in such oath or notice, so much of the lands out of which such rent is issuing as are of sufficient value to answer such rent (*q*).

After such notice given, the plaintiff in the action may, if he think fit, discontinue the action on payment of costs, with leave of the court; but if he discontinued otherwise, or was nonsuit, or had a verdict against him, the defendant formerly was entitled to treble costs (*r*), until the right to recover treble costs was

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(*k*) Need not be taken by borough justices, 5 & 6 Will. 4, c. 76, s. 104, see *post*, p. 44.

(*l*) 18 Geo. 2, c. 20, ss. 1, 2.

(*m*) *Ibid.* s. 3. See *Wright* v. *Horton*, *ante*, p. 36.

(*n*) *R.* v. *Herefordshire* (*Justices*), 1 Chit. R. 700; *Margate Pier Company* v. *Hannam and Others*, 3 B. & A. 266.

(*o*) 18 Geo. 2, c. 20, ss. 3, 4, 5.

(*p*) *Ibid.* s. 6.

(*q*) *Ibid.* s. 7.

(*r*) *Ibid.* s. 9.

Of Justices.

Qualification by estate.

taken away by 5 & 6 Vict. c. 97, s. 2. Only one penalty can be recovered in reference to any act done before the commencement of an action (*s*); no proceedings can be had, after notice, in any other action subsequently commenced, for an offence prior to the first action, if it has been commenced *bonâ fide*, &c., without fraud (*t*). And every action to recover the penalty must be brought within six months after the instance of acting without qualification, on which it is grounded (*u*).

Qualification not required in certain persons.

These provisions, however, respecting pecuniary qualification, only extend to what are usually denominated "*county* justices." They do not extend to persons acting for smaller jurisdictions and liberties, or to certain persons whose qualifications for the magistracy may be inferred from the rank which they possess, or from the offices which they fill. Thus, they do not extend to any city, town, cinque port or liberty having justices of peace within their limits (*x*), nor to any boroughs within the new municipal corporations act (*y*), nor to any peer or lord of parliament, or to the lords of the privy council, justices of either bench, barons of the exchequer, attorney or solicitor general, or to the eldest son, or heir apparent, of any peer or lord of parliament, or of any person qualified to serve as a knight of a shire (*z*); nor to the officers of the board of green cloth, or the commissioners and principal officers of the navy, or the two under-secretaries of state, or the secretary of Chelsea college, where they usually have been justices (*a*); nor to the heads of colleges, or halls, or the vice-chancellors, or to the mayors of Oxford and Cambridge, who may respectively be justices in the counties of Oxford, Berks and Cambridge, and the cities and towns within them (*b*), nor to magistrates of the police courts, or offices established in Middlesex, Westminster and Surrey, whether appointed before or after 24th August, 1839 (*c*).

Oath of office.

By the 21 & 22 Vict. c. 48, one oath was substituted for the oaths of allegiance, supremacy and abjuration; and by 30 & 31 Vict. c. 75, the form of such oath was changed and abbreviated, and now a form of oath of allegiance and the judicial oath is substituted for the form enacted by 30 & 31 Vict. c. 75, and is required to be taken by every justice of the peace for a county and a borough as soon as may be after his acceptance of office (*d*).

(*s*) 18 Geo. 2, c. 20, s. 8.
(*t*) *Ibid.* s. 10.
(*u*) *Ibid.* s. 11.
(*x*) *Ibid.* s. 12. And see 5 & 6 Will. 4, c. 76, ss. 101, 104, *ante*, p. 37, *post*, p. 44.
(*y*) 5 & 6 Will. 4, c. 76, ss. 101, 103. See *ante*, p. 37.
(*z*) 18 Geo. 2, c. 20, s. 13.
(*a*) *Ibid.* s. 14.
(*b*) *Ibid.* s. 15.
(*c*) 2 & 3 Vict. c. 71, s. 3.
(*d*) Promissory Oaths Act, 1868, 31 & 32 Vict. c. 72, s. 6.

Of the Oaths to be taken by Justices.

The oath of allegiance referred to runs as follows:—

"I, ———, do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria, her heirs and successors, according to law. So help me God" (*e*).

Judicial oath.

The judicial oath runs as follows:—

"I, ———, do swear that I will well and truly serve our sovereign lady Queen Victoria in the office of ———, and I will do right to all manner of people, after the laws and usages of this realm, without fear or favour, affection or illwill.

So help me God" (*f*).

Declaration substituted for oath.

When an oath is required to be taken under the Promissory Oaths Act, 1868, every person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath may, instead of taking such oath, make a solemn affirmation in the form of the oath hereby appointed, substituting the words "solemnly, sincerely and truly declare and affirm," for the word "swear," and omitting the words "so help me God" (*g*).

Where in any case, not otherwise provided for by this act or included within the saving clauses thereof, an oath is required to be taken by any person on or as a condition of his accepting any employment or office, a declaration shall be substituted for such oath to the like effect in all respects as such oath (*h*).

The making a declaration in pursuance of this section, instead of an oath, shall in all respects have the same effect as the taking the oath for which such declaration is substituted would have had if this act had not passed.

The declaration against transubstantiation, the invocation of saints, and the sacrifice of the mass, prescribed by 30 Car. 2, c. 1, was abolished as a qualification for office by 30 & 31 Vict. c 62, s. 1; but that repeal was not to enable Roman Catholics to hold offices, for the exercise of which such declaration was then a necessary qualification, or any other office from which he was at that time excluded.

Persons before whom oaths taken.

These oaths are to be taken before such persons as her Majesty may from time to time appoint, or in England before the lord chancellor, or in the Court of Chancery, Queen's Bench, Common Pleas or Exchequer, in open court before one or more of the judges of such court, or in open court at the general or quarter sessions of the peace for the county, borough or place in which the person taking the oaths acts as justice (*i*). Before this act the person named in the commission, who intended to act as a justice, must have sued out a writ from the Court of Chancery, called, from the first words of it, a writ of *Dedimus*

(*e*) 31 & 32 Vict. c. 72, ss. 2, 6.
(*f*) *Ibid.* ss. 4, 6.
(*g*) *Ibid.* s. 11.
(*h*) *Ibid.* s. 12, par. 4.
(*i*) 34 & 35 Vict. c. 48, s. 2.

Of the County Justices.

potestatem, to enable him to take the oath of office before some other acting justice or justices, to be certified into the court from which it issued.

Effect of not taking oath.

If any officer, specified in the schedule to the 31 & 32 Vict. c. 72 (which includes justices of the peace for counties and boroughs), declines or neglects, when any oath required to be taken by him under this act is duly tendered, to take such oath, he shall if he has already entered on his office vacate the same, and if he has not entered on the same be disqualified from entering on the same; but no person shall be compelled, in respect of the same appointment to the same office, to take such oath or make such affirmation more times than one (*l*).

Neglect to take declaration.

If any person, required by this act to make a declaration instead of an oath, declines or neglects to make such declaration, he shall be subject to the same penalties and disabilities, if any, as he would have been subject to for declining or neglecting to take the oath for which the declaration provided by this act is substituted (*m*).

Borough justices' oaths of office and judicial oath.

In boroughs under the Municipal Corporation Act, no person assigned to keep the peace within any such borough, shall be capable of acting as such justice till he shall have taken the oaths provided to be taken by justices of the peace, except the oath as to qualification by estate, and until he shall have made before the mayor, or before any two or more of the aldermen or councillors of such borough (who is and are authorized to administer the same), a declaration in the following form:—

Declaration of office.

"I, A. B., do hereby declare that I will faithfully and impartially execute the office of justice of the peace for the borough of ——— according to the best of my judgment and ability" (*n*).

And in the general construction of the act 18 Geo. 2, c. 20, relating to the qualification of justices, it has been holden, that the acts of justices, who may have omitted any of the forms of their inauguration which the law requires, but who have been commissioned, and are acting as justices, are not therefore invalid, although the justices may be liable either to indictment or to penalties for the omission (*o*).

Discharge from the commission.

A justice may be discharged from the commission by writ under the great seal. At common law, the demise or abdication of the crown determined the authority of all the justices named in the then existing commission; but, by special enactments, they are enabled to act for six months after, unless prohibited by the successor (*p*), which is done by a new commission; for

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(*l*) 31 & 32 Vict. c. 72, s. 7. See *M'Mahon* v. *Lennard*, 6 H. of L. Cas. 970.
(*m*) *Ibid.* s. 13.
(*n*) 5 & 6 Will. 4, c. 76, s. 104. See now 31 & 32 Vict. c. 72, *ante*, pp. 42, 43; 34 & 35 Vict. c. 48, *ante*, p. 43.
(*o*) *The Margate Pier Company* v. *Hannam*, 3 B. & A. 266, *ante*, p. 41.
(*p*) 1 Ann. st. 1, c. 18.

every new commission supersedes the old (*q*). Formerly it was thought that if a man named in any commission of the peace received new dignity conferred by the crown, his office of justice was determined, as he no longer answered to the description given in the commission (*r*); but it was long ago enacted that "although any justice of the peace be made duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of either bench, or serjeant-at-law, yet he shall remain justice, and have authority to execute the same" (*s*). *As to Discharge from the Commission.*

The court of quarter sessions has no authority to amerce any justice of the peace for non-attendance, as the justices of assize *may* for the absence of any such justices at the gaol delivery; for it is a general rule that *inter pares non est potestas;* it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office, to other judges of a superior station, than to those of the same rank with themselves (*t*). But where a past mayor, without whose presence the session could not be holden under a charter, voluntarily absented himself without sufficient cause, the court of King's Bench granted an information against him (*u*). Non-attendance at sessions.

By an ancient statute (*x*), it is provided that "justices shall have for their wages 4*s.* the day, for their time of attendance in session, and their clerk (*i. e.* the clerk of the peace) 2*s.*, of the fines and amerciaments rising and coming of the said sessions, by the hands of the sheriffs: and the lords of franchises shall be contributory to the said wages, after the rate of their part of the fines and amerciaments." Wages for attendance abolished.

And by another statute of the same king (*y*), it is enacted that *eight* justices shall be assigned in each county besides the lords assigned in this parliament (*z*), that duplicates of the estreats of the said justices shall be made, and the one part delivered by them to the sheriff, to levy the money therefrom arising, and therefore to pay the *said* [in practice the eight senior] justices and their clerks their wages by the hand of the sheriff, by indenture betwixt them thereof to be made.

By 18 & 19 Vict. c. 126, s. 21, after reciting, that whereas by acts of the 12th and 14th years of King Richard the Second payments are provided by justices of the peace and their clerks in each county, as wages by the day for the time of their sessions, to be payable by the sheriff as therein mentioned, and in several counties in England sums are claimed from the sheriffs and paid in respect of such statutory wages, and it is expedient

(*q*) 2 Steph. Black. Com. 627, 3rd ed.
(*r*) *Ibid.*
(*s*) 1 Edw. 6, c. 7.
(*t*) Hawk. bk. 2, c. 8. See Dalton, c. 185, p. 458.
(*u*) *R.* v. *Fox*, 1 Stra. 21. As to recorders, mayors, &c. see 5 & 6 Will. 4, c. 76, ss. 103, 105, 106.
(*x*) 12 Rich. 2, c. 10.
(*y*) 14 Rich. 2, c. 11.
(*z*) 12 Rich. 2, cc. 1, 2.

Of County Justices.

Their wages abolished.

that such payments should be discontinued, it was enacted, that so much of 12 Rich. 2, c. 10, and 14 Rich. 2, c. 12, or of any other act now in force, as directs or authorizes the payment of wages to justices of the peace and their clerks for the time of their sessions, shall be repealed.

Acts in court protected.

It appears clear, that no judicial act done by justices when sitting as a court of record affords a ground of action against all or any of them (*a*). A justice of the county and borough of Poole, told the grand jury at a general session, "You have not done your duty; you are a seditious, scandalous, corrupt and perjured jury." For this language an indictment was found against him, but quashed as unprecedented. Lord *Mansfield* is reported to have said, "Neither party, witness, counsel, jury nor judge, can be put to answer civilly or criminally for words spoken in office. If the words spoken are *opprobrious*, or *irrelevant to the case*, the court will take notice of them as a contempt, and examine them *on information:* and if anything of *mala mens* is found on such inquiry, it will be punished suitably" (*b*).

He then says, that to proceed by way of indictment is improper. But for extra-judicial language used on or off the bench of justice, a magistrate seems liable. Fraud or mis-

(*a*) *Hamond* v. *Howel*, 1 Mod. 184; 2 Mod. 218; thus stated by Lord *Tenterden* in *Garnett* v. *Ferrand*, 6 B. & C. 625: "Hamond and other jurymen had been fined and imprisoned by the court at the Old Bailey for acquitting certain persons of a riot whom the evidence showed to be guilty. This was certainly a very strong exercise of authority, calculated to excite, and in fact exciting, great public interest. It was determined by the Court of Common Pleas, on a suit of *habeas corpus*, that the fine and imprisonment was contrary to law, and the parties were discharged out of custody. After this, Hamond brought an action of trespass against the Recorder of London, one of the judges in the commission, for this imprisonment. The defendant by his plea showed the proceedings before the commissioners, and averred that the jury had pronounced a verdict against plain evidence, and the direction of the court in matter of law. The plaintiff traversed the finding against evidence; and upon the pleadings it was held that the action did not lie, because the defendant was a judge of record. This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be. And it is not to be supposed beforehand that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment as long as they act within the bounds of their jurisdiction. In the imperfection of human nature it is better even that an individual should occasionally suffer a wrong than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct in it; for these I trust there is, and always will be, some due course of punishment by public prosecution." See also *Scott* v. *Stansfeld*, 37 L. J., Ex. 155; L. R., 3 Ex. 220; *Thomas* v. *Chirton*, 31 L. J., Q. B. 139; 2 B. & S. 475; *Kemp* v. *Neville*, 31 L. J., C. P. 158; 10 C. B., N. S. 523.

(*b*) *R.* v. *Skinner*, Lofft, 55.

Acts and Words in Court protected.

conduct of magistrates in session, in proceeding notwithstanding the issuing of a *certiorari*, may be the ground of a criminal information against them (*c*). An information was moved for against four persons, who were churchwardens and overseers of Seaford, and also the only justices of the peace for the borough, for refusing to put a substantial householder on the poor rate, with a view to deprive him of his elective franchise, and for refusing to amend the rate on appeal to them in sessions. The court refused the rule to show cause, saying, "That as they were acting in a court of record, with powers entrusted to them by the constitution, it must be a very strong case indeed, with flagrant proofs of their having acted from corrupt motives, that would warrant a rule for an information" (*d*). But this case as well as Lord *Tenterden's* judgment in *Garnett* v. *Ferrand* (*e*) shows that where corruption can be clearly established against magistrates acting illegally, they will be open to criminal information.

Section 3.

of the sheriff of the county.

Duties of sheriff in respect of sessions.

The sheriff of the county formerly had important duties to perform in respect of the sessions (*f*). He was bound to provide and make ready a fit and decent place for holding the sessions, unless where this duty was otherwise regulated by statute (*g*). It is his duty to proclaim the sessions in proper places in his bailiwick, to return the grand jury, to summon the petit jury by post (*h*) or otherwise, and to give notice to all stewards, constables, bailiffs of hundreds and liberties, and other officers, to be present and do their duties at the sessions. He ought also formerly to have attended the sessions by himself or his under-sheriff on the justices' summons, to return the precept (*i*), receive fines for the king, and take notice of the sentences; but all these duties are now performed by the clerk of the peace (*j*). He formerly had to take charge of the prisoners (*k*); and, if he neglected to attend, it was said, might be fined by the court (*l*). When the sentence

Levying fines.

(*c*) 7 T. R. 373; *R.* v. *Seton.*
(*d*) 1 Bla. Rep. 432.
(*e*) 6 B. & C. 625, *ante*, p. 46 n. (*a*).
(*f*) As the principal duties of the sheriff have no reference to the business of the sessions, his office is but slightly noticed in this work.
(*g*) Dalt. Sheriff, c. 39, 371.
(*h*) 25 & 26 Vict. c. 107, s. 11.
(*i*) See form, *ante*, p. 22.
(*j*) *Wildes* v. *Morris*, 22 L. J., M. C. 8, per *Erle*, J.
(*k*) Dalt. Sheriff, c. 99, 372.
(*l*) Dalt. Sheriff, *ubi sup.*; but the authority cited for this position hardly establishes it, as it is the case of a fine imposed by a court of great sessions in Wales, which had, until the abolition of those courts, jurisdiction analogous to courts of assize, and to the superior courts at Westminster.

Of the Sheriff of the County.

His duty as to fines.

is that the party be imprisoned till a fine be paid, the sheriff has authority to receive the money at any time. Indeed the prisoner has a right to demand the sheriff to receive it, so that his imprisonment may be terminated (*k*). Upon the delivery of the roll of fines and the writ to levy to the sheriff, he should not levy any fines which he knows to have been paid, though inserted as unpaid (*k*). He is, however, bound to execute the writs and precepts of justices in session, and is responsible for default to the court of which he is an officer, though he may execute any process by deputy (*l*), *e. g.*, to abate a nuisance. Resistance furnishes him with no excuse for leaving process unexecuted, because he is empowered, by statute, to take the power of the county to his aid (*m*). He has the appointment of the under-sheriff and the bailiffs; but he cannot dispose of any of these offices for money; as it is enacted, by 3 Geo. 1, c. 15, that none shall buy, sell, let, or take to farm the office of under-sheriff, gaoler, bailiff, or other office pertaining to the office of high-sheriff, on pain of 500*l.*, half to the king, and half to him that shall sue within two years. The county gaol was formerly placed under the direction of the sheriff by early statutes, 14 Edw. 3, c. 10, 19 Hen. 7, c. 10, and the gaoler was merely his deputy, and he had the appointment of a gaoler upon a vacancy; but prisons were, by the 4 Geo. 4, c. 64, and acts amending the same, put under the control and management of the justices in quarter sessions, and those acts are now repealed and superseded by the 28 & 29 Vict. c. 126, under which act the gaoler is appointed by the justices in sessions assembled, and holds his office during their pleasure (*n*), and he must not be an under-sheriff or bailiff (*o*). And every prisoner confined in a prison is deemed to be in the legal custody of the gaoler (*p*); but the former jurisdiction and responsibility of the sheriff is not affected in respect of prisoners under sentence of death, or his jurisdiction or control over the prison where such prisoners are confined, and the officers thereof so far as may be necessary for the purpose of carrying into effect the sentence of death, or for any purpose relating thereto; and in any prison in which sentence of death is required to be carried into effect on any prisoner, whether such prison is or is not the common gaol of the county, the sheriff shall, for the purpose of carrying that sentence into execution, be deemed to have the same jurisdiction with respect to such prison as he has by law with respect to the common gaol of a county, or would have had if this act had

Custody of prisoners.

The sheriff of Brecon was, in 1799, fined by the court of great sessions 100*l.* for non-attendance, which sum was levied, and the Court of King's Bench refused to lessen it on *certiorari*. *R.* v. *Loveden*, 8 T. R. 615.

(*k*) *Wildes* v. *Morris*, *ubi sup.* See *post*, p. 59.

(*l*) Hawk. bk. 2, c. 22, § 2.

(*m*) 13 Edw. 1, st. 1, c. 39.

(*n*) 28 & 29 Vict. c. 126, ss. 10, 14.

(*o*) *Ibid.* sched. 1, s. 68.

(*p*) *Ibid.* s. 58.

not passed (*q*). The sheriff is not liable now for the escape from imprisonment of any prisoner other than a debtor (*r*). The sheriff is no longer required to deliver to the justices at quarter sessions a calendar of all prisoners in custody for trial at the sessions; but the gaoler of every prison is to deliver such calendar (*s*). At the expiration of his period of office, the custody of the county gaol was immediately vested in the next sheriff, with the responsibility attendant on his predecessor; and he is directed to turn over, by indenture and schedule, all writs and processes then remaining unexecuted, *e. g.*, rolls and writs, particularizing fines, issues, amerciaments, forfeited recognizances, &c., not levied by him (*t*), to such successor, who is bound to execute and return them (*u*). In point of practice, formerly, the high sheriff rarely attended the sessions in person, but attended by his under-sheriff or deputy (*x*); but now, since the Prison Acts, never does.

Sheriff of the County.

Calendar of prisoners.

Section 4.

Of the Clerk of the Peace.

His office, what in counties.

The clerk of the peace is an officer, by whatever name called, whether clerk and attorney for the crown, clerk of the justices, or clerk of the peace, who is appointed to assist the justices assembled in quarter sessions to hear and determine felonies and trespasses under stat. 34 Edw. 3, c. 1, in drawing indictments, arraigning prisoners, joining issue for the crown, entering their judgments, awarding their process, and making up and keeping their records (*y*), as we have seen, appointed by the *custos rotulorum*, as of right, by common law (*z*), but is responsible to the justices in session for the due performance of his duties, according to 37 Hen. 8, c. 1, which in its preamble recites the evils which had arisen from the ignorance and inattention of this officer. He should be an able person, learned and instructed in the laws of the realm; and by 1 W. & M. sess. 1, c. 21, s. 5, is to be an able and sufficient person residing in the county, riding, division or other place for which he is appointed. He is to execute his office in person, "or by his sufficient

Qualification of.

(*q*) 28 & 29 Vict. c. 126, s. 58.
(*r*) *Ibid.* s. 60.
(*s*) *Ibid.* s. 62.
(*t*) 4 Geo. 4, c. 37, s. 1.
(*u*) 20 Geo. 2, c. 37.
(*x*) As to his returning a jury of bystanders on exhaustion of the jury-panel, see *post*, "Challenge of Jurors," Chap. V.
(*y*) Per *Vaughan*, B., *Harding* v. *Pollock*, 6 Bing. 67, citing Year-Book, 2 Hen. 7, p. 31, pl. 2. See also *R.* v. *Justices of Middlesex*, 5 B. & Ad. 1113, *ante*, p. 29.
(*z*) See *Harding* v. *Pollock*, 6 Bing. 25. As to this appointment in Lancashire, see 6 Bing. 34, per *Holt*, C. J.; *Harcourt* v. *Fox*, 1 Show. 530; in Durham, 6 & 7 Will. 4, c. 19; in Yorkshire, Ely, &c., 6 & 7 Will. 4, c. 87.

Clerk of the Peace.

deputy, instructed in the laws of the realm, so that the same deputy be admitted, taken, and reputed, by the said *custos rotulorum*, to be sufficient and able to exercise, occupy, keep and enjoy the same office of clerkship of the peace (*b*).

Office not to be purchased.

As the *custos* is prohibited from selling, so his appointee is forbidden to purchase the office; for it is enacted, "that if he shall give any reward, fee or profit, directly or indirectly, or any bond or other assurance, for such appointment, he shall be disabled from holding the office, and shall forfeit double the value of the thing given for the appointment, to whomsoever shall sue for the same" (*c*). In cities and towns corporate there was usually an analogous officer, who performed correspondent duties under some other title, as that of "Town Clerk," and who was generally appointed, not by the *custos rotulorum*, but by the body corporate of which he was an officer. But by 5 & 6 Will. 4, c. 76, the duties of town clerk are distinguished from those of clerk of the peace in a borough (*d*).

In cities and boroughs.

Town Clerk.

Duration of office.

The clerk of the peace of the county cannot hold the office of clerk to the justices of a borough within the county (*e*).

The office of the clerk is "so long as he shall well demean himself in his said office" (*f*); and, therefore, he has an estate of freehold for life in the office, on condition of behaving well; so that he cannot be dispossessed, except for misbehaviour, and by a competent tribunal; nor does his estate determine by the death or removal of the *custos*. He can be appointed for no other term; and, therefore, an appointment during pleasure is void, and the party so appointed no clerk of the peace (*g*).

On a vacancy custos appoints.

On a vacancy in the office, the *custos rotulorum* may appoint another; and if he neglect to do so before the ensuing quarter sessions, the justices assembled may appoint to the office (*h*).

Declaration on entering office.

On entering upon his office, the clerk of the peace is no longer required to take the oaths of allegiance, supremacy and abjuration, or any other oath (*i*); but must make a declaration to the following effect (*k*):—

> I, A. B., declare, that I have not paid nor will pay any sum or sums of money, or other reward whatsoever, nor have given nor will give any bond or other insurance to pay any money, fee or profit, directly or indirectly, to any person or persons whomsoever, for such nomination and appointment. So help me God.

Dismissal from office.

But if the clerk of the peace "misdemean himself in the execution of the said office, and a complaint and charge in

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(*b*) 37 Hen. 8, c. 1, s. 3; 1 W. & M. sess. 1, c. 21, s. 6.
(*c*) 1 W. & M. sess. 1, c. 21, s. 8.
(*d*) See *post*, p. 53; and see *Faulkner* v. *Cheverell*, 10 A. & E. 76.
(*e*) 24 & 25 Vict. c. 75, s. 5.
(*f*) 1 Will. 3, sess. 1, c. 21, s. 5.
(*g*) *Harcourt* v. *Fox*, 4 Mod. 167, 173; *R.* v. *Owen*, *ibid.* 293.
(*h*) 1 W. & M sess. 1, c. 21, s. 6. See the form, 2 Stra. 996.
(*i*) 31 & 32 Vict. c. 72, s. 9.
(*k*) *Ibid.* s. 12.

writing of such misdemeanor shall be exhibited against him to the court of quarter session, such court, on due examination and proof openly heard before them, may suspend or discharge him (*l*). Extortion is one of the offences for which this power of the sessions may be exerted (*m*). The word misdemeanor in the above section is not confined to a criminal offence, but means any improper conduct; such as gross negligence, or acts of omission or commission in his office; therefore, an absolute and contumacious refusal to enter an order of the court is a ground for removal (*n*). The order of sessions, removing a party so charged, need not set forth the evidence on which it is founded (*o*). Cases, however, have occurred in which clerks of the peace have been guilty of such misconduct as to render them unfit to hold their offices, but the justices have been unable to remove them, by reason that such misconduct did not occur in the execution of their office; therefore, by the 27 & 28 Vict. c. 65, s. 2, if it appear to any two justices of the peace of a county, &c., that the clerk of the peace of that county, &c., has been guilty of such misconduct otherwise than in the execution of his office, as in the opinion of the said justices to render him an unfit or improper person to hold the office of clerk of the peace, the said justices may exhibit against him to the court of general or quarter sessions of the county, &c., complaint in writing stating the misconduct of which the clerk has been guilty, a copy of which shall at the same time be sent to the *custos rotulorum*, and it shall be lawful for the said court, if satisfied upon due examination in open court that the clerk complained of has been guilty of the misconduct imputed to him, and that the same is such as to render him an unfit or improper person to hold his office, to suspend or remove him from his office, and a new clerk of the peace shall be appointed in manner provided by the said act in cases where a clerk of the peace has misdemeaned himself in the execution of his office.

Clerk of the Peace.

Guilty of misconduct otherwise than in the execution of his office.

By sect. 3, if the clerk of the peace feels aggrieved by the decision of the court he may appeal within three months to the lord chancellor by motion in a summary manner.

The word county includes riding, division or liberty of a county, or any city, borough or other place having a separate court of quarter sessions.

The clerk of the peace, by himself or his sufficient deputy, must be in constant attendance on the court of quarter sessions. He gives notice of its being holden or adjourned; issues its processes; records its proceedings; and does all the ministerial acts necessary to give effect to its decisions. It is his duty, when prosecutors do not choose to seek professional assistance else-

His duties in connection with the sessions.

(*l*) 1 W. & M. sess. 1, c. 21, s. 6. See the form, 2 Stra. 996.
(*m*) *R.* v. *Baines*, 6 Mod. 192; 2 Salk. 680.
(*n*) *Wildes* v. *Russell*, L. R., 1 C. P. 722, 738; 35 L. J., M. C. 241.
(*o*) *R.* v. *Lloyd*, 2 Stra. 996.

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where, to draw the bills of indictment. He has also been said to be amerciable in the court of Queen's Bench for gross errors in indictments framed by him, and brought before that court on *certiorari* (*m*); and though, perhaps, at the present day he would scarcely be held responsible for mere error, there is no doubt that if an indictment drawn by him were of immoderate and oppressive length, it might be referred to the master, upon whose report he might be ordered to pay the costs of such parts of it as should be found manifestly superfluous (*n*).

Duties of the office in connection with quarter sessions.

In the actual course of the sessions, it is the duty of the clerk of the peace, as officer of the court, to read such matters as are by statute, *e.g.* the certificate of justices upon the diversion or stopping up of highways (*o*), directed to be read in sessions, as well as documents proved in evidence ; to call over and swear all jurors, and make known their defaults and excuses to the court (*p*); to call the parties under recognizance, whether to prosecute, plead, or give evidence ; to present the bills to, and receive them from, the grand jury ; to arraign prisoners ; to receive and record verdicts ; to administer all oaths for the justices, though this duty is usually performed by the crier ; and make true entries of all proceedings (*q*).

The clerks of the peace may be made the trustees of lands purchased or hired by the justices of the county for public purposes (*r*).

As to his duties in summoning juries, and upon fines being imposed on jurors for non-attendance in boroughs, see *post*, p. 95 ; and in respect of highways, see the Highway Acts, and *post*.

He has also a variety of other duties imposed upon him by several acts of parliament (*s*).

For his duties on a division of the court of quarter sessions, see 21 & 22 Vict. c. 73, s. 11, *post*, Chap. V., Sect. 2 (*t*).

Taxation of costs.

Costs are taxed by the clerk of the peace, as the officer and

(*m*) Lilly's Pract. Reg. 71.
(*n*) *R.* v. *May*, 1 Dougl. 193, 194; 1 Leach, C. C., 201 (*n.*) a, 4th ed.
(*o*) 5 & 6 Will. 4, c. 50, s. 85, *infra*.
(*p*) See 25 & 26 Vict. c. 107, s. 12.
(*q*) *Wildes* v. *Russell*, *ubi sup.*
(*r*) See 21 & 22 Vict. c. 92, extended by 34 Vict. c. 14, *post*, Part IV.
(*s*) By 7 & 8 Vict. c. 101, s. 39, "on application of any overseer, or of any board of guardians, or of any attorney at law, it shall be the duty of the clerk of the peace of the county or place, or his deputy, if thereunto required, to tax any bill due to any solicitor or attorney in respect of *business performed on behalf of any parish or union situate wholly or in part within such county or place;* and the allowance of any sum on such taxation shall be *primâ facie* evidence of the reasonableness of the amount, but not of the legality of the charge, and the clerk of the peace shall be allowed for such taxation after the rate to be fixed from time to time by the master of the crown office, and declared by an order of the poor law commissioners; and if any such bill be not taxed before it is presented to the auditor, the auditor's decision on the reasonableness as well as the legality of the charges shall be final."
(*t*) See also *Wildes* v. *Morris*, 22 L. J., M. C. 4.

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in aid of the court, who, however, must adopt his taxation, which he must report to them before the close of the sessions (*u*). His taxation should therefore be completed before the final close of the sessions, unless the parties consent to the taxation being proceeded with out of court (*v*).

Duties of the office.

The clerk of the peace is no longer prohibited from practising as an attorney since the 6 & 7 Vict. c. 73, repealing 22 Geo. 2, c. 46, s. 14.

Appointment of, in cities, boroughs, &c.

In a borough within the Municipal Corporations Act (5 & 6 Will. 4, c. 76), the council of a borough, which has obtained a grant of separate quarter sessions, shall appoint a fit person to be clerk of the peace during his good behaviour (s. 103).

The clerk of the peace of a borough may not hold the appointment of clerk of the justices of the borough (*w*).

The clerk of the peace in a borough is the officer of the court of quarter sessions of the borough, while the town clerk is the officer of the council (*x*).

Duties of town clerk under 3 Geo. 4, c. 46, to be performed by clerk of the peace.

The duties imposed upon town clerks of cities, boroughs and places by the 3 Geo. 4, c. 46, are to be performed by the clerks of the peace for such city, boroughs or places where the offices of town clerk and clerk of the peace are not united in the same person; and such clerks of the peace are required to make all returns, issue all processes, and do and perform all other acts which are imposed upon town clerks by the said recited act (*y*).

Removal of clerk of the peace in boroughs.

As in counties the removal of a clerk of the peace from his office for misbehaviour is in the hands of the court of quarter sessions under 1 W. & M. sess. 1, c. 21, so in boroughs, having quarter sessions under 5 & 6 Will. 4, c. 76, it is within the jurisdiction of the recorder and not of the town council (*z*).

In counties—his fees.

By 57 Geo. 3, c. 91, the fees of the clerk of the peace were to be ascertained, and a table expressing them arranged by the court of general quarter sessions, and submitted to the approval of the next court of general quarter sessions, and finally, having received their sanction, to the judges of assize at the following circuit, by whom it was to be ratified, with any alterations which they may deem just. The table of fees, when once confirmed in this manner, may be altered by the justices in session, subject in like manner to the approval of a subsequent court of quarter session, and afterwards to the correction

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(*u*) *Ex parte Holloway*, 1 Dowl. P. C. 26; *Reg.* v. *Long*, 1 Q. B. 740; *Selwood* v. *Mount*, 1 Q. B. 726.

(*v*) *Rawnsley* v. *Hutchinson*, 40 L. J., M. C. 97; L. R., 6 Q. B. 305; *Freeman* v. *Read*, 30 L. J., M. C. 123; 9 C. B., N. S. 301. See *post*, Part III., Chap. I., *on Appeals*.

(*w*) 24 & 25 Vict. c. 75, s. 5.

(*x*) 5 & 6 Will. 4, c. 76. See *R.* v. *Carmarthen*, 7 A. & E. 756.

(*y*) 20 & 21 Vict. c. 50, s. 5, *post*, pp. 59, 61.

(*z*) *Reg.* v. *Hayward*, 2 B. & S. 585; 31 L. J., M. C. 177.

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of the judges (*a*); but a table of fees, once confirmed, cannot be altered by the mere order of the quarter sessions (*b*); such table was to be deposited with the clerk of the peace, and an exact written or printed copy placed and kept in a conspicuous part of the room where the quarter sessions is held, on pain of forfeiture by the clerk of the peace of 5*l.* to any person who shall sue for the same within three months (*c*); and if he received any greater fee or allowance than authorized by such table, he is subjected to a similar penalty (*d*).

Tables of fees in counties and boroughs.

And now by 11 & 12 Vict. c. 43, s. 30, the fees to which any clerk of the peace, clerk of the special sessions, or clerk to any justice or justices out of sessions, shall be entitled shall be ascertained, appointed and regulated in manner following: (that is to say) the justices of the peace at their quarter sessions for the several counties, ridings, divisions of counties and liberties throughout England and Wales, and the council or other governing body of every borough in England and Wales, shall from time to time, as they shall see fit, respectively make tables of the fees which, in their opinion, should be paid to the clerks of the peace, to the clerks of the special and petty sessions, and to the clerks of the justices of the peace within their several jurisdictions; and which said tables respectively, being signed by the chairman of every such court of quarter sessions, or by the mayor or other head officer of any such borough respectively, shall be laid before her Majesty's principal secretary of state. And it shall be lawful for such secretary of state, if he thinks fit, to alter such table or tables of fees, and to subscribe a certificate or declaration that such fees are proper to be demanded and received by the several clerks of the peace, clerks of special and petty sessions, and clerks to the several justices of the peace throughout England and Wales. And such secretary of state shall cause copies of such tables or sets of tables of fees to be transmitted to the several clerks of the peace throughout England and Wales, to be by them distributed to the several clerks of special sessions and petty sessions, and to the clerks of the justices within their several districts respectively. And if, after such copy shall be received by such clerks or clerk, he or they shall demand or receive any other or greater fee or gratuity for any business or act transacted or done by him as such clerk than such as is set down in such table or set of tables, he shall forfeit for every such demand the sum of 20*l.*, to be recovered by action of debt in any of the superior courts of law at Westminster by any person who will sue for the same.

The table of fees made under the authority of the 57 Geo. 3,

(*a*) 57 Geo. 3, c. 91, s. 1.
(*b*) *Reg.* v. *Coles*, 8 Q. B. 75.
(*c*) 57 Geo. 3, c. 91, s. 3.
(*d*) *Ibid.* s. 2.

c. 91, is *primâ facie* a statement of fees that ought to be paid, and imports that they had been ascertained to be legally due. The justices at sessions had no power under the statute to create fees; but they had power to ascertain those which legally had been paid, and to prescribe of those so ascertained which for the future should be paid (*e*). It is there said by *Coleridge*, J., in his judgment in answer to an argument which had been urged, that no fees whatever could be taken by the clerk of the peace, because he was not an officer immemorially entitled at common law to take fees. "It is certainly well known that the office of clerk of the peace was created within the time of legal memory; but on its being created it became analogous to that of clerk of assize, which is an immemorial and prescriptive office; and we may easily conceive that the officer of the newly-created court would, from the earliest period, be deemed to be entitled to fees of the same sort as had been paid to the analagous officer of the old and immemorial court."

Fees of, in Counties.

Upon the forfeiture clause of the 57 Geo. 3, s. 2, a clerk of the peace who took a larger fee than allowed by the table, under a mistake as to the existence of the facts upon which he made the charge, was held not to be guilty of the offence or to have incurred the forfeiture, if he, reasonably believing that there were two sureties to a recognizance, received a fee as for taking recognizances for a principal and two sureties instead of one surety only, as the fact was,—for the maxim *Actus non facit reum, nisi mens sit rea*, applies in such case (*f*).

By 5 & 6 Will. 4, c. 76, s. 124, the council of every borough shall and they are hereby required, within six calendar months next after their election, to make and settle a table of the fees which shall be taken by the clerk of the peace in those boroughs in which a separate court of quarter sessions of the peace shall be holden, and in those boroughs to which a commission of the peace shall have been granted a table of the fees to be taken by the clerk of the justices, and in those boroughs in which there shall be a court of record a table of the fees to be taken by the registrar and officers of such court; and such table of fees shall be submitted to one of her Majesty's principal secretaries of state; and where such table of fees shall be confirmed and allowed by such secretary of state, either as such table shall have been transmitted to him or with such alterations, additions or abatements as he shall think proper, the fees therein mentioned may thenceforth be lawfully taken by the person therein named to be entitled thereunto.

Fees of, in boroughs.

And it shall be lawful for the council of such borough from time to time as occasion may require to make new tables of

(*e*) *Reg.* v. *Coles*, 8 Q. B. 86.
(*f*) *Reg.* v. *Coles*, *ubi sup.*; *Bowman* v. *Blyth*, 7 E. & B. 26; 26 L. J., M. C. 57.

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fees to be taken instead of the fees contained in the tables which shall have been made as aforesaid, which new tables shall be confirmed and allowed in the manner hereinbefore mentioned, otherwise the same shall be of no validity; and that until tables of the fees so to be taken in any such borough shall have been made and confirmed as aforesaid, it shall be lawful for such clerk of the peace at the quarter sessions for any such borough and such clerk to the justices to take the fees authorized by the table for the time being to be taken by the clerk of the peace at the quarter sessions, and clerk to the justices respectively for the county within or adjoining to which such borough is situated, and for the registrar and officers of such court of record to take the fees usually taken by them before the passing of this act.

Payment by salary instead of fees in counties and boroughs.

And by 14 & 15 Vict. c. 55, s. 9, the justices of the peace at general or quarter sessions for the several counties, ridings, divisions of counties and liberties throughout England and Wales, notice being given at the preceding quarter sessions that a motion will be made for such purpose, and the council or other governing body in every borough in England and Wales from time to time, if they see fit so to do, may recommend to one of her Majesty's principal secretaries of state that the clerks of the peace, the clerks of petty and special sessions, and the clerks of justices of the peace within their several jurisdictions, or any of such clerks as aforesaid, be paid by salaries in lieu of fees and other payments, or where any of such clerks are for the time being paid by salaries by virtue of any order made under this act or otherwise, to recommend that the amounts of all or any of the salaries for the time being payable be reconsidered, or that all or any of such clerks, for the time being paid by salaries, be paid by fees in lieu of salary, and where payment by salaries in lieu of fees, or the reconsideration of the amounts of any salaries, is recommended, to state the amount of the salaries which, in the opinion of such justices, council, or governing body, should in each case be paid; and every such recommendation being signed by the chairman of the court of general or quarter sessions, or the mayor or other head officer of the borough, shall be transmitted to the secretary of state; and it shall be lawful for such secretary of state when any such recommendation is so made to him by order under his hand, if he so think fit, to direct that all or any of the clerks to which such recommendation refers be paid, and to fix the amount of salary to be so paid, or vary the amount of salary for the time being payable to any such clerk, or to direct that any such clerk for the time being paid by salary, be paid by fees in lieu of salary; and such secretary of state shall cause copies of every order made under this enactment, affecting any clerk of the peace, or any clerks of special sessions or petty sessions, or clerks to the justices within the district of any clerk of the

peace, to be transmitted to such clerk of the peace, to be by him distributed, where occasion shall require, to such other clerks as aforesaid ; and the salary for the time being payable to any such clerk under any such order shall be paid out of any county rate, or rate in the nature of a county rate, made in the county, riding, division or liberty, or out of the borough fund of the borough, as the case may be, for or in which such clerk of the peace, or other clerk to whom the same is payable, is appointed or acts, &c.

Payment by Salary.

Then follow provisions as to the basis for fixing the amount of the salary and in respect of compensation.

It is only by statute that the clerks of the peace can be paid by salary instead of fees ; and, therefore, an agreement between a clerk of the peace in a municipal borough and the town council that he will take a certain sum by way of annual salary, instead of the fees attached to his office, and account for the surplus of the fees to the council, is void on the ground of public policy (*g*).

It is competent, also, for the court of sessions or council to recommend that certain work, which the clerk of the peace might be called upon to do by reason of his office, should be paid for by fees or otherwise irrespective of his salary (*h*).

After the salary is fixed and ordered to be paid, all fees, &c. are to be paid by the clerk of the peace of the county to the treasurer in aid of the county rate, or rate in the nature of the county rate, or in boroughs to the treasurer of the borough fund (*i*).

And justices are authorized to remit fees which the clerks shall be discharged from accounting for (*j*).

Fees under 18 & 19 Vict. c. 126.

Fees to clerks of the peace for filing the depositions, conviction or certificate of dismissal of charges summarily adjudicated upon under 18 & 19 Vict. c. 126, are provided for by sect. 14; but as the fees and emoluments of clerks of the peace in counties and boroughs in criminal proceedings were seriously diminished by the passing of that act, it was provided by sect. 18, that an average of the fees in criminal proceedings should be ascertained for the five years before that act by the commissioners of the treasury ; and any deficiency between the amount so ascertained and the amount of the receipts in any one year afterwards should be paid to the clerk out of the consolidated fund, or, if he were paid by salary, to the treasurer of the county in aid of the county rate.

Fees in respect of taking depositions of prisoners' witnesses.

And afterwards, when by 30 & 31 Vict. c. 35, prisoners were entitled to have the expenses of witnesses called for them allowed, additional trouble was imposed upon clerks of the peace in making out certificates for their expenses, they

(*g*) *Corporation of Liverpool* v. *Wright*, 28 L. J., Chan. 868.
(*h*) 14 & 15 Vict. c. 55. s. 10.
(*i*) *Ibid.* s. 11.
(*j*) *Ibid.* s. 12.

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were by such act to be allowed 6*d.* for each witness; but where he is paid by salary, or under a table of fees which allows only one fee of a fixed amount in respect of his several duties relating to the prosecution of an offender, he is not to take this fee (*k*). And where he may take the fee, he is to include it in every return or account of fees during any one year under the 18 & 19 Vict. c. 126, s. 18, *supra*.

Extortion.

There is no doubt also that if he wilfully take more than is due, under colour of his office, he will be liable to be indicted for extortion at common law, or to be removed from his office on articles exhibited against him in the court of quarter sessions (*l*). It is said that he is not bound "to enter judgment or the like, at the suit of any," without receiving his legal fee for the same; but he is compellable to enter, without previous fee, whatever the court shall order *without* the suit of another (*m*); and it may now be taken that he is bound to enter whatever they, on reference to them, shall absolutely command. The sessions cannot compel payment of his fees by summary process, or detain parties till they are paid, but he must seek his remedy by action (*n*); and it is questionable whether the sessions have power to make him any compensation under 55 Geo. 3, c. 51, s. 16, for any labour performed by him respecting the county rates. At all events they cannot make a prospective order for future payments to him on such an account (*o*). Where the clerk of the peace is entitled to have from the county treasurer such fee as has been usually paid, and he is lawfully entitled to receive, a long disuse of the right to receive them, viz. during forty-five years, will not affect the right (*p*).

Abolition of fees from prisoners.

Fees taken from prisoners have now been abolished. Since the 55 Geo. 3, c. 50, by which every prisoner charged with felony, or being accessory thereto, or misdemeanor, against whom no bill is found, or who on trial is acquitted, or who shall be discharged by proclamation for want of prosecution, is to be immediately set at large without payment of any fee to any person whatsoever; and by the 5th section the fees usually paid to the clerk of the peace were abolished, and by the 9th section it is made a misdemeanor to exact any such fees; and by the 8 & 9 Vict. c. 114, it shall not be lawful to demand

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(*k*) 32 & 33 Vict. c. 89, s. 10.

(*l*) *Ante*, p. 55. But see *Bowman* v. *Blyth*, 7 E. & B. 26; 26 L. J., M. C. 57; *ante*, p. 55.

(*m*) Cromp. 159.

(*n*) *Pollard* v. *Gerard*, 1 Ld. Raym. 703; *R.* v. *Bury*, 1 Leach, C. C. 201. See *Crosbie* v. *Hurley*, 1 Alcock & Napier (Irish), 431; 1 Burn's Justice, 30th ed. 772.

(*o*) *R.* v. *Williams*, 3 B. & A. 215; see *R.* v. *Houldgrave*, 1 B. & A. 312.

(*p*) *Reg.* v. *Baker*, *Knt.*, 7 A. & E. 502; 2 N. & P. 375, turning on 5 Geo. 4, c. 84, s. 21, and 55 Geo. 3, c. 156, s. 3. See 3 B. & A. 215; 1 *id.* 312; 4 T. R. 591.

Abolition of Fees from Prisoners.

or take from any such prisoner any fee for their appearance to the indictment or information, or for allowing them to plead thereto, or for recording their appearance or plea, or for discharging any recognizance taken, or any surety or sureties for them.

Duties as to fines and estreats.

The duties of the clerk of the peace with respect to fines and forfeitures are now mainly regulated by 3 Geo. 4, c. 46. By sect. 2, all justices (*i. e. not* sitting in quarter sessions) are required to certify fines, issues and amerciaments imposed by them, or recognizances forfeited before them, or sums paid in lieu of either of them (of which acts of parliament have not otherwise disposed), in writing, authenticated by their signatures, containing the names, residences and occupations of the parties, the amount forfeited, and the cause of the forfeiture, to the clerk of the peace of the county or borough in which the forfeiture occurred, at or before the next ensuing sessions. These fines, &c. (with such forfeited recognizances to appear or to prosecute and give evidence in felonies and misdemeanors, or to answer for a common assault, or to articles of the peace, as the recorder, chairman, or two other justices who have attended the court, shall by order direct to be estreated or put in process, and those only) the clerk of the peace has to make up in the roll of fines, and he appears to be authorized by the 3 Geo. 4, c. 46, to receive fines imposed in court. His duties with reference to the roll of fines, issues, amerciaments and forfeited recognizances imposed at sessions, under 3 Geo. 4, c. 46, ss. 2 and 3, are thus stated by *Coleridge*, J. (*q*): "With regard to these the statute seems to contemplate that the clerk of the peace may be the hand to receive some of them. Then within twenty-one days after the sessions, at a time to be fixed by the justices, the clerk of the peace is to make out a roll of the fines, &c. certified by the justices (*r*), and of all fines, &c. paid or to be paid, and of all sums of money paid or to be paid, and of all sums of money paid in lieu or satisfaction of such fines, imposed or forfeited at the sessions. He is to send a copy of that roll, with a writ annexed to it, to the sheriff; and accompanying that roll is a writ, on the back of which is endorsed:—'I make oath that this roll is truly and carefully made up and examined, and that all fines, issues, amerciaments, recognizances and forfeitures which were set, lost, imposed or forfeited, and in right and due course of law ought to be levied and paid, are to the best of my knowledge and understanding inserted in the said roll, and that in the said roll are also contained and expressed all such fines as have been paid to or received by me, either in court or otherwise, without any wilful or fraudulent discharge, omission, misnomer or defect whatever.'"

(*q*) *Wildes* v. *Morris*, 22 L. J., M. C. 7.
(*r*) 7 Geo. 4, c. 64, s. 31.

Clerk of the Peace.

Duty as to fines and estreats.

The sheriff is not to act on this roll of fines and levy the amount thereof if he has received the fine within the twenty-one days.

It is an imperative duty on the part of the clerk of the peace to make up this roll (*s*); and he is liable to an action for negligently and carelessly making up the roll, so as to include the name of a party, who has paid a fine imposed at the sessions to the clerk of the peace or his servant, as being an unpaid fine, whereby the sheriff, acting upon the correctness of the roll, executed the writ accompanying the roll and imprisoned the party (*t*). And according to *Coleridge*, J.,—"If the clerk of the peace has received a sum of money in respect of a fine, and has omitted to state that in his return, and the sheriff not knowing anything about it has the roll given him and levies, or even if the circumstances be such that the sheriff may not be entirely free from negligence because he has failed to make some inquiries, or, what is a stronger case, has had the amount of the fine handed over to him, still I think there would be a breach of duty in the clerk of the peace. It would be no defence in him to show that another officer had also been guilty of negligence" (*t*).

Under 59 Geo. 3, c. 28, and 5 & 6 Vict. c. 38, s. 4, it would be the duty of the deputy of the clerk of the peace to receive fines, &c. imposed at sessions, so as to make a payment to such assistant a payment to the clerk of the peace (*t*).

With respect to the duties of the clerk of the peace in regard to fines of jurors and witnesses, certified to him by the coroner of counties, &c. under 7 & 8 Vict. c. 92, s. 17, and as to recognizances forfeited at any coroner's inquest, see *post*, p. 63.

If he should discharge or conceal any fine or forfeiture, unless by rule of court, he was, by the 22 & 23 Car. 2, c. 22, s. 9, liable to forfeit treble value, half to the king, and half to him that shall sue, to lose his office, and be incapacitated ever to hold any office connected with the revenue, and that section seems left unrepealed by 26 & 27 Vict. c. 125; and a neglect of duty imposed by the 3 Geo. 4, c. 46, is punishable by a penalty of 50*l.* (s. 11).

The sheriff is to return the writ or roll to the following sessions, with a statement of what he has done to levy the sums which it describes as due; and his return, with a duplicate of the roll, and a certificate by the sessions that the sheriff's duty has been performed, is to be returned by the clerk of the peace to the lords of the treasury (*u*). Besides the fees on forfeited recognizances, the clerk of the peace is entitled to

Fees on forfeited recognizances.

(*s*) See per Lord *Denman*, C. J., *Reg.* v. *Justices of the West Riding*, 7 A. & E. 591.

(*t*) *Wildes* v. *Morris*, 22 L. J., M. C. 4.

(*u*) 3 Geo. 4, c. 46, s. 8.

an allowance of sixpence for every hundred words for all copies of the roll so transmitted to the sheriff. For any neglect of the duty so imposed he is liable to forfeit 50*l.*, to be recovered with costs by any one who will sue in any of the courts at Westminster (*x*). And within twenty days from the opening of the sessions he has to send to the treasury a copy of the sheriff's roll as delivered by him to the sessions (*y*). *As to Fines and Estreats.*

Besides the roll thus delivered to the sheriff, and finally transmitted to the exchequer, the clerk of the peace in counties or boroughs (*z*) must yearly, before the second Monday after the morrow of All Souls, deliver into the court of exchequer a duplicate of all fines, issues, amerciaments and forfeited recognizances, &c. contained in the rolls sent during the year to the sheriff (*a*). This duplicate must be delivered *on oath;* for, though the 3 Geo. 4, c. 46, does not expressly require this formality, the 4 & 5 W. & M. c. 24, s. 5, which prescribes such oath, is not for this purpose repealed, and the oath attesting the yearly duplicate is not superseded by the oaths taken before the magistrates to the correctness of the quarterly rolls (*b*). This oath must be either taken before a baron of the exchequer or by commission; when it is taken by commission, the clerk of the peace should furnish the names of three or more persons, and to them, on a baron's warrant, a commission issues to administer the oaths, which must be taken before two at least of the commissioners so appointed (*c*).

But in a case, the amount being under 5*l.*, the court of exchequer permitted the town clerk of Richmond, in Yorkshire, to verify his return of estreats made to them under 3 Geo. 4, c. 46, s. 14, by affidavit, without a commission or personally appearing; and directed a similar course for the future, where the estreats, &c. did not amount to that sum (*d*).

The court of exchequer has no jurisdiction over recognizances forfeited at quarter sessions, if *not* estreated, though the yearly certificate of them has been delivered into the exchequer, under 3 Geo. 4, c. 46, s. 14 (*e*); and only the quarter sessions can relieve (*f*).

A clerk of the peace (as well as a town clerk) must receive and keep documents directed by the standing orders of parlia- *As to custody of certain documents.*

(*x*) 3 Geo. 4, c. 46, s. 10. See *post, Forfeiture of Recognizances and Estreats.*

(*y*) 4 Geo. 4, c. 37, s. 5.

(*z*) 20 & 21 Vict. c. 50, s. 5.

(*a*) 3 Geo. 4, c. 46, s. 14.

(*b*) *Ex parte Hodgson*, clerk of the peace of Cumberland, 2 You. & J. 142; 1 Man. & Ry., M. C. 346.

(*c*) 2 You. & J. 146, n. (*a*); 1 M. & R., M. C. 351, n. (*a*).

(*d*) *Ex parte Tomlins*, 2 Tyr. R. 176; 2 Cr. & J. 122.

(*e*) *R.* v. *Thompson*, 3 Tyr. R. 53; *R.* v. *Pellow*, 13 Pri. 299; M'Cle. 111; *R.* v. *Hankins*, M'Cle. & Yo. 27.

(*f*) *Ibid.* See *Haynes* v. *Hayton*, 7 B. & C. 293; *Reg.* v. *Yorkshire (W. R.) Justices*, 7 A. & E. 583; 2 N. & P. 457; *post, Forfeiture of Recognizances and Estreats.*

Clerk of the Peace.

ment (*h*), or *à fortiori* by inclosure, railway, highway or other acts, to be deposited with him. The danger to titles from neglect so to enrol inclosure awards made before 28th August, 1833 (*i*), has been met by 3 & 4 Will. 4, c. 87, which by sect. 1 makes them valid, though not enrolled, and permits them to be enrolled *nunc pro tunc*, directing the clerk of the peace or his deputy to make out copies of them when so enrolled at 3*d.* for seventy-two words; which copies, signed as by the act directed, are made legal evidence as well as the *original* awards as to compelling enrolment (*k*).

All writs of *mandamus* and *certiorari* are served upon the clerk of the peace, on behalf of the justices, as their recognized organ; and therefore it is both usual and convenient for the court, when it directs any proceedings to be taken or defended on behalf of the county, and at its charge, to commit the conduct of the case to him, as their attorney, if duly certificated; in which case he is invested with the rights and subject to the responsibility of an attorney acting on behalf of individual clients.

Section 5.

of the coroner.

It is only proposed in this place to treat of the duties of the coroner which bring him into connection with the quarter sessions; for the law relating to the election, the reader is referred to the 7 & 8 Vict. c. 92, and as to the rights, duties and powers and removal of a coroner for misconduct, to Burn's Justice, vol. 1, tit. *Coroner*, 30th ed. In counties, divisions and places not being municipal corporations he is stated in the older authorities to be an officer attendant on the court of quarter sessions (*l*); in modern times, however, he does not attend in his official character. He may, however, be called upon to act in the summoning of jurors in case of a challenge to the array, on the ground of un-indifferency in the sheriff, which, if found, would cause the court to award a fresh venire to the coroner (*m*),

Fines by coroner on inquest.

and may take the sheriff's fees for so acting (*n*). Fines imposed by a coroner of liberties, franchises, counties, cities and boroughs not within 5 & 6 Will. 4, c. 76, on jurors or witnesses making default in their appearance at any inquest before him, are certified to the clerk of the peace of the sessions for the county, riding, division or place in which such defaulter

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(*h*) 7 Will. 4 & 1 Vict. c. 83; 8 & 9 Vict. c. 16, s. 161.
(*i*) See 41 Geo. 3, c. 109, s 35.
(*k*) See *Reg.* v. *Leeds and Liverpool Canal Company*, 11 A. & E. 316; *Glynn* v. *Thorpe*, 1 B. & A. 153.
(*l*) Dalt. Just. c. 185.
(*m*) *R.* v. *Dolby*, 2 B. & C. 104.
(*n*) 7 & 8 Vict. c. 92, s. 22. See, however, 23 & 24 Vict. c. 116, s. 3.

shall reside, on or before the first day of the quarter sessions of the peace next ensuing upon the inquest, and a copy of such certificate is to be caused to be served upon the person fined by leaving it at his residence twenty-four hours at the least before the first day of the said quarter sessions. And such fines are to be copied by the clerk of the peace on the rolls on which all fines and forfeitures imposed at such quarter sessions of the peace shall be copied, and the same shall be estreated, levied and applied in like manner and subject to the like powers, provisions and penalties in all respects as if such fine or fines had been part of the fines imposed at such quarter sessions (*o*). And every recognizance, forfeited at any inquest holden before any coroner of any county, city, town, liberty or place in England, shall be certified to the clerk of the peace of the county, riding, division or place where the person forfeiting such recognizance shall reside, at the like time, and a copy shall be served in a similar manner, and the clerk of the peace shall likewise act as in the case of fines certified to him under sect. 17 of 7 & 8 Vict. c. 92 (*p*).

Fines on Coroner's Inquest leviable at Sessions.

Recognizances forfeited on inquest.

The expenses of coroner's inquests formerly had been usually paid out of the poor rate until by 7 Will. 4 & 1 Vict. c. 68, the quarter sessions in counties and the town council in boroughs having a coroner are to make a schedule of the several fees, allowances and disbursements which may be lawfully made by the coroner on holding any inquest (other than the fees payable to medical witnesses under 6 & 7 Will. 4, c. 89), and such sessions or council may vary or alter such schedule from time to time, and a copy of every such schedule is to be deposited with the clerk of the peace of such county or borough, and another copy given to the coroner (*q*). And every coroner in counties within four months after holding any inquest shall cause a full and true account with vouchers of all sums paid by him, including sums paid to medical witnesses, to be laid before the quarter sessions or some adjournment thereof, and in boroughs before the council; and the sessions or council may if they think fit examine the coroner on oath as to such account, and upon being satisfied may make an order on the county or borough treasurer, as the case may be, for payment of the sum due to the coroner on such account, and six and eightpence for every inquest held by him over and above all other fees and allowances allowed by law (*r*). This act is made applicable to the city of London, and the town and borough of Southwark (*s*). There is a distinction between the disbursements made by a coroner under this act and the ordinary fees, mileage and allowances

Expenses of coroner's inquests.

Schedule of fees, allowances, &c.

County coroners' accounts

(*o*) 7 & 8 Vict. c. 92, s. 18.
(*p*) 22 & 23 Vict. c. 21, s. 40.
(*q*) 7 Will. 4 & 1 Vict. c. 68, s. 1.
(*r*) *Ibid.* s. 3.
(*s*) *Ibid.* s. 4.

Coroners' Accounts.

of his office (*u*). And now so much of the above act as relates to the remuneration of county coroners by fees, mileage and allowances is repealed (*x*). Detached parts of counties, &c. are to be deemed (for the purpose of holding coroners' inquests) to be within the county by which they are respectively, wholly, or for the most part, surrounded (*y*). As to the accounts of the treasurers for expenses due in respect of inquests in detached parts of counties, and in cases of dispute thereupon, see 7 & 8 Vict. c. 92, s. 24.

Payment of salary.

And now, since 1st January, 1861, every county coroner is to be paid by annual salary in lieu of fees, mileage and allowances, not being less than the amount received by him for them in the five years before 31st December, 1859, to be agreed upon between him and the general or quarter sessions for the county for which or for some portion of which he is coroner, to be paid quarterly out of the county rate, and in case of death between quarterly payments it is to be apportionable; and in case of inability to agree upon the amount, the coroner may apply to the home secretary to fix and determine the amount, having regard to the average amount of fees, mileage and allowances actually received for the said five years, also to the average number of inquests held in such five years, and also the special circumstances of each case, and the general scale of salaries for county coroners; provided also, that after the lapse of every successive period of five years it shall be lawful for such justices and coroner to revise and thereby increase or diminish any such salary, having regard to the average number of inquests held by any such coroner in the five years immediately preceding, and subject in case of their disagreement to such appeal to the home secretary as before mentioned (*z*).

Borough coroners' accounts.

And in boroughs, under 5 & 6 Will. 4, c. 76, every coroner appointed by the council of a borough, having a separate court of quarter sessions, for every inquisition which he shall duly take within such borough shall be entitled to have the sum of twenty shillings, and also the sum of ninepence for every mile exceeding two miles which he shall be compelled to travel from his usual place of abode to take such inquisition, to be paid by the treasurer out of the borough fund of such borough by order of the court of quarter sessions for such borough (*a*). The recorder is the judge of whether the inquisition has been "duly taken" or not, and has a discretion as to whether he will allow the fee or not. See the decisions on similar words in the analogous act of 25 Geo. 2, c. 29, s. 1 (*b*).

(*u*) See *Reg.* v. *Justices of Gloucestershire*, 7 E. & B. 805; 27 L. J., M. C. 15.

(*x*) 23 & 24 Vict. c. 116, s. 3.

(*y*) 6 & 7 Vict. c. 12, s. 2.

(*z*) 23 & 24 Vict. c. 116, s. 4.

(*a*) 5 & 6 Will. 4, c. 76, s. 62.

(*b*) *Reg.* v. *Justices of Gloucestershire*, 7 E. & B. 805; 27 L. J, M. C. 15; *Reg.* v. *Justices of Carmarthenshire*, 10 Q. B. 796; 16 L. J., M. C. 167; *R.* v. *Justices of Kent*, 11 East, 229.

The coroner is not entitled to mileage in returning to his usual place of abode from taking the inquisition (*c*); and where there are several inquisitions taken at the same place and upon one journey, he cannot claim mileage for his travelling expenses for more than one inquisition (*d*). The coroner may appoint a deputy, subject to the approval of the chancellor, to act for him during his illness or absence from lawful or reasonable cause, provided that a duplicate of such appointment shall be forthwith transmitted to the clerk of the peace for the county or division in which the coroner shall reside (*e*).

Coroner's mileage.

Appointment of deputy coroner.

Section 6.

COUNTY TREASURER.

This officer is a person resident in the county or division appointed by the justices in general or quarter sessions, on *first* giving (*f*) security (*g*) to account for the county rates paid to them, and to pay sums ordered by the sessions and faithfully to execute his trust (*h*). An alderman and justice of peace of a city is not capable of being appointed treasurer of the county of that city (*i*). A *de facto* election by the quarter sessions suffices (*k*) ; nor need it any longer be certified to the Queen's Bench (*l*). The sessions may continue him from time to time in his office, may remove him at pleasure, and appoint another (*m*). By sects. 7 and 8, he must keep account of receipts and payments, and deliver in a true account thereof every general or quarter sessions, on oath if required, with proper vouchers; which when passed shall be deposited with the clerk of the peace. By sect. 9, the discharge of the justices by their order at sessions is a sufficient release to the treasurer. So the receipt of the county treasurer is a good discharge to the guardians of the union for the amount of the precept for any rate issued to them by the justices (*n*), and the same effect attaches to his receipt in respect of the police rate for the county (*o*); and as to his duties in respect of the police rate, see 2 & 3 Vict. c. 93, s. 23, and 3 & 4 Vict. c. 88. By sect. 12, his salary was 20*l.*; but may now be increased by the sessions and paid out of the county rate (*p*). He must publish

Mode of appointment.

Removable at pleasure.

(*c*) See *R.* v. *Justices of Oxfordshire*, 2 B. & A. 203.
(*d*) See *R.* v. *Justices of Warwick*, 5 B. & C. 430.
(*e*) 6 & 7 Vict. c. 83, s. 1.
(*f*) Giving the security is not a condition precedent to the party becoming treasurer or responsible to the justices, *R.* v. *Patteson*, 4 B. & Ad. 9.
(*g*) As to the bond, see *Farr* v. *Hollis*, 9 B. & C. 315.
(*h*) 12 Geo. 2, c. 29, s. 6.
(*i*) *R.* v. *Patteson*, 4 B. & Ad. 9.
(*k*) *R.* v. *Herefordshire* (*Justices*), 1 Chitt. R. 709.
(*l*) 53 Geo. 3, c. 113, s. 1, repealing 11 Geo. 2, c. 20, s. 3.
(*m*) 12 Geo. 2, c. 29, s. 11.
(*n*) 15 & 16 Vict. c. 81, s. 26.
(*o*) 7 & 8 Vict. c. 33, s. 1.
(*p*) 55 Geo. 3, c. 51, s. 17.

County Treasurer.

and send to the clerks of the guardians of every union yearly an abstract of his accounts (*o*), and must attend the sessions by himself or sufficient deputy, to pay costs of prosecutions, &c. allowed by the court. The provisions of the 15 & 16 Vict. c. 81, are applied to the whole county when such county is divided into separate divisions (*p*). In boroughs the treasurer is appointed by the council, to whom he accounts and is responsible, 5 & 6 Will. 4, c. 76. The legality of his disbursements depend upon the various statutes under which they are made.

Section 7.

Of Gaolers, Keepers of Prisons and other Prison Officers.

Gaolers, &c.

It is the duty of all gaolers to attend on the court of quarter sessions. Under this denomination are comprehended all persons who have the custody or superintendence of the prisons to which the jurisdiction and cognizance of the sheriff or of the justices of the county extend, by whatever name they may be usually called, such as governor, keeper or other chief officer of a prison (*q*). Besides the obvious duties of the gaoler, in bringing the prisoners in custody who are to take their trials; in bringing vagrants who are to be further committed or discharged; and in taking charge of such other prisoners as may be committed to his care by the court, he has important duties to discharge, which have been distinctly ascertained by the recent statute for consolidating the laws relating to prisons (*r*).

Appointment of.

The gaoler is appointed to every prison by the quarter sessions (*s*), and so the deputy gaoler (*t*), to hold office during the pleasure of the justices in sessions assembled, and at such salary as they direct; or in a municipal borough as the council directs (*u*); and the justices may grant in certain cases a superannuation allowance (*v*). Every prison to which the Prisons Act 1865 applies, shall be deemed to be a gaol and house of correction (*x*). Every prisoner confined in a prison shall be deemed to be in the legal custody of the gaoler: provided that nothing in this act contained shall affect the jurisdiction or responsibility of the sheriff in respect of prisoners under sentence of death, or his jurisdiction or control over the prison where such prisoners are confined (*y*).

To deliver calendar of prisoners.

The gaoler of every prison shall deliver or cause to be delivered to the judges of assize, and to the justices in quarter sessions, a calendar of all prisoners in custody for trial at such

(*o*) 15 & 16 Vict. c. 81, s. 50.
(*p*) 21 & 22 Vict. c. 33.
(*q*) 28 & 29 Vict. c. 126.
(*r*) The Prisons Act, 1865, 28 & 29 Vict. c. 126.
(*s*) 28 & 29 Vict. c. 126, s. 10.
(*t*) *Ibid.* s. 12.
(*u*) *Ibid.* s. 14.
(*v*) *Ibid.* s. 15.
(*x*) *Ibid.* s. 63.
(*y*) *Ibid.* s. 56.

assizes or quarter sessions in the same way as the sheriff of a county has hitherto been required by law to deliver a calendar of such prisoners when committed to the common gaol of the county, and the sheriff shall no longer be required to deliver or cause to be delivered such calendar (*z*). *Duties of Gaoler.*

A prisoner may be brought up for trial, and may be removed by or under the direction of the gaoler from one prison to another, or from one place of confinement to another, to which such person may be legally removed for the purpose of being tried or undergoing his sentence; and no prisoner whilst in the custody of the gaoler shall be deemed to have escaped, although he be taken into different jurisdictions or different places of confinement (*a*). Removal of prisoners from one prison to another.

Prisoners may be removed from one prison to another prison or place of confinement within the jurisdiction of the same prison authority, or to the prison of any other authority with the consent of such last-mentioned authority, by order of the justices in sessions assembled, for the purpose of enabling any prison to be altered, enlarged or rebuilt, or in case of a contagious or infectious disease breaking out in any prison, or for any other reasonable cause; and in case of emergency such removal may be made in pursuance of an order under the hands of the visiting justices; and any prisoners removed from a prison in pursuance of this section may, by order of the justices in sessions assembled, be taken back by the gaoler to the prison from whence they were removed, or be removed to any other place in which they can legally be imprisoned (*b*).

Where a prison authority has contracted with any other prison authority that the receiving authority is to receive into and maintain in its prison any prisoners maintainable at the expense of the contracting authority, the prison of the receiving authority shall, for all the purposes of and incidental to the commitment, trial, detention and punishment of the prisoners of the contracting authority, or any of such purposes, according to the tenor of the contract, be deemed to be the prison of the contracting authority, except that the contracting authority shall have no right to interfere in the management of the prison of the receiving authority (*c*).

In every prison under this act prisoners convicted of misdemeanor and not sentenced to hard labour shall be divided into at least two divisions, one of which shall be called the first division; and whenever any person convicted of misdemeanor is sentenced to imprisonment without hard labour, it shall be lawful for the court or judge before whom such person shall be tried, to order, if such court or judge shall think fit, that such person shall be treated as a misdemeanant of the first Division of misdemeanants.

(*z*) 28 & 29 Vict. c. 126, s. 58.
(*a*) *Ibid.* s. 62.
(*b*) *Ibid.* s. 64.
(*c*) *Ibid.* s. 66.

Of the Gaoler.

division; and a misdemeanant of the first division shall not be deemed to be a criminal prisoner within the meaning of this act (*d*).

Duties of gaoler in prison.

The duties of a gaoler with respect to the government of his prison, as well as those of the other prison officers, are strictly and accurately defined by the schedule to the Prisons Act, 1865.

Books to be kept by gaoler.

By the 99th regulation for the government of prisons under the Prisons Act, 1865, the visiting justices shall once, at the least, in each quarter of the year carefully examine the following books kept by the gaoler of every prison, *i. e.*, the register kept under the Prison Ministers Act, 1863, the journal, the nominal record, the punishment book, the visitors' book, the record of articles taken from prisoners, the record of the employment of prisoners, the list of books and documents committed to his care, the inventory and account of the prison receipts and disbursements, and shall report to the justices assembled in sessions any special circumstances which call for notice in respect of such books; the gaoler shall also at such sessions answer, upon oath if required, the inquiries of the justices with respect to the condition of the prison and of the prisoners, and with respect to any other matters relating thereto. He shall at the same time present a certificate signed by himself, containing a declaration how far the requisitions of the act, with respect to the separation of the prisoners and enforcement of hard labour, have been complied with, and shall point out any deviation therefrom which has taken place since his last attendance at sessions.

Chaplain and surgeon.

A chaplain and a surgeon are also appointed by the quarter sessions (*e*). And by the 100th regulation the journals of the chaplain and surgeon shall, once at least in each quarter of a year, be laid before the quarter sessions at such time as they may appoint, and shall be signed by the chairman of the sessions in proof of the same having been then produced. The chaplain shall once in the year, and he may at any sessions, deliver to the justices in sessions assembled a statement of the condition of the prison to which he is attached, and his observations thereon: and the surgeon shall, once at least in each quarter of a year, report to the justices in sessions assembled the condition of the prison and the state of health of the prisoners under his care.

Their reports.

For the rest of the provisions of the Prisons Act, 1865, the act itself should be consulted.

Section 8.

of constables.

Of high constable.

Whether high constables, (*viz.*, constables of hundreds, wapentakes, &c.,) originated with the statute of *Winton*, 13

(*d*) 28 & 29 Vict. c. 126, s. 67.
(*e*) *Ibid.* s. 10.

High Constables.

Edw. 1, st. 2, c. 6, which mentions them, or came in with justices of peace in 1 Edw. 3 (st. 2, c. 16) as their proper officers, or existed at common law as subordinate to the ancient conservators of the peace, was *vexata quæstio* (*f*); but the preponderance of authority seems to show the latter (*g*). The high constable was formerly an officer of high importance, as forming the link between the acting portion of the magistracy and all the petty constables and overseers throughout the hundred or division. He had the same authority as the petty constable in breaches of the peace; and both were formerly appointed by the sheriff in his court of record, the tourn (*h*), unless there was a feudal lord of the hundred who had a leet; in which case he was high constable, and his steward of the leet admitted the petty constables chosen there by the homage (*i*).

Appointment of high constable.

However, after the disuse of the sheriff's tourn, the right of appointing a high or chief constable devolved on the general body of the justices of the county, or of the riding in Yorkshire, or division in Lincolnshire (*k*), to be exercised nowhere but at their general or quarter sessions (*l*). But now by 7 & 8 Vict. c. 33, s. 8, where high constables have heretofore been usually appointed at quarter sessions, high constables of such places shall hereafter be appointed by such justices as may be present at the special sessions of their division, held for the purpose of hearing appeals against the rates of the several parishes in such division, or at any adjournment thereof; but if the hundred, or other like division of the county for which any high constable is to be appointed, be not included within the limits of any one division of the county for which such special sessions are held, then the justices of the peace for the county assembled at general quarter sessions, or any adjournment thereof, may from time to time determine the division of the special sessions at which such high constable for the time being is to be appointed, and shall cause notice of such determination to be sent by post or otherwise to the high constable for the time being of such hundred or other like division; and every high constable, whether appointed at a special sessions or at an adjournment thereof, or at a court leet, or any other special court, shall if present at the time of his being appointed then and there take his oath for the due execution of his office; and if otherwise, he shall forthwith on the receipt of his appointment

By special sessions.

(*f*) See per *Twisden*, J., *Homeby's case*, 1 Mod. 13; *Reg.* v. *Wyatt*, 1 Salk. 380; Dalt. c. 28; 2 Hawk. c. 10, s. 33; Vin. Ab. *tit. Constable* (A); 1 Bla. Com. 115; Dougl. 28—30.

(*g*) See authorities collected *arguendo*, *Reg.* v. *Watkinson*, 10 A. & E. 288.

(*h*) 4 Inst. 265.

(*i*) Dalton, c. 28; Bac. Ab. *tit. Constable* (A), 683. See per Lord *Tenterden*, in *R.* v. *Adlard*, 4 B. & C. 779; and other cases cited, *post*.

(*k*) See *Evans* v. *Stevens*, per Lord *Kenyon*, 4 T. R. 227.

(*l*) *Reg.* v. *Watkinson*, 10 A. & E. 288.

High Constables.

Oath of office.

go before the next or some other justice of the peace for the county in which he resides, and then and there take his said oath of office; and he shall not in virtue of his office of high constable be required to take any other oath than the said oath for the due execution of his office.

Since this act, it might be doubtful whether they could any longer be sworn in except as above (*m*). And now a declaration to the like effect is substituted in lieu of such oath for the execution of the office (*n*), and the oaths of allegiance, supremacy and abjuration need no longer be taken by constables (*o*).

Duty of serving notices of special sessions transferred.

The duty of serving notices of the holding of special sessions on the justices of the peace of the division of special sessions personally, formerly devolved on high constables, but it is now enacted that such notices, signed by one justice of the peace acting in the division, are to be sent by post addressed to each justice of the peace resident and usually acting within such division at his residence in such division (*p*); and the duty of sending such notices as well as of other sessions is transferred to the clerk to the justices of petty sessional divisions out of the metropolitan district (except in the case of such notices as relate to claims against the hundred or other like district, or to parliamentary or municipal elections or the registration of electors); and no precept is any longer to go to any high constable to perform such duties (*q*).

Duties as to jury lists abolished.

The functions and duties of high constables with reference to forming the lists, summoning, &c. of juries, &c. under the Juries Act (*r*), have now ceased and determined (*s*); and no notice need be sent to him of the holding of a special petty sessions for the production of jury lists, as formerly required by the 10th section of the 6 Geo. 4, c. 50 (*t*). Such duties are now imposed upon the clerk of the peace (*u*).

Delivery of presentments abolished.

So high constables had to deliver to the quarter sessions the presentments of petty constables made by them to justices in petty sessions, till by the 7 & 8 Geo. 4, c. 38, after reciting that in some parts of England the petty constables of the several parishes have from a very remote period been required to appear at a petty sessions held previously to every general and gaol delivery and quarter sessions, to make certain presentments of various indictable and other offences, it is enacted that

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(*m*) They might formerly be sworn in by warrant from the general or general quarter sessions. Dalt. c. 28. See *Foot* v. *Prowse*, Stra. 625, as cited *R.* v. *Whitchurch* (*Inh.*), 7 B. & C. 577; *R.* v. *Ellis*, 9 East, 252, n.
(*n*) 31 & 32 Vict. c. 72, s. 12, subs. 4.
(*o*) *Ibid.* s. 9.
(*p*) 7 & 8 Vict. c. 33, s. 7.
(*q*) 32 & 33 Vict. c. 47, s. 3.
(*r*) See *post*, "Jurors."
(*s*) 25 & 26 Vict. c. 107, s. 3.
(*t*) *Ibid.* s. 7.
(*u*) *Ibid.* s. 4.

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no petty constable shall be required to make at petty sessions, or any high constable to deliver at any general or quarter sessions, &c., any presentment respecting popish recusants, persons absenting themselves from their parish church, or rogues and vagabonds, retailers of brandy, ingrossers, forestallers, regraters, false weights and measures, highways, bridges, riots and other matters enumerated.

Presentments abolished.

They were also formerly employed in collecting the county rates, and had to give security (*x*); but the 7 & 8 Vict. c. 33, provided that, so soon as any vacancy should occur in the office of high constable of any hundred, by the expiration of his appointment or otherwise, the guardians of the unions were made the medium for raising the money required for any county rate, police rate, or other rate in the nature of a county rate. This statute was repealed as to county rates by the 24 & 25 Vict. c. 101; but the enactment now in force in respect to county rates (*y*) contains a similar provision for transferring the duties of high constable, as to collection, to the guardians upon any future vacancy of the office (*z*).

Duties as to county rates transferred.

By 32 & 33 Vict. c. 47, s. 4, all the provisions of the 7 & 8 Vict. c. 33, intituled "An Act for facilitating the collection of county rates, and for relieving high constables from attendance at quarter sessions in certain cases, and from certain other duties," which under such act are to come into force upon the occurrence of any vacancy in the office of high constable of any hundred, shall come into force immediately after the passing of this act in every case as if a vacancy in such office had occurred; but, inasmuch as the act above recited had been previously repealed as above mentioned as to county rates, and the 15 & 16 Vict. c. 81, the statute now in force, enacts, that the duties of high constables are to be discharged until a vacancy in the office, they ought still to perform them under that act. The duties of the office having been thus diminished, it is, by the 32 & 33 Vict. c. 47 (*a*), recited, that it is expedient to abolish the office of high constable in England and Wales, except in certain cases, and to make provision for the discharge of the duties heretofore performed by such constables, and enacted (*b*), that it shall be the duty of the quarter sessions, held in the January next after the passing of the act, to consider and determine whether the office of high constable within each hundred and other districts within their jurisdiction is necessary, and, if not, they should give notice to the person or persons in whom the appointment of such high constable is vested, and upon a vacancy such office shall not be filled up; but this provision shall not apply to the case of any high constable

Abolition of the office.

(*x*) *Lodge, In re*, 2 A. & E. 123, and see 15 & 16 Vict. c. 81, s. 37.
(*y*) 15 & 16 Vict. c. 81.
(*z*) *Ibid.* ss. 25, 36.
(*a*) The High Constables Act, 1869.
(*b*) 32 & 33 Vict. c. 47, s. 2.

High Constables.

who is by law or custom returning officer at any parliamentary or municipal election, or is charged with the supervision of the register of electors, or in whom is vested, by virtue of his office, any real property. Provision is also made by the 6th section of 32 & 33 Vict. c. 47, for compensation to be paid to high constables for the loss, if any, of emoluments consequent upon that act.

Compensation on loss of office.

Actions against hundreds to be defended by chief constables.

And by the same act it is provided, that "In every action to be brought or summary claim to be preferred against any hundred or other like district, of which there is no high constable, the process for appearance in the action and the notice required in the case of the claim shall be served upon the chief constable or other chief officer of police for the time being of the county in which such hundred or district is situate; and all matters which by any act the high constable of a hundred is authorized or required to do, in either of such cases shall be done by the officer so served, who shall have the same powers, rights and remedies and be subject to the same liabilities as any high constable would, but for the passing of this act, have had and incurred under any act of parliament; and in case of the termination of his office by death or otherwise his successor shall act in his stead (*b*).

Parish constables.

Resolution of quarter sessions for the appointment of.

Whenever by a resolution of the quarter sessions it has been determined that one or more parish constable should be appointed for any parish within the jurisdiction of such court, they are to be appointed until such resolution is rescinded, according to the provisions of the law for the appointment of parish constables then in force (*c*); and the vestry of any parish not included wholly or in part within a borough, after due notice, may at any time resolve that one or more parish constables shall be appointed for their parish, and in such resolution may fix the amount of salary to be paid to him or them, which salary shall be paid out of the poor rate of the said parish, and a copy of such resolution shall be delivered by one of the overseers or some other officer of the parish to the justices of the petty sessional division in which the parish is situated, and such justices may appoint, by warrant under the hand and seal of two of them, some fit and competent person or persons willing to serve the office to be the constable or constables for the said parish, who shall hold his or their office until he or they shall resign or be dismissed for misconduct or incompetency by the justices of the said division, or the vestry shall determine to discontinue the appointment of a constable at the expiration of not less than six months from the day on which a copy of such resolution shall be delivered to the justices of the said division, and until the vestry shall come to such determination the justices shall renew the appointment upon the occurrence of any vacancy in the office.

Payment by salary.

(*b*) 32 & 33 Vict. c. 47, s. 6.
(*c*) 35 & 36 Vict. c. 92, s. 2.

Of Parish Constables.

Provided that if the vestry shall deem it right that the salary should be increased at any time when the office is not vacant, they may upon due notice pass a resolution to that effect, and a copy thereof shall be delivered by the overseer or other officer to the justices in petty sessions, and a copy thereof shall be endorsed on the warrant of appointment and be signed by two justices at such petty sessions (*d*). All paid constables appointed prior to that act are to hold their office as before (*e*).

Qualification.

At common law a parish constable must have been qualified to serve by actual residence in the parish (*f*). And now by 5 & 6 Vict. c. 109, s. 5, "Every able-bodied man resident within the parish, between the ages of twenty-five years and fifty-five years, rated to the relief of the poor or to the county rate on any tenements of the net yearly value of 4*l.* or upwards, except such persons as shall be exempt or disqualified as hereinafter mentioned, shall be qualified and liable to serve as constable of that parish."

Exemption.

Sect. 6 contains the exemptions.

Sect. 7 further provides that all licensed victuallers and persons licensed to deal in exciseable liquors, or to sell beer by retail, all gamekeepers and all persons who have been attainted of any treason or felony, or convicted of any infamous crime, shall be disqualified from serving the office of constable under this act.

The 13 & 14 Vict. c. 20, s. 5, extends the exemptions to persons employed in the post office.

Parish constables, if appointed, must attend the sessions, and may be called over, and fined by the court if they do not answer (*g*), or use contumelious language to it (*h*). Their duties relative to their parishes are, in a great degree, similar to those of the chief constables respecting the hundreds, with some additional ones; such as reporting the state of their respective parish stocks (*i*), giving evidence respecting the execution of warrants wherewith they may have been charged (*j*); and all other matters pertaining to their office, both as conservators of the peace, and as ministers of the justices attending the court, to keep it; also attending the grand and petit juries during their sittings.

Powers and duties of, under 5 & 6 Vict. c. 109.

By 5 & 6 Vict. c. 109, s. 15, the said constables have, within the whole county, and also within all liberties and franchises and detached parts of other counties situated therein, and also in every county adjoining to the county in which they are appointed, all the powers, privileges and immunities, and shall be liable to all the duties and responsibilities of a constable within his con-

(*d*) 35 & 36 Vict. c. 92, s. 4.
(*e*) *Ibid.* s. 6.
(*f*) *R.* v. *Adlard*, 4 B. & C. 772.
(*g*) Dalt. c. 185.
(*h*) *Anon.*, 1 Ventris, 336; *R.* v. *Loveden*, 8 T. R. 617.
(*i*) Seems unnecessary since 7 & 8 Geo. 4, c. 38.
(*j*) See Burn's Just., *tit. Constable*, s. 3.

Parochial Constables—Appointment of.

stablewick, but shall not be bound to act as a constable beyond the parish for which they are severally appointed and sworn without the special warrant of a justice of the peace: provided always that in those counties in which any chief constable or superintendent shall have been appointed under 2 & 3 Vict. c. 93, or any amending act, the constables appointed under this act for any parish within the district for which such chief constable or superintendent shall have been appointed, shall be subject to the authority of such chief constable or superintendent. And constables appointed under 35 & 36 Vict. c. 92, are placed under the same authority (sect. 7).

The justices of the petty sessional division having issued their precept to the overseers under 5 & 6 Vict. c. 109, s. 2, and the overseers having summoned a vestry meeting, and the vestry having made out a list under sect. 3, and such list having been published by the overseers as provided for by the 8th section, and the overseers having attended the special sessions for the appointment of constables, and verified such list, and the objections being determined and list allowed by the justices under sect. 10,

Chosen by justices.

the justices are to choose the names of such number of persons as they deem necessary, having regard to the extent and population of the parish, to act as constables during the year next following and until other constables shall be chosen and sworn to act in their stead (sect. 11); but the constables so

Oath of office abolished.

chosen have no longer to take an oath of office (*k*). And the clerk of the justices has, within fourteen days after the appointment of constables, to send to each justice of the division and to the clerk of the peace, to be laid before the quarter sessions, a list of those appointed (*l*). By the 5 & 6 Vict. c. 109, s. 21, after the passing of that act no petty constable, headborough, borsholder, tithing-man or peace officer of the like description under any name of office shall be appointed for any parish, township or vill within the limits of this act, except for the performance of duties unconnected with the preservation of the peace or the execution of this act, at any court leet or tourn, or otherwise than under the provisions of this act, or under 3 Vict. c. 93, or of some act passed for the amendment thereof: but nothing herein contained shall be taken to prevent

Places exempted from the act.

the appointment of special constables, or to apply to the city of London or the metropolitan district, or to any borough within 5 & 6 Will. 4, c. 76, or of any charter granted in pursuance of that act, or to any parish, town or place in which rates are levied for the payment of constables under 3 & 4 Will. 4, c. 90, or any local act, nor to the county palatine of Chester. The exemption of parishes in certain boroughs in 5 & 6 Vict. c. 109, is explained by 7 & 8 Vict. c. 52, s. 4.

Constable, what.

The 35 & 36 Vict. c. 92, applies to every petty constable,

(*k*) 35 & 36 Vict. c. 92, s. 3.
(*l*) 5 & 6 Vict. c. 109, s. 14; 35 & 36 Vict. c. 92, s. 3.

headborough, borsholder, tithing-man or other peace officer of the like description (sect. 14).

Proceedings to enforce the appointment and swearing in of parochial constables.

The Court of Queen's Bench has granted a mandamus to compel the justices to swear such constables as have been duly appointed (*m*), and also, under 5 & 6 Vict. c. 109, to the overseers of a parish to call a vestry meeting, and to the inhabitants to make out a list of persons liable to serve and do all other things required by that act. Thus, under 5 & 6 Vict. c. 109, s. 2, the justices of petty sessional divisions were the persons to determine whether parish constables are to be appointed in places where the rural police is established; and if in their discretion they thought fit to issue their precept, the inhabitants in vestry must have obeyed it and returned the list of men qualified to serve, and if the vestry did not a mandamus might be issued to compel them to make out and return such list (*n*).

Formerly, if a petty constable refused to be sworn in before a justice, he could not be committed (*o*), but might be bound over to the assizes or sessions of the peace, and be there indicted for such his contempt (*p*). In all cases where a high or petty constable duly chosen, refused to take on himself the office and to be sworn in accordingly, within a month after his appointment, he might be indicted at the sessions or assizes; when, if he did not establish a valid defence of unfitness, *e. g.* non-inhabitancy in the district or parish, not dwelling conveniently, being of weak body, chosen from spleen, attendance in public courts, &c., &c., he was liable to be punished by imprisonment or fine (*q*); but the oath of their office is now abolished, see *ante*, p. 74.

Appointment of, in boroughs.

In towns not having town councils within 5 & 6 Will. 4, c. 76, the corporations cannot choose constables as of common right; but by custom they may, as having the government of the place reposed in them; they must, however, prescribe for it (*r*). Before the municipal corporation act just mentioned, charter justices in a borough had the same authority in these cases, *e. g.* of creating a high constable, as justices under a general commission (*s*); but now, in boroughs having town councils, the appointment of constables is regulated by watch committees, see 5 & 6 Will. 4, c. 76, s. 76.

(*m*) Hawk. b. 2, c. 10, s. 47. See *R.* v. *Corfe Mullen*, 1 B. & A. 219.

(*n*) *Reg.* v. *Inhabitants of the Township of North Bierley*, 27 L. J., M. C. 275; E. B. & E. 519.

(*o*) Dalt. c. 28; Dyer, 29.

(*p*) *R.* v. *Crawley*, Cro. Car. 567; 2 Hawk. c. 10, s. 46; *Greisley's case*, 8 Rep. 75; *R.* v. *Lone*, Stra. 920; see form of indictment, *post*.

(*q*) See *R.* v. *Adlard*, 4 B. & C. 772; Dyer, 31; *R.* v. *Mosley*, *Bart.* 3 A. & E. 492 (fine of 300*l.* overruled); Dalt. c. 29; Vin. Abr. *tit. Constable;* Dyer, 31; Com. Dig. *tit. Privilege.*

(*r*) *R.* v. *Bernard*, 2 Salk. 501; 1 Lord Raym. 7, 94; 12 Mod. 115; Skinn. 669, pl. 5.

(*s*) *Weatherhead* v. *Drewry*, 11 East, 168. See *James* v. *Green*, 6 T. R. 228.

Fees and allowances.

By 5 & 6 Vict. c. 109, s. 17, the justices of the county in general or quarter sessions assembled shall from time to time, subject to the approval of one of her Majesty's principal secretaries of state, settle tables of fees and allowances to the clerks of the justices for the performance of their duties under this act, and to the constables for the service of summonses and execution of warrants, and for the performance of such other occasional duties which may be required of the said constables for which the said justices shall think that fees ought to be allowed; and whenever any duty, for which any such fee or allowance shall have been settled, and for which the payment is not by law charged upon the county rates, shall have been performed by any clerk or by any constable appointed under this act, the amount of the fee or allowance shall be paid by the overseers of the parish, in respect of which such fee has become payable, out of any monies in their hands collected for the relief of the poor, upon the order of the justices in petty sessions assembled for the division, and under such regulations as shall be made from time to time by the justices in general or quarter sessions assembled, subject to the approval of the secretary of state; and the same fees and allowances are in like manner to be paid to such constables for the execution of any order of a justice in writing or for the performance of any occasional duties sanctioned by petty sessions (*p*); and these fees and allowances, as settled, are to continue to be in force until they shall be altered by the justices with the like consent (*q*). And where any fee or allowance is claimed by any constable in respect of any service rendered to an overseer, surveyor of the highways, or other officer of the parish, the same, if lawfully due, may be paid by such overseer or without any order of justices; but if payment be refused, or cannot be obtained on request, they may apply to the justices in petty sessions for an order on the overseer, &c., who, after summoning such officer, may order him to pay; and a payment made in obedience to such order must not be disallowed by the auditor (*r*). And by a similar mode of proceeding *high* constables are to be remunerated for extraordinary exertions in cases of tumult, riot or felony (*s*); *e. g.*, for payments made to special constables procured by him by direction of the justices to suppress riots at an election, and duly sworn in accordingly; and also for sums paid to ordinary constables by way of compensation for their extraordinary exertions for the same object (*t*).

As the office of petty constable is a ministerial office, he might at common law execute its duties by deputy for special

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(*p*) 13 Vict. c. 20, s. 2.
(*q*) 35 & 36 Vict. c. 92, s. 11.
(*r*) *Ibid.* s. 12.
(*s*) 41 Geo. 3, c. 78.
(*t*) *R.* v. *Leicester* (*Justices*), 7 B. & C. 6.

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cause (*u*). Even a high constable may depute any competent person to do a particular ministerial act, by parol, and without causing him to be sworn; as, for example, to billet soldiers; and will remain liable for his act (*x*). But now he must submit the person proposed to be his substitute, who must be appointed by the justices, and if they do not make such appointment, he is bound to serve himself (*y*) Under that statute it is not necessary that a person named as substitute for and by a person selected as constable from the vestry list of persons, qualified and liable or recommended to serve, should himself be on the vestry list (*z*).

Appointment of substitute.

The old practice for petty constables to make presentments of various matters at the sessions has been abolished, at least as to the indictable and other offences there enumerated (*a*).

County constabulary.

The 2 & 3 Vict. c. 93, passed for the establishment of county and district constables, was made compulsory by 19 & 20 Vict. c. 69. By the 2 & 3 Vict. c. 93, s. 4, as soon as the rules mentioned in sect. 3 as finally settled shall have been received from the secretary of state, the justices of the county in general or quarter sessions assembled, or at any adjournment thereof, shall, subject to the approval of the secretary of state, appoint a person duly qualified according to the rules to be chief constable of the county, and in every case of vacancy of the office shall, subject to the like approval, appoint another fit person in his room; and every chief constable so to be appointed may hold his office until dismissed by the justices in general or quarter sessions assembled, or at any adjournment thereof; and by 20 Vict. c. 2, s. 2, the justices of the peace of any county in general or quarter sessions assembled, subject to the provisions of the 2 & 3 Vict. c. 93, may appoint a person to be chief constable of their county or of part thereof, although he may hold or be appointed to the office or offices of chief constable of any adjoining county or counties, or part or parts of counties: provided that the justices of each county in general or quarter sessions assembled shall declare their consent that the office in their appointment may be held by such person together with such other office or offices. With the notice of the time of holding the quarter sessions, notice shall be given of the day and hour at which any business relating to the appointment or dismissal of any chief constable, or the increase or

Appointment of chief constable.

(*u*) 2 Hawk. c. 10, s. 36; *R.* v. *Clarke*, 1 T. R. 252; 4 B. & Cr. 780; 7 Dowl. & R. 350.

(*x*) *Medhurst* v. *Waite*, 3 Burr. R. 1259.

(*y*) 35 & 36 Vict. c. 92, s. 3.

(*z*) *R.* v. *Booth*, 12 Q. B. 884; 18 L. J., M. C. 25.

(*a*) 7 & 8 Geo. 4, c. 38, *ante*, p. 71, and see *R.* v. *Bridgewater and Taunton Canal Company*, 7 B. & C. 514, in which case this act was not cited, though it had received the royal assent on the 21st of June preceding.

diminution in the number of constables, will begin at such session (*b*).

Deputy chief constable.

By 2 & 3 Vict. c. 93, s. 7, the chief constable shall, subject to the approval of the justices in general or quarter sessions assembled, or at any adjournment thereof, appoint one of the superintendents to act as his deputy in case of his being incapable, from illness or necessary absence from the county, to perform the duties of chief constable of the county; and the deputy so appointed shall, in such case as aforesaid, and also in case of the vacancy of the office of chief constable by death or otherwise, have all the powers, privileges and duties of the chief constable: provided that no deputy chief constable shall be capable of continuing to act with the powers of chief constable during any vacancy of the office for more than three calendar months after the vacancy has been occasioned.

Appointment of superintendents.

The chief constable is empowered to appoint the other constables to be appointed for the county and a superintendent to be at the head of the constables in each petty sessional division of the county, and at his pleasure may dismiss all or any of them, and shall have the direction and government of them subject to the lawful orders of quarter sessions and the rules of the force (2 & 3 Vict. c. 93, s. 6); but inasmuch as it was found not always necessary that a superintendent should be appointed for every petty sessional division, the justices in general or quarter sessions assembled, with the approval of her Majesty's principal secretaries of state, may direct how many of the constables shall be appointed superintendents, and may direct the appointment of inspectors and serjeants and other subordinate officers, with such gradations of rank and pay, and such variety of duties, as shall be found expedient; and the justices may make such orders as to them shall appear expedient touching the attendance of the superintendents, inspectors, serjeants and other subordinate officers, among the said constables, upon the justices at their several sessions (*c*).

Upon the certificate of one of her Majesty's principal secretaries of state that the police of any county or borough established under 2 & 3 Vict. c. 93, 3 & 4 Vict. c. 88, and 5 & 6 Will. 4, c. 76, and 19 & 20 Vict. c. 69, has been maintained in a state of efficiency in point of numbers and discipline for the year ending on the 29th of September then last past, the commissioners of her Majesty's treasury may pay such sum towards the expenses of such police for the year mentioned in such certificate, as shall not exceed one-fourth of the charge for their pay and clothing, but such payment shall not extend to any additional constables appointed under 3 & 4 Vict. c. 88, s. 19; provided that before any such certificate shall be finally

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(*b*) 2 & 3 Vict. c. 93, s. 5; 3 & 4 Vict. c. 88, s. 30.
(*c*) 3 & 4 Vict. c. 88, s. 26.

Chief Constables of County Constabulary.

withheld in respect of the police of any county or borough, the report of the inspector relating to the police of such county or borough shall be sent to the justices of such county or to the watch committee of such borough, who may address any statement relating thereto to the secretary of state; and in every case in which such certificate is withheld, a statement of the grounds on which the secretary of state has withheld such certificate, together with any such statement of the justices or watch committee as aforesaid, shall be laid before parliament (*d*). But boroughs not consolidated with the police of the county, and of a population not exceeding 5,000, are excepted from that provision (*e*).

Chief constable to make declaration in lieu of oath.

The chief constable and other persons so appointed shall be sworn as constables before a justice of the county, and shall have all the powers, privileges and duties throughout the county; and also in all liberties and franchises and detached parts of other counties locally situated within such county; and also in any county adjoining to the county for which they are appointed, which any constable duly appointed has within his constablewick by virtue of the common law, or of any statute made or to be made; and every provision of the 1 & 2 Will. 4, c. 41, shall be deemed to extend to the constables appointed under this act, except as to the manner of their appointment and dismissal, the time for which they shall serve, and the manner in which their allowances shall be paid, or as to any matter herein expressly otherwise provided (*f*). A declaration is substituted for the oath by 31 & 32 Vict. c. 72, s. 12, subs. 4.

Duty of chief constable to attend at sessions;

Every chief constable, unless prevented by sufficient cause, shall attend every general and quarter sessions of the justices of the county, and at every adjournment thereof, and shall make quarterly reports to the justices of all matters which they shall require of him concerning the police of the county; and shall obey all lawful orders and warrants of the said justices in the execution of his duty; and the superintendents of divisions shall, in like manner, attend every sessions of the justices holden for their respective divisions, and shall make the like reports to the justices of such divisions (*g*).

and superintendents of divisions.

Provision is made for the case of a vacancy in the office during the year by sect. 16; and see 13 & 14 Vict. c. 20.

The chief constable has to transmit to the clerk of the peace monthly returns, showing the disposition and number of the constabulary in the county or district for which he may act

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(*d*) 19 & 20 Vict. c. 69, s. 16; but a bill is now (1874) before parliament to increase the contribution of the treasury in this matter.

(*e*) *Ibid.* s. 17.

(*f*) 2 & 3 Vict. c. 93, s. 8.

(*g*) *Ibid.* s. 17.

County Constabulary.

during the preceding month, and it shall specify the changes and the number and names of the force, and the clerk of the peace shall cause the said returns to be laid before the justices at the next ensuing quarter sessions for examination (*h*); and superintendents have to make similar returns to the chief constable, who has to transmit copies of such returns to the clerk of the peace to be laid before the next sessions (*i*).

Returns of numbers and disposition of the force to quarter sessions.

Police constables may be employed to keep order within assize courts by the direction of the quarter sessions, and in that case it shall not be necessary for the high sheriff to maintain any javelin men or men servants in liveries, notwithstanding 13 & 14 Car. 2, c. 21 (*k*).

Employment by order of quarter sessions to keep order at the assize courts.

The chief constable of any county may, with the approval of the justices of the county in general or quarter sessions assembled (if he shall think fit), on the application of any person or persons showing the necessity thereof, appoint and cause to be sworn in any additional number of constables at any place within the limits of his authority, at the charge of the person or persons by whom the application shall be made, but subject to the orders of the chief constable, and for such time as he shall think fit; and every such constable shall have all the powers, privileges and duties of other county constables, and a power is given to discontinue such additional constables on giving a month's notice to the chief constable (*l*).

Appointment of additional constables.

Rules for pay, government, &c.

In order that rules for the government, pay, clothing and accoutrements and necessaries of such constables may be uniform, it is enacted, that such rules shall be made from time to time by a secretary of state, but not so as to increase the number of men proposed to be appointed; and such rules shall be sent to the clerk of the peace, and the secretary of state may amend or add to them upon the representation of the county justices setting forth special reasons, and copies of such rules are to be laid before parliament (*m*).

Gratuities for meritorious acts.

The court of general or quarter sessions for any county, and the watch committee for any borough, subject to the approbation of its council, may, upon the recommendation of the chief constable of any county police force, or of the superintendent of the police for the said borough, grant to any constable in the said county or borough, out of the police rate or borough fund, a gratuity in money not exceeding 3*l*., in respect of and as a reward for any meritorious act done by the said constable in the execution of his duty (*n*).

(*h*) 3 & 4 Vict. c. 88, s. 31.
(*i*) *Ibid.* s. 32.
(*k*) 22 & 23 Vict. c. 32, s. 18.
(*l*) 3 & 4 Vict. c. 88, s. 19.
(*m*) 2 & 3 Vict. c. 93, s. 3.
(*n*) 22 & 23 Vict. c. 32, s. 24.

Of County Constabulary.

Allowances in respect of expenses.

In addition to the salary to be paid to the chief constable of the county reasonable allowances shall be made him for extraordinary expenses necessarily incurred by him and by the constables under his orders in the apprehension of offenders, and in the execution of his and their duty under this act, which allowances shall be examined and audited by the justices of the county in quarter sessions assembled (*o*); but the costs of a prosecution for a libel upon an inspector of police, of him in his character of inspector of public houses, cannot be allowed (see *Reg.* v. *Mayor, &c. of Liverpool*, 41 L. J., Q. B. 175).

Quarter sessions to settle tables of fees and allowances.

The power of the justices of the county in general or quarter sessions assembled, subject to the approval of one of her Majesty's principal secretaries of state, to settle tables of fees and allowances, is retained as far as relates to the county constabulary, notwithstanding the repeal of 3 & 4 Vict. c. 88, ss. 16, 17, 18, by the 22 & 23 Vict. c. 88, s. 28.

Petty constables in county constabulary.

Appointment of.

Subject to the approval of two or more of the justices of the county in petty sessions assembled, the chief constable shall appoint the other constables to be appointed for the county, and a superintendent to be at the head of the constables in each division of the county, and at his pleasure may dismiss all or any of them, and shall have the general disposition and government of all the constables so to be appointed, subject to such lawful orders as he may receive from the justices in general or quarter sessions assembled, or at any adjournment thereof, and to the rules established for the government of the force (*p*).

Upon the appointment of constables under 2 & 3 Vict. c. 93, in any county, or in any division of a county, the power to appoint and pay and to make rates for paying any constables in any hundred, parish, borough or place within such county or division, except boroughs within 5 & 6 Will. 4, c. 76, other than high constables or special constables, under 1 & 2 Will. 4, c. 41, and also all the powers and duties of all such constables, shall cease and determine. Provided also, that nothing herein contained shall prevent or invalidate the appointment of parochial constables (*q*).

Direction of warrant.

A warrant directed for execution to "The constable of ——," a place possessing a parish constable, though also within the jurisdiction of the county police, must be executed by the parish constable, and the county constable is not entitled to execute it (*r*).

Duties of, in boroughs.

By the 19 & 20 Vict. c. 69, s. 6, county constables appointed under 2 & 3 Vict. c. 93 and 3 & 4 Vict. c. 88, have in every borough wholly or in part within the county all the powers and duties, privileges and responsibilities as the constables of the

(*o*) 2 & 3 Vict. c. 93, s. 18.
(*p*) *Ibid.* s. 6.
(*q*) *Ibid.* s. 25.
(*r*) *Reg.* v. *Saunders*, L. R., 1 C. C. R. 75; 36 L. J., M. C. 87; *Freegard* v. *Barnes*, 7 Exch. 827; 21 L. J., Ex. 320.

County Constables.

borough have within the county, and they must obey the commands of the borough justices in which they are called upon to act, for conducting themselves in the execution of their office (*s*).

No county constable shall, as such constable, be required to act in any borough having a separate police establishment, except in execution of warrants of justices of such county, or by the order of the chief constable or his superintendent; and in all cases of special emergency the chief constable or superintendent, when required so to do by the watch committee of any borough having a separate police establishment, shall have power to direct the county constables to act within such borough; and no constable of any borough having a separate police establishment shall, as such constable, be required to act out of his borough, except in execution of warrants of justices of such borough or in pursuance of directions from the watch committee in case of special emergency (*t*).

And the constables acting under 2 & 3 Vict. c. 93; 3 & 4 Vict. c. 81, and 5 & 6 Will. 4, c. 76, shall in addition to their ordinary duties perform all such duties connected with the police in their respective counties or boroughs as the justices in general or quarter sessions, or the watch committees of such respective counties or boroughs, from time to time direct and require (*u*).

Nothing in the 2 & 3 Vict. c. 93 is to authorize the justices for any county to appoint any constable in any borough within 5 & 6 Will. 4, c. 76. But by 19 & 20 Vict. c. 69, power is given to a borough to require a consolidation of its police with the county, giving the same powers in boroughs to the county police as the counties to the borough police (sects. 5, 6, 7).

Power of suspension, fining, &c.

The chief constable is empowered to suspend any constable within his jurisdiction, or may fine him not more than a week's pay or may reduce his rank (*v*).

Constables in boroughs, appointment of.

By 5 & 6 Will. 4, c. 76, s. 76, the watch committee are to appoint a sufficient number of fit men who are to be sworn in before a borough justice to act as constables for preserving the peace by day and night, and preventing robberies and other felonies, and apprehending offenders against the peace. And they shall not only within such borough, but also within the county in which such borough or part thereof shall be situated, and also within every county being within seven miles of any part of such borough, and also within all liberties in any such county, have all such powers and privileges and be liable to all such duties and responsibilities as any constable duly appointed now has or hereafter may have in his constablewick by virtue of the common law of this realm, or of any statutes made or to

(*s*) 19 & 20 Vict. c. 69, s. 6.
(*t*) 22 & 23 Vict. c. 32, s. 2.
(*u*) 19 & 20 Vict. c. 69, s. 7.
(*v*) 22 & 23 Vict. c. 32, s. 26.

be made, and shall obey all such lawful commands as they may from time to time receive from any of the justices of the borough or within any county in which they shall be called upon to act as constables for conducting themselves in the execution of their office. *Borough Constables.*

The power of suspending or fining not more than a week's pay or inflicting a reduction of rank of any such constables is in the watch committee, and of dismissing in such committee or two borough justices, and no man so dismissed can be re-appointed without the consent of two borough justices (*w*). Power of suspending, fining, &c.

Constables on duty are to apprehend all idle and disorderly persons whom they shall find disturbing the public peace or whom they shall have just cause to suspect of an intention to commit a felony, and to deliver such person so apprehended to the constable in attendance at the nearest watch-house, that such person may be secured till he be brought before a justice (*x*).

Section 9.

of the jurors.

The grand jury in counties consists of gentlemen selected out of the county by the *sheriff*, and returned by him to the sessions of the peace to inquire, present, do and execute all those things which on the part of the Queen shall then and there be commanded of them. In boroughs they are summoned by the clerk of the peace (*y*). Grand jury.

The grand jury must consist of twelve at the least, and may contain any greater number, not exceeding twenty-three, in order that twelve may form a majority of the jurors (*z*). For if a number amounting to two full juries or more should be sworn, it might happen that a complete jury of twelve might find a bill to be true, though other twelve or more of the same jury might reject it as untrue; which would be inconvenient and absurd (*a*). It suffices if twelve of the grand jurors agree to the finding, though the rest disagree (*b*). Number of.

The qualifications of grand jurors and petit jurors at sessions are the same in counties since 6 Geo. 4, c. 50, and in boroughs within the 5 & 6 Will. 4, c. 76, since that act. It should be premised that there is in the present session (1874) a bill before parliament for the purpose of amending the jury system, and such act will, if possible, be referred to in the Addenda; but at Qualification.

(*w*) 22 & 23 Vict. c. 32, s. 26; 5 & 6 Will. 4, c. 76, s. 77.
(*x*) 5 & 6 Will. 4, c. 76, s. 78.
(*y*) *Ibid.* s. 121.
(*z*) *Clyncard's case*, Cro. Eliz. 654; 2 Hawk. c. 25, s. 16; 2 Burr. 1088; *R.* v. *Marsh*, 6 A. & E. 236.
(*a*) 2 Burr. 1088.
(*b*) 2 Hale, 16; Burn's Justice, vol. 3, p. 65, 30th ed.

Of the Jurors.

any rate the following pages must be taken subject to the provisions of such act.

Qualification of jurors in counties in England.

Every man, except as hereinafter excepted, between the ages of twenty-one years and sixty years, residing in any county in England, who shall have in his own name, or in trust for him, within the same county, 10*l.* by the year above reprises, in lands or tenements, whether of freehold, copyhold or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements and rents taken together, in fee simple, fee tail, or for the life of himself or some other person; or who shall have, within the same county, 20*l.* by the year above reprises, in lands or tenements held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives; or who, being a householder, shall be rated or assessed to the poor rate, or to the inhabited house duty, in the county of Middlesex on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*; or who shall occupy a house containing not less than fifteen windows, shall be qualified and shall be liable to serve on *grand juries* in courts of *sessions of the peace*, and on *petty juries* for the trial of all issues joined in such courts of session of the peace, and triable in the county, riding or division in which every man so qualified respectively shall reside (*c*).

In Wales.

By the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 7, the qualifications of persons as jurors in Wales shall be the same as the qualifications of persons as jurors in England.

Aliens.

Aliens having been domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, shall be qualified and shall be liable to serve on juries or inquests in England and Wales as if they had been natural-born subjects of the Queen; but, save as aforesaid, no man not being a natural-born subject of the Queen shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever (*d*). The persons described in the schedule thereto (as therein specified) are severally exempt from being returned to serve, and from serving upon any juries or inquests whatsoever, and their names shall not be inserted in the lists of the persons qualified and liable to serve on the same; but, save as aforesaid, no man otherwise qualified to serve on such juries or inquests shall be exempt from serving thereon, any enactment, prescription, charter, grant or writ to the contrary notwithstanding (*e*).

Qualification in boroughs.

Every person being a burgess of any borough wherein there shall be a separate court of sessions of the peace (unless he shall be exempt or disqualified otherwise than in respect of property from serving on juries by virtue of 6 Geo. 4, c. 50),

(*c*) 6 Geo. 4, c. 50, s. 1.
(*d*) 33 & 34 Vict. c. 77, s. 8.
(*e*) *Ibid.* s. 9; 5 & 6 Will. 4, c. 76, s. 123.

shall be qualified and liable to serve on grand juries in such borough, and also upon juries for the trial of all issues joined in any court of quarter sessions of the peace, and the clerk of the peace of every such borough shall give public notice of the time and place of holding every such quarter sessions of the peace ten days at the least before the holding thereof, and shall, seven days at the least before the holding thereof, cause to be summoned a sufficient number of persons, being qualified and liable as aforesaid, to serve as grand jurors at such sessions, and the clerk of the peace shall also cause to be summoned not less than thirty-six nor more than sixty persons so qualified and liable as aforesaid to serve as jurors at every such sessions (*f*). *Qualification in Boroughs.*

The following parties are exempted or disqualified otherwise than in respect of property, and are to be omitted in the list prepared under authority of these statutes—peers, members of parliament, judges, clergymen, Roman Catholic priests, ministers of any congregation of protestant dissenters and of Jews, whose place of meeting is duly registered, provided they follow no secular occupation, except that of a schoolmaster; serjeants and barristers at law, certificated conveyancers and special pleaders if actually practising; members of the society of doctors of law, and advocates of the civil law, if actually practising; attornies, solicitors and proctors if actually practising, and having taken out their annual certificates and their managing clerks, and notaries public in actual practice; officers of the courts of law and equity and of the admiralty and ecclesiastical courts, including therein the courts of probate and divorce and the clerks of the peace or their deputies, if actually exercising the duties of their respective offices; coroners, gaolers and keepers of houses of correction, and all subordinate officers of the same; keepers in public lunatic asylums; members and licentiates of the royal college of physicians in London, if actually practising as physicians; members of the royal college of surgeons in London, Edinburgh or Dublin, if actually practising as surgeons; apothecaries certificated by the court of examiners of the apothecaries' company, and all registered medical practitioners and registered pharmaceutical chemists, if actually practising as apothecaries, medical practitioners or pharmaceutical chemists respectively; officers of the navy, army, militia and yeomanry while on full pay; the members of the Mersey Docks and Harbour Board; the master, wardens and brethren of the corporation of Trinity-house of Deptford Strond; pilots licensed by the Trinity-house of Deptford Strond, Kingston-upon-Hull or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service, employed by either of those corporations, and all pilots licensed under any act of parliament or charter for the regula- Exemptions from serving upon any juries.

(*f*) 5 & 6 Will. 4, c. 76, s. 121.

Exemption from serving on Juries.

lation of pilots; the household servants of her majesty, her heirs and successors; officers of the post office, commissioners of customs, and officers, clerks or other persons acting in the management or collection of the customs; commissioners of inland revenue, and officers or persons appointed by the commissioners of inland revenue, or employed by them or under their authority or direction in any way relating to the duties of inland revenue; sheriff's officers, officers of rural and metropolitan police; magistrates of the metropolitan police courts, their clerks, ushers, doorkeepers, and messengers; the members of the council of the municipal corporation of any borough, and every justice of the peace assigned to keep the peace therein; treasurer and town-clerk of every borough, so far as relates to any jury summoned to serve in the county wherein it is situate; burgesses of every borough, for which a separate court of quarter sessions of the peace is holden, so far as relates to any jury summoned for trial of issues joined in any court of general or quarter sessions of the peace in the county wherein such borough is situate; justices of the peace, so far as relates to any jury summoned to serve at any sessions of the peace for the jurisdiction of which he is a justice; officers of the houses of lords and commons (*f*). And the inhabitants of Westminster are expressly exempted from serving on any jury at the sessions of the peace for the county of Middlesex (*g*).

Boroughs.

In boroughs all justices of the peace thereof and the treasurer and town clerk are exempt from serving on juries summoned for the borough (5 & 6 Will. 4, c. 76, s. 122). And in boroughs containing 12,000 inhabitants and more at the last census, the members of the council are exempt (5 & 6 Will. 4, c. 76, s. 122; 16 & 17 Vict. c. 79, s. 6).

It is said to be the practice not to summon those persons to serve as jurors at sessions who are on the sheriff's list to serve as such at the assizes. These exceptions are cases not of disqualification, but of privilege; therefore any of the parties returned may lawfully serve at the sessions without objection, if they take the oath required, and possess all other qualifications (*h*).

Disqualification from serving on any jury.

The following persons are altogether disqualified from serving on all juries or inquests:—aliens, except as mentioned in sect. 8, of 33 & 34 Vict. c. 77, *ante*, p. 84; persons attainted of treason or felony, or convicted of any crime that is infamous, unless they shall have obtained a free pardon; and persons under outlawry (*i*).

Lists of jurors for counties, &c.

In order to secure the service on juries of all proper persons

(*f*) 33 & 34 Vict. c. 77, sched.
(*g*) *Ibid.* s. 9.
(*h*) 3 Burn's Justice, 30th ed., p. 68.
(*i*) 6 Geo. 4, c. 50, s. 3; 33 & 34 Vict. c. 77, s. 10.

Formation of Jury Lists in Counties.

in due rotation, the statute 25 & 26 Vict. c. 107, s. 4, proceeds to lay down a plan for the return of their names to the sessions, checked and controlled by the supervision of the magistrates. For this purpose it requires the clerk of the peace, on or before the 20th of July in every year, to issue his precept to the churchwardens and overseers of the poor of the several parishes, and to the overseers of the poor of the several townships within their respective parishes and townships, requiring them to make out, before the 1st of September, a true list of all persons then residing within their respective parishes and townships qualified and liable to serve on juries, and further to comply with the requisitions of the precept. And he is to forward every precept so issued, and to annex a competent number of printed forms of returns for the use of the respective persons by whom such returns are to be made by post in a registered letter with the words "jury precept" on the outside, which is to be deemed service of the same, which documents he must cause to be printed and registered at the county's charge (*k*).

This act is not to affect the mode of summoning jurors in London.

The following is the form of the PRECEPT for returning lists of jurors provided by the same act (*l*), to be issued by the clerk of the peace of the county, riding, or division to the parish officers of the several parishes and townships within the county, riding or division for which he acts, and which minutely explains their duties:—

Precept.

County of ——— } To the churchwardens and overseers of the poor of
to wit. } the parish [*or* to the overseer of the poor of the town-
Hundred of ——— } ship] of ———.

You are hereby required to make out, before the first day of September next, a true list, in writing, in the form hereunto annexed, containing the names of all men, being natural born subjects of the queen, between the ages of twenty-one and sixty, residing within your parish [*or* township], qualified to serve upon juries; that is to say, of every such man who has in own name, or in trust for him, a clear income of ten pounds by the year in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, situate in the said county, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents, taken together, in fee simple, or fee tail, or for his own life, or for the life of any other person; and also of every such man who has a clear income of twenty pounds by the year, in lands or tenements, situate in the said county, held by lease for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives; and also of every such man who is a householder in your parish [*or* township], and is rated or assessed to the poor rate, or to the inhabited house duty, on a value of not less than twenty pounds [*if in Middlesex*, thirty pounds]; and you are required to make out the said list in alphabetical order, and to write the christian and surname of every man at full length,

(*k*) 25 & 26 Vict, c. 107, s. 5.
(*l*) *Ibid.* sched.

Lists of Jurors for Counties, &c.

Jury precept.

and the place of his abode, his title, quality, calling, or business and the nature of his qualification, in the proper columns of the forms hereunto annexed, according to the specimens given in such columns for your guidance. And you are to specify which of such persons are in your judgment qualified as special jurors; and also the nature of the qualification, and also the occupation and the amount of the rating or assessment of every such person (*o*).

And if you have not a sufficient number of forms, you must apply to me for more; and in order to assist you in making out the list, you are to refer to the poor rate; and you may, if you think proper, apply to any collector or assessor of taxes, or any other officer who has the custody of any house tax, land tax, or other tax assessment for your parish [*or* township], and take from thence the names of men so qualified; and in making such list, you are to *omit* the names of all peers; members of parliament; all judges; all clergymen; all Roman Catholic priests; all ministers of any congregation of Protestant dissenters, and of Jews, whose place of meeting is duly registered, provided they follow no secular occupation except that of a schoolmaster; all serjeants and barristers at law, certificated conveyancers and special pleaders, if actually practising; all members of the society of doctors of law, and all advocates of the civil law, if actually practising; and all attornies, solicitors, and proctors, if actually practising, and having taken out their annual certificates, and their managing clerks; and notaries public in actual practice; all officers of the courts of law and equity, and of the admiralty and ecclesiastical courts, including the courts of probate and divorce, and the clerks of the peace and their deputies, if actually exercising the duties of their respective offices; all coroners; all gaolers and keepers of houses of correction, and all subordinate officers of the same; all keepers in public lunatic asylums; all members and licentiates of the Royal College of Physicians in London, if actually practising as physicians; and all members of the Royal College of Surgeons in London, Edinburgh, and Dublin, if actually practising as surgeons, and apothecaries certificated by the court of examiners of the apothecaries' company; and all registered medical practitioners and registered pharmaceutical chemists, if actually practising as medical practitioners or pharmaceutical chemists respectively; all officers of the army, militia, yeomanry, and navy while on full pay; the members of the Mersey Docks and Harbour Board; the master, wardens and brethren of the corporation of Trinity House of Deptford Strond; all pilots licensed by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service employed by either of those corporations, and all pilots licensed under any act of parliament or charter for the regulation of pilots; all the household servants of her majesty; all officers of the post-office, commissioners of customs and officers, clerks or other persons appointed by the commissioners of inland revenue, or employed by them, or under their authority or direction in any way relating to the duties of inland revenue; all officers of the rural and metropolitan police; all magistrates of the metropolitan police courts, their clerks, ushers, doorkeepers, and messengers; members of the council of the municipal corporation of any borough, and every justice of the peace assigned to keep the peace therein, and the town clerk and treasurer for the time being of every such borough, so far as relates to any jury summoned to serve in the county where such borough is situate; all burgesses of every borough in and for which a separate court of quarter sessions shall be holden, so far as relates to any jury summoned for the trial of issues joined in any court of general or quarter sessions of the peace of the county wherein such borough is situate; all justices of the peace, so far as relates to any jury summoned to serve at any sessions of the peace for

(*o*) 33 & 34 Vict. c. 77, s. 11.

the jurisdiction of which he is a justice; all officers of the Houses of Lords and Commons; all sheriff's officers (*p*). *Jury Precept.*

And when you have made out such list, you are authorized to order a sufficient number of copies thereof to be printed, the expense of which printing will be allowed you by the parish [*or* township]; and you are required, on the three first Sundays in September next, to fix a copy of such list, signed by you, on the principal door of every church, chapel, or other public place of religious worship within your parish [*or* township], and also to subjoin to every such copy a notice to the following effect, inserting the time and place, of which you shall be previously informed:—"Take notice, that all objections to the foregoing list will be heard by the justices in petty sessions on the ——— day of September next, at the hour of ——— at ———;" and you must allow any inhabitant of your parish [*or* township] to inspect the original list, or a true copy of it, during the three first weeks in September next, gratis; and you are also further required to produce the said list at such petty sessions, and there to answer on oath such questions as shall be put to you by her majesty's justices of the peace there present, touching the said list; and these several matters you are in nowise to omit, upon the peril that may ensue.

Given under my hand, at ——— in the said county, the ——— day of ——— in the year ———.

——— ——— *Clerk of the Peace.*

In pursuance of this precept, the churchwardens and overseers are forthwith to prepare in alphabetical order a true list of every man residing within their respective parishes, &c., who shall be qualified and liable to serve on juries, with the christian and surname written at full length, with the true place of abode, the title, quality, calling or business and the nature of the qualification of every such man in the proper columns of the form of return given in the schedule to the act, and to sign such list (*q*). And, in addition to this, by the 33 & 34 Vict. c. 77, s. 11, they are to specify which of the persons are entitled to be special jurors, and the nature of the qualification, and also the occupation and the amount of the rating or assessment of every such person; and a notice to the effect that no person whose name is in the jury book as a juror will be excused attendance on the ground of any disqualification or exemption other than illness, not claimed by him at or before the revision of the list by the justices of the peace (*r*).

Signing the jury list.

A churchwarden whose year of office has expired continues in office when his successor has been elected, but has not been sworn, nor has made the substitued declaration, nor has done any act which would make him *de facto* churchwarden. Such churchwarden is, therefore, bound to sign the jury list as above, and is liable to the penalty under sect. 45 if he does not do so (*s*).

(*p*) But see as to, in Westminster, 33 & 34 Vict. c. 77, s. 9.
(*q*) 25 & 26 Vict. c. 107, s. 6; 6 Geo. 4, c. 50, s. 8.
(*r*) 33 & 34 Vict. c. 77, s. 12.
(*s*) *Bray* v. *Somer*, 2 B. & S. 374; 31 L. J., M. C. 135. For sect. 45, see *post*, p. 96.

Lists of County Jurors.

A form of return is given in the schedule to the 6 Geo. 4, c. 50, as follows:—

Form of Return.

Return to precept.

County of ——— } The return of the churchwardens and overseers of
to wit. } the parish of ——— in the hundred of ——— in
Hundred of ———. } the said county, of men qualified to serve on juries.

Parish or Township. [In towns add the name of the streets.]	Christian and surname at full length.	Title, quality, calling, or business.	Nature of Qualification.
All Saints, Derby.			
King-street	Adams, John	Esquire	Freehold
John-street	Alley, James	Merchant	Copyhold
Duke-street	Bond, Henry	Baker	Leasehold
High-street	Boyd, George	Grocer	Poor Rate
Duke-street	Cole, Charles	Butcher	House assessment
Church-street	Cook, John	Innkeeper	Windows

Publication of list.

A copy of the list so made out by the parish officers, signed by them, is to be affixed by them to the doors of the places of worship in the parish, to remain during the three first Sundays of September, with the notice subjoined as mentioned in the precept (*t*), and the original list is to be open to the inspection of the parishioners. On some day within the last sēven days of September, in every year, at a day and place of which the clerk of the justices shall have given notice, before the preceding 20th August, to the clerk of the peace and to churchwardens and overseers of every parish and township in the division, the justices of the division are to hold a special petty session, at which the parish officers must attend, and produce their lists, and answer on oath any questions which may be asked by the magistrates respecting them. At this session the justices are authorized, on the oath of any party complaining, or other proof, or on their own knowledge, that he is not liable or qualified to serve (*e. g.*), for being under or over age, or want of qualification by property, &c., to strike his name out of the list returned, and also to strike out the names of men disabled by lunacy, imbecility of mind, deafness, blindness, paralysis, or other continual infirmity of body, from serving on juries (*u*).

Special sessions to revise lists.

Power of revision in justices.

They are also empowered to amend the lists, by introducing the name of any person improperly omitted; or to correct any error in the name or description of a person who is mentioned in such lists, notice having been given to the party to be affected; or, if notice be not previously given, at an adjourned sessions, to be held four days thereafter, at which such parties shall be called on to show cause (*v*); and the justices may adjourn sessions to any day within seven days thereafter for the production of the jury list in any parish, or when through

(*t*) 6 Geo. 4, c. 50, s. 9.
(*u*) *Ibid.* s. 10. See 13 Edw. 1, stat. 1, c. 38; 2 Inst. 447.
(*v*) *Ibid.* See 13 Edw. 1, stat. 1, c. 38; 2 Inst. 447.

Revision of the County Jury List.

the default of any churchwarden or overseer it is not forthcoming (*w*). And upon completing the revision of the jury lists the justices at petty sessions shall certify in writing that they have examined such lists, and that the same are, to the best of their belief, true and proper lists of the special and common jurors, and the decisions of justices as to qualifications of persons marked as special jurors are to be final (*x*). And the clerk of the justices in every petty sessional division is to take charge of the jury lists when allowed and sign and forward them by the next available post in a registered letter to the clerk of the peace for the county, with a schedule of the parishes, &c., for which jury lists have been allowed, which schedule is to be signed by one of the said justices (*y*).

Certifying lists.

Lists deposited with the clerk of the peace.

The costs and expenses of overseers are payable out of the poor rate (*z*). The justices' clerks are not entitled to charge the overseers with fees for sending notices to return and verify jury lists, or for the allowance of the list and return thereof and oath; and the overseers are not entitled, if they pay such fees, to reimburse themselves out of the poor rate (*a*); but the justices' clerks are allowed a fee for making out the schedule of parishes out of the county rate (*b*).

Expenses of overseers.

The lists so returned to the sessions are to be kept by the clerk of the peace among the records of the sessions, arranged with every hundred in alphabetical order, and every parish or township within such hundred also in alphabetical order; and the clerk of the peace is required to "cause the same to be fairly and truly copied in the same order, in a book to be by him provided for that purpose at the expense of the county, with proper columns for making the register afterwards directed, and to deliver the same book to the sheriff of the county or his under-sheriff, within six weeks next after the close of such session, which book shall be called "the jurors' book for the year ———" (inserting the calendar year for which such book is to be in use); and the sheriff, on quitting his office, is to deliver the same to his successor. Every *jurors' book*, so prepared, is to be brought into use on the 1st January, after it is so delivered by the clerk of the peace to the sheriff or his under-sheriff, and is to be used for one year then next following (*c*). From this book, for the current year, and from this only, the sheriff, or in case the precept goes to the coroner, elisor or other minister, then such coroner, &c., is to return the names of jurors, unless, indeed, there be no jurors' book for the current year, and then he may return names from the book of the year preceding (*d*).

Jurors' book.

(*w*) 25 & 26 Vict. c. 107, s. 8.
(*x*) 33 & 34 Vict. c. 77, s. 14.
(*y*) 25 & 26 Vict. c. 107, ss. 9, 10.
(*z*) 7 & 8 Vict. c. 101, s. 60.
(*a*) *Reg.* v. *The Overseers of Haslingfield*, 43 L. J., Q. B. 38.
(*b*) 25 & 26 Vict. c. 107, s. 9.
(*c*) 6 Geo. 4, c. 50, s. 12; 25 & 26 Vict. c. 107, s. 10.
(*d*) 6 Geo. 4, c. 50, s. 14.

Precept to the Sheriff.

Every precept to be issued for the return of jurors before the courts of sessions of the peace shall direct the sheriff to return a competent number of good and lawful men, qualified according to law, from the body of the county, without requiring any to be returned from particular hundreds, or from any particular venue within the county, and that the want of hundredors shall be no cause of challenge (*e*).

Mode of summoning county jurors.

For grand jury.

The grand jury are summoned by virtue of a precept directed to the sheriff in the form set out, *ante*, pp. 20, 21. The qualification and disabilities of grand and petty jurymen to serve at sessions are now precisely similar, and the names are to be taken from the same returns (*f*) and the same precept.

For petty jury.

The precept requires him to return twenty-four jurors to try the issues; but on this it is usual for him to return forty-eight, seventy-two, or more, according to the size of the baliwick, and the expected number of prisoners, in order to provide for challenges (*g*), and the division of courts by the quarter sessions. Any person liable to serve on any jury in a county may be summoned as heretofore, or the sheriff or other proper officer may make out a summons and affix the seal of his office thereto; and such summons, having the words "jury summons" legibly written or printed on the same side as the address, may be sent open by the post prepaid, and directed to the juror at his place of abode as described in the "jurors' book" (*h*). If the panel should be exhausted, by reason of parties returned being challenged or excused, the court retains the power, which it possessed before the act, of orally requiring a sheriff to return a jury immediately of the bystanders; which shows the propriety of the sheriff attending by a competent representative on the sessions, as it is not fitting that so important a duty should be left to a bailiff or other subordinate officer. Juries at adjourned quarter sessions are summoned by virtue of the 1 Vict. c. 4, *ante*, p. 29.

Summons may be by post.

Jury *de circumstantibus.*

At adjourned sessions.

In order to provide for a fair distribution of labour among parties qualified and liable to serve on grand and petty juries at the session in counties, it is provided, that at every session the clerk of the peace shall make out a list of such persons as shall attend to serve on any grand or petty jury at such sessions, together with their respective places of abode and additions, and the date of their services; and shall, within twenty days after the close of every such sessions, transmit such list to the sheriff or under-sheriff of the county, who is required forthwith to register the names of the men included in such list in the proper column of the jurors' book for that purpose, together with the date of their services; and every man so summoned, and having duly attended or served until discharged by the court of sessions, shall, upon application by

List of persons who have served according to summons.

Certificate of having served.

(*e*) 6 Geo. 4, c. 50, s. 13. See form of precept, *ante*, p. 20.
(*f*) 6 Geo. 4, c. 50, s. 1.
(*g*) 2 Hale, 263. See *ante*, pp. 21, 22.
(*h*) 25 & 26 Vict. c. 107, s. 11. See *post*, p. 94.

Mode of Summoning Jurors.

him made to such clerk of the peace before he shall depart from the place where the sessions are holden, receive a certificate testifying such his service, which certificate the said clerk of the peace is required to give on payment of one shilling (*i*).

The following regulations are enacted with respect to the summoning of jurors in counties:—

Regulations as to summoning in counties.

1. That no person shall be summoned to serve on any jury or inquest (except a grand jury) more than once in any one year, unless all the jurors upon the list shall have been already summoned to serve during such year. Provided that nothing herein contained shall prejudice the operation of any certificate granted under the County Juries Act, 1825, sects. 41 and 42.

2. No person shall be exempted from serving as a common juror by reason of his being on any special jurors' list, or being qualified to serve as a grand juror.

3. No person shall be summoned or liable to serve as a juror in more than one court on the same day (*k*). Anyone who has served as a juror at any session shall, upon application to the clerk of the peace before he depart, receive a certificate of his having served on payment of a shilling (*l*).

Lists and panels in boroughs.

The clerk of the peace in boroughs is to make out a list of the names of the persons summoned as grand jurors and a panel of the other jurors; such list and panel are respectively to contain therein the christian names and surnames, places of abode and descriptions of the several persons therein named (*m*).

Mode of summoning in boroughs.

By 5 & 6 Will. 4, c. 76, s. 121, the summons by the clerk of the peace of the borough to jurors shall be made by showing to the person to be summoned, or in case he shall be absent from the usual place of his abode, by leaving with some person therein inhabiting, notice under the hand of such clerk of the peace, containing the substance of such summons. And seven days at the least before the holding of such sessions shall summon both grand jurors and other jurors (*n*).

No person shall be summoned to serve as a juror at sessions in boroughs oftener than once in a year (*n*), unless every person qualified and liable has been summoned once in the year, then any person may be summoned a second time (*o*).

Penalties on sheriffs or their officers for misconduct in summoning jurors.

And no sheriff, under-sheriff or other officer shall, directly or indirectly, receive any money or other reward, or promise of money or reward, to excuse any man from serving, or from being summoned to serve on juries, or under any such colour or pretence; and no officer appointed to summon juries shall summon any man to serve thereon other than those whose

(*i*) 6 Geo. 4, c. 50, s. 41.
(*k*) 33 & 34 Vict. c. 77, s. 19.
(*l*) 6 Geo. 4, c. 50, s. 41.
(*m*) 5 & 6 Will. 4, c. 76, s. 121.
(*n*) *Ibid.*
(*o*) 7 Will. 4 & 1 Vict. c. 78, s. 36.

Mode of Summoning Jurors.

names are specified in the warrant to him directed; but if any party shall wilfully transgress in such respect, summoning parties as jurors who are not named in the warrant, he shall be liable to be fined, on summary complaint, by the court within whose jurisdiction the offence shall be committed (*q*).

Service of summons.

The summons to serve on juries at the sessions must be made by the proper officer by showing to the person to be summoned, or, in case he shall be absent from the usual place of his abode, by leaving with some person there inhabiting, a note in writing under the hand of the sheriff or other proper officer, containing the substance of the summons (*r*), or by a summons sealed by the sheriff and sent open by post, which is to be evidenced by a duplicate stamped by the postmaster of the office where it is posted; which, where it is not returned as undelivered, shall be deemed in all respects as duly served. Provided that when any summons shall be served by post two additional days shall be allowed for the transmission of such summons by post over and above the number of days required by law for the service of the summons before the day on which the juror is required to attend (*s*).

Summoning by post.

Penalty for non-attendance in counties.

And if any man having been *duly summoned* to attend on any kind of jury at a quarter sessions for the county shall not attend in pursuance of such summons, or being thrice called shall not answer to his name, or being called shall be present but not appear, or after his appearance shall wilfully withdraw himself from the presence of the court, the court shall set such fine on every such man so making default (unless some reasonable excuse shall be proved by oath or affidavit) as the court shall think meet (*t*).

And by 33 & 34 Vict. c. 77, s. 20, no juror is to be liable to any penalty for non-attendance on any jury, unless the summons requiring him to attend be duly served six days at least before the day on which he is required to attend, but no longer period than such six days shall in any case be required between the service and such last-mentioned day. By the County Juries Act, 1825, if any officer shall summon a juror less than ten days before the day when he is required to attend, such officer is liable to be fined for his neglect in the discretion of the court (*u*); but now no longer than six days' notice is required (*x*).

Regulations for attendance.

The sheriff or other officer, with the consent of the person by whom such precept shall have been issued, is to make regu-

(*q*) 6 Geo. 4, c. 50, s. 43.
(*r*) *Ibid.* s. 25.
(*s*) 25 & 26 Vict. c. 107, s. 11.
(*t*) *Ibid.* s. 38. This was the common law. "Courts inferior to the courts of Westminster may clearly fine and imprison for a contempt, if they are courts of *record*, as the court of quarter sessions, and the court of oyer and terminer. Indeed, it is the constant practice for those courts to fine jurors who do not attend." Per *Holroyd*, J., in *R.* v. *Clement*, 4 B. & A. 223.
(*u*) 6 Geo. 4, c. 50, s. 43.
(*x*) See *supra*.

lations as to the attendance of jurors during the time for which they shall be summoned, and in particular as to the days on which and the time during which they are to attend. Such regulations may be sent to any juror, together with the summons requiring him to attend on any jury, and when so sent shall be deemed to be part of such summons (*y*). *Attendance of Jurors.*

Whenever any fine shall be imposed upon any person for not attending as a juror in a county in obedience to a summons in that behalf, it shall not be lawful to estreat the said fine until after the expiration of fourteen days, and in the meantime the proper officer of the court by which such fine was imposed shall forthwith by letter inform the said person of the imposition of such fine, and require him within six days after the date of such letter to forward him an affidavit of the cause, if any, of his non-attendance; and such officer shall, upon the receipt of any such affidavit, submit the same to the said court, or the judge or chairman who presided at the said court at the time when such fine was imposed; and such court, judge or chairman shall have power to remit such fine (*z*). Enforcing fines for non-attendance in counties.

By 33 & 34 Vict. c. 77, s. 12, no person whose name shall be in the jury book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption other than illness, not claimed by him at or before the revision of the list by the justices of the peace, and a notice to that effect shall be printed at the bottom of every jury list. Exemptions must be claimed. When.

If any person having been duly summoned to attend on any jury in a borough shall not attend in pursuance of such summons, or being thrice called shall not answer to his name, or after his appearance wilfully withdraw himself from the presence of the court, the court shall impose such fine upon every person so making default (unless some reasonable excuse shall be proved to the satisfaction of the court) as the court shall think meet; and if any person on whom such fine shall be imposed shall refuse to pay the same to the person who shall be authorized by the court to receive the same, it shall be lawful for the court (then), or at its next sitting by order of the court signed by the clerk of the peace, to cause to be levied by distress and sale of the goods of the person on whom such fine shall have been imposed every such fine, and the reasonable charges of such distress and sale (*a*). Fines for non-attendance in boroughs.

To ensure the due performance of the duty imposed on the various officers, in respect of the selection and summoning of juries, by the recent act they are made answerable for their neglect in penalties. Thus the clerk of the peace neglecting to cause the proper forms to be printed; or to provide the jurors' book, and deliver it to the sheriff or under-sheriff; or to give notice to the sheriff or under-sheriff of any error certified

(*y*) 33 & 34 Vict. c. 77, s. 21.
(*z*) 25 & 26 Vict. c. 107, s. 12.
(*a*) 5 & 6 Will. 4, c. 76, s. 121; 6 Geo. 4, c. 50, s. 54.

County Jurors.

by a justice; or to deliver to any man who has served on the grand and petty jury at sessions, a certificate of his service on application and payment of 1*s.*; or to transmit to the sheriff or under-sheriff a list of the men who have attended and served, will forfeit 50*l.*, half to the queen, and the other half, with full costs, to any who will sue in either of the courts at Westminster (*b*). The like penalty is imposed on the clerk of the petty sessions holden for allowing the lists, omitting to give notice of the holding of such session to the parish officers; and on the sheriff or under-sheriff making an undue alteration in the jurors' book, or refusing to deliver over that book to the succeeding sheriff within ten days after he shall be sworn into office (*c*). Every churchwarden or overseer neglecting (unless prevented by sickness) to assist in making out his list, so that it may not be ready; or wilfully omitting any proper, or inserting any improper name, or taking any money or reward for omitting or inserting any name whatsoever, or wilfully omitting or inserting a wrong description; or omitting, in case the forms of returns supplied be insufficient, to apply for more to the delay of the list; or neglecting to fix a copy of the list, duly signed (*d*), and with the subjoined notice, on the principal door of each place of worship; or refusing to allow to an inhabitant inspection of the list, or a true copy, at any reasonable time within the prescribed three weeks; or refusing to produce the list at the petty sessions, or to answer questions respecting it there on oath; or to attend such sessions or an adjournment; or refusing to allow the petty sessions, or any justice of the peace, on due request, to inspect or make extracts from any poor rate in his custody, for the purpose of correcting the lists,—is made liable to a like penalty, not more than 10*l.*, nor less than 40*s.*, at the discretion of the convicting justice (*e*). And the justice before whom any parish officer shall be convicted of a wrongful insertion or omission in the list is required to certify the error to the clerk of the peace, who is to correct his own list accordingly, and give notice to the sheriff or under-sheriff, who is to make a similar correction in the jurors' book (*f*).

Penalty on the sheriff and officers for neglect or misconduct in the selection or summoning of jurors, &c.

The regulation respecting the providing lists is not extended to liberties, franchises, cities, and boroughs, whether counties of themselves or not, which possess separate jurisdiction civil or criminal; but in such places the panels are to be prepared, as directed by 5 & 6 Will. 4, c. 76 (*g*); except that no man is to be returned to serve at the London sessions who is not a householder or the occupier of a shop, warehouse, counting-house, chambers or office, for the purpose of trade and commerce

(*b*) 6 Geo. 4, c. 50, s. 46; 25 & 26 Vict. c. 107, s. 10.
(*c*) 6 Geo. 4, c. 50, s. 46.
(*d*) *Bray* v. *Somer*, 2 B. & S. 374; 31 L. J., M. C. 135, *ante*, p. 89.
(*e*) 6 Geo. 4, c. 50, s. 45.
(*f*) *Ibid.*
(*g*) Sect. 121, *ante*, p. 93.

within the city, having lands, tenements or personal estate of the value of 100*l.* (*g*).

Any juror consenting to the offence of embracery is still liable to be indicted, or to an information punishable by fine and imprisonment (*h*).

Section 10.

OF COUNSEL AND ATTORNIES.

Right of accused to conduct their own case.

Every man, whether accused of any breach of the law, or seeking to enforce a claim under it, has a natural right to plead his own cause, of which no municipal regulation can deprive him without manifest injustice. All persons, therefore, accused of crime or misdemeanour, and all parties in convictions, informations, or appeals, have a right to address the court or jury, as the case may be, for themselves; to examine witnesses in their own behalf; or to cross-examine the witnesses produced against them. In all these cases it is a mere question of discretion, whether a party will conduct his case in person, or entrust it to such advocates as the practice of the court allows him (*i*).

Defence by counsel or attorney in felonies.

And by 6 & 7 Will. 4, c. 114, s. 1, it is enacted, all persons tried for felonies shall be admitted after the close of the case for the prosecution to make full answer and defence thereto by counsel learned in the law, or by attorney in courts where attorneys practise as counsel.

In prosecutions party prosecuting cannot conduct his own case in court.

But an indictment, being preferred at the suit of the crown, although at the instance of an individual, is not considered as a proceeding at the suit of the party prosecuting, so as to entitle him to conduct the case in court further than to tender his own evidence as a witness, and to offer suggestions to the chairman (*k*).

(*g*) 6 Geo. 4, c. 50, s. 50.

(*h*) *Ibid.* s. 61.

(*i*) A defendant cannot delegate to counsel the duty of examining or cross-examining witnesses, and reserve to himself the right of addressing the jury, per *Abbott*, C. J., *R.* v. *Parkins*, Ry. & M. N. P. C. 166. So, in civil cases, *Shuttleworth* v. *Nicolson*, 1 M. & R. 254, and in *Moscati* v. *Lawson*, 1 M. & R. 454, this division of labour is not allowed, on the ground that it would be derogatory to the bar and otherwise mischievous to allow counsel to make out the facts from the witnesses and afterwards the defendant to state what he chose to the jury; he ought to be in his proper place—at the head of it—and conduct it throughout.

(*k*) This was distinctly laid down by Lord *Tenterden*, in *R.* v. *Stoddart*, tried at Guildhall, Oct. 16, 1819. That case was an indictment for libel, and the prosecutor, Mr. H. Hunt, appeared in person; when the Lord Chief Justice made the following observations as to the course to be pursued:—"If it be *your intention to address the jury*, it is a course which you will not be permitted to pursue. It has been determined by all the judges of the Court of King's Bench, and that determination has been publicly expressed on more than one occasion, together with the concurrence of many of the other judges, that a prosecution by indictment is not, in point of law, the

Counsel.

Where, therefore, no advocate appears for the prosecution, no address is made to the jury, but the witnesses are examined by the chairman.

Right of sole and pre-audience in the bar.

The advocates at county sessions, who, by the practice of the court, are entitled to take upon them the causes of others, and to prosecute for the crown, are barristers and attornies. Where a sufficient number of barristers attend, it is usual to give them sole audience, and the attornies are consequently not heard in their presence. Where members of the bar do not attend, as in some distant counties and many boroughs, it is usual to hear the attornies as advocates; and though it may be doubted whether in strictness they are entitled to address the jury when prosecuting the indictments, it is customary, and certainly convenient, to allow them that privilege. In cases where, as in Cornwall, counsel have not been accustomed to attend, but three or more barristers wish to do so, it is usual for them to intimate their desire to the chairman or recorder, and to request that they may have the pre-audience due to their station in the profession; and if this request is granted, as it ought to be, the attornies cannot be afterwards heard in their presence, unless so many of those who attend should be retained on one side as not to leave a choice of counsel to the defendant.

Upon such a request being made the quarter sessions ordered that pre-audience be granted at all times when four barristers should be present. This order was removed by certiorari, but the court refused to quash it, because they would not interfere with the discretion of the sessions in such a matter as regu-

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suit of an individual. If any individual seeks redress—personal redress for personal injury—the course that he is to pursue is to bring an action for damages. If, instead of electing to bring his action for the redress of a personal injury, he thinks fit to put the law in motion *in the name of the king*, for the sake of public justice it is not *his* suit, but it is the suit of *his majesty*. Where a person, therefore, chooses to proceed by indictment, he has no right to address the jury, unless he is a gentleman at the bar. That opinion has been solemnly pronounced by all the judges of the Court of King's Bench. We have at every assizes, and under every commission of gaol delivery in London, at *every court of quarter sessions* holden throughout the country, a great number of prosecutions, instituted certainly by private individuals, in which the name of his majesty is used; but in none of them is it ever thought that the person prosecuting has a right to address the jury. The course taken on every occasion of a criminal prosecution is, where there are depositions, that the judge refers to them, and examines the witnesses one by one, according to those depositions. Where there are no depositions, as in cases of this description, it has been usual for the judge to consult the person prosecuting as to the manner of bringing his case before the court, and as to the witnesses proper to be examined. That is the way in which justice is administered in such cases, and that is the course of proceeding I mean to adopt on the present occasion. Mr. Hunt will communicate with me, and give me the names of his witnesses. If he is disposed to proceed in that way, it shall be done. This is the only course I shall allow; and if you do not choose to have justice administered in your case according to the ordinary and established rules and opinions of the judges of the land, the record must be withdrawn." Dick. Q. S. 6th ed., p. 152.

lating their own practice where their discretion seemed to be exercised in a sound manner (*l*). *Counsel.*

All barristers may attend and practise at sessions; but it is not usual for queen's counsel and serjeants to appear there. Barristers not called within the bar as her majesty's counsel, or by patent of precedency, and not being members or officers of the court, as justices, clerk or deputy clerk of the peace, &c., may practise there with propriety. Their seniority, if called to the bar on the same day, depends on the dates of their admission as entered in the books of the inn of court of which either or both are members (*m*). What counsel attend.

It may be convenient here to allude to a point of practice which is probably more in question where a limited number of the bar are in attendance than elsewhere, namely, that where it is sought to retain the services of a particular barrister a retainer to have a binding effect must be accompanied by the payment of the retaining fee; and in default, that a subsequent retainer in point of time would, if tendered with the retaining fee, be entitled to displace the prior incomplete one. Retainers to counsel—practice as to.

The practice of attornies at sessions is either in the joint characters of advocates and attornies, where the bar do not attend, or simply as attornies, advising and assisting their clients, and instructing counsel. In *borough* sessions Lord *Denman* has intimated that barristers have pre-audience, but not exclusive audience. How far a barrister may, merely as such, *insist*, without the sanction of the bench, on his right of pre-audience in courts of sessions where attornies *alone* have been accustomed to practise, is a question of some difficulty; but is very unlikely, it may be hoped, to be raised in practice. Attornies attending sessions.

The right to practise at the sessions as an attorney is strictly confined to those who have been admitted and remain enrolled in one of the superior courts at Westminster (*n*), and it is an indictable misdemeanor to practise as an attorney without being admitted and enrolled (*o*). If he is not certificated at the time of practising, he cannot recover his bill (*p*); and if at the time of acting as attorney in any proceedings he be not admitted and enrolled, he is guilty of a contempt of the court wherein such proceedings are (*q*), and shall, in addition to other penalties and forfeitures, pay for every such offence 50*l*., recoverable by a penal action with the sanction of the attorney-general (*r*).

(*l*) *Ex parte Evans*, 9 Q. B. 279: *sub nom. Reg.* v. *Justices of Denbighshire*, 15 L. J., Q. B. 335.

(*m*) 6 C. & P. 637, n. Case of Abbott, afterwards C. J., and Peake, afterwards Serjt.

(*n*) 6 & 7 Vict. c. 73, s. 2.

(*o*) *Reg.* v. *Buchanan*, 8 Q. B. 883.

(*p*) 6 Vict. c. 73, s. 26; 23 & 24 Vict. c. 127, s. 26.

(*q*) 23 & 24 Vict. c. 127, s. 26.

(*r*) *Ibid.*

Attornies.

No attorney, who has been struck off the rolls of the courts above, can be permitted to practise in the quarter session of the peace, nor can any person convicted of felony, or other infamous crime, be allowed to practise in any way (*s*).

Though persons acting as attornies in the court of quarter session, without being admitted and enrolled and duly qualified, cannot, as we have seen, recover any compensation for their services, and are indictable or perhaps may be punished for contempt of the court, yet persons who are unqualified and irresponsible occasionally obtain practice there to the great injury of those who are induced to employ them, and of others against whom they may employ the law as the engine of petty oppression. The bench, therefore, will always confer benefit on the suitors by repressing such attempts; and the members of the bar only perform the duty they owe to the court in assisting to detect them.

(*s*) *Ex parte Browsall*, Cowp. 829.

CHAPTER III.

OF THE FUNCTIONS OF THE GRAND JURY AND THE FINDING OF BILLS.

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SECTION 1.

OF THE OPENING OF THE COURT—CALLING THE GRAND JURY—SWEARING AND CHARGING THEM.

Proclamation of sessions in counties.

THE session is usually proclaimed by the bailiff in the following terms :—

O yes! O yes! O yes! The Queen's justices do strictly charge and command all manner of persons to keep silence while the Queen's commission of the peace for this county of ———— is openly read, upon pain of imprisonment.

Then the commission, the Queen's proclamation against vice, &c., and the several statutes which are directed to be read at the sessions, ought, in strictness, to be read by the clerk of the peace; but in practice, inasmuch as some of the statutes have been repealed and others become obsolete, the ceremony of reading them has fallen into disuse. The Queen's proclamation is still, however, read at the opening of the court. The persons who attend to take any oaths are next called, and the oaths administered by the clerk of the peace. The declaration, however, substituted for the sacramental test, by 9 Geo. 4, c. 17, has no longer to be made by parties admitted to office (*a*). The registration of dissenting chapels and of Roman Catholic chapels and Jewish places of worship, which had formerly to be recorded at quarter sessions, has no longer to be registered there (*b*).

Calling the grand jury.

The clerk of the peace, as well in boroughs as in counties, next proceeds to call the names of those who are returned to

(*a*) 29 & 30 Vict. c. 22, s. 1.
(*b*) 18 & 19 Vict. c. 81, s. 2.

Of the Grand Jury.

Challenge to grand jury.

serve on the grand jury; whose qualifications at quarter sessions in counties, as well as boroughs, are now, as we have already seen, the same with those of the petty jurors (*c*). If any of the parties so called are aliens who have not been domiciled in England or Wales for ten years, or are not in other respects duly qualified (33 & 34 Vict. c. 77, s. 8), or outlaws, even on civil process; or attainted of treason or felony; or convicted of any infamous crime; or improperly returned; a prisoner, or party bound to answer a charge, may, it has been said, challenge them before he is indicted for cause; or if he discover it after a bill has been found against him, may plead it in avoidance of the finding (*d*). A juror who has been sworn may be dismissed, on the discovery that he is an improper person (*e*). On the other hand, if any of the parties summoned have any claim of exemption by law or courtesy, they must now submit their claim to the chairman or recorder. In practice it is not uncommon, and may be discreet and proper, when the names are called over, for the court to direct the names of all those to be omitted who reside in a particular district, in which matter of prosecution has arisen, calculated to excite feelings in the inhabitants inconsistent with the calm administration of impartial justice.

Number sworn or affirmed.

The number called and sworn, or affirmed (30 & 31 Vict. c. 35, s. 8), on the grand inquest should not be less than thirteen, nor more than twenty-three: not less than thirteen, because every bill must be found by twelve at least; not more than twenty-three, for if a number amounting to two full juries were sworn, there might be an equal division (*f*). At sessions, after sixteen or seventeen names have been called, and the parties have appeared, it is not unusual to consider the inquest as complete, and to dismiss all others attending on their summons.

When the grand jurors who remain to serve have taken their places in the box assigned to them, and have named their foreman, the following oath is administered by the clerk of the peace to their foreman :—

Oath of foreman.

You, as foreman of this inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge. The Queen's council, your fellows', and your own, you shall keep secret. You shall present no man for envy, hatred, or malice; neither shall you leave any man unpresented for fear, favour, or affection, or hope

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(*c*) *Ante*, p. 84.

(*d*) Hawk. bk. 2, c. 25, s. 16; 2 Hale, 155; but this authority is based upon the purview of the statutes 11 Hen. 4, c. 9, and 3 Hen. 8, c. 12, now repealed by 6 Geo. 4, c. 50, which contains no substituted enactment to the same effect.

(*e*) Lamb. 400.

(*f*) See *R.* v. *Marsh*, 6 A. & E. 237. But if a bill is found by a grand jury of more than twenty-three, and the prisoner pleads and is found guilty, the indictment will not be quashed on motion, and he will be left to his writ of error; no affidavit by a grand juryman of what passed in the grand jury room on the subject of a bill will be received.

of reward; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. *Oath of Foreman.*
So help you God.

Then the rest of the grand jury, by three at a time, in order, are sworn in the following manner:—

The same oath which your foreman hath taken on his part, you, and every of you, shall well and truly observe and keep on your parts. Oath of grand jury.
So help you God.

If the grand juror affirms or declares, his affirmation or declaration will be to the same effect (*g*).

When the grand jury are sworn, or affirmed, as the case may be, it becomes the duty of the chairman of the session, or recorder, to deliver his charge to them.

It should consist of remarks tending to explain and elucidate any cases which the calendar may disclose, or which may be known to the court as likely to be presented, and to require more than ordinary attention, either from the complicated nature of the facts, or from the law applicable to them happening to be of recent enactment or of unfrequent use. In cases, for example, where the distinction between principal and accessary; between theft and embezzlement; or between larceny and breach of trust, or obtaining money under false pretences, are likely to arise on the matters which will be submitted to the grand jury, a popular explanation of the law on these subjects will facilitate their labours, and give to them their proper aim. So if the nature of the depositions requires it he should point out to them that the crime of simple larceny is included in that of larceny in a dwelling-house, or that on a bill found for any felony or misdemeanor, there may be a conviction of an attempt to commit such offences respectively, or that a charge of indecent assault includes one of a common assault, and such like points of law. When parties have been committed or held to bail on charges arising upon any recent act of parliament, it becomes absolutely necessary that the statute should be stated and explained by the chairman; and even where no such case is presented by the calendar, it may be expedient for him to take this opportunity of publicly stating and expounding any new penal law, or modification of the former law, which it may be desirable should be generally understood; and the more especially since the practice of requiring statutes to be read at the sessions has been disused by the legislature. In the exercise of a sound discretion, he may also advert to general topics presented by the calendar—to the prevalence of crime in general, or of any particular class of crime—to the causes which may induce it, and the means which may be applied by way of prevention. He may properly take occasion to discou- Charge to the grand jury.

(*g*) 30 & 31 Vict. c. 35, s. 8.

Charge to the Grand Jury.

rage petty and frivolous prosecutions, as indictments for trifling assaults, which only serve to prolong animosities, to unsettle habits of industry, and to burden the parties with fruitless expenses. His local knowledge will enable him to expose any prevalent mistake which may operate to the public evil; as those which sometimes exist as to the remuneration of the labourer, and the administration of the laws; and, in times of excitement, to suggest considerations which may tend to preserve peace, order, and good-humour among all classes of his neighbours.

Section 2.

FINDING OF BILLS—PRELIMINARY CONDITIONS TO JURISDICTION OF GRAND JURY OVER CERTAIN INDICTMENTS.

The finding of bills by the grand jury.

The grand jury, being sworn, or affirmed, as the case may be, proceed in a private room to consider the bills brought before them. Although sworn to secrecy, they may, in cases of difficulty, allow the prosecutor or his attorney to assist them by marshalling the evidence and examining the witnesses. If any doubts occur on points of law, or with respect to the propriety of admitting any part of the evidence offered to them, they should come into court and pray the advice of the chairman or recorder. A majority consisting of twelve at the least is necessary to the finding of the bill, and to prevent its being thrown out (*i*). They should not throw out a bill on the ground of the supposed insanity of the prisoner (*k*). The court will not act upon the affidavit of a grand juryman as to what passed before the grand jury on a motion to quash an indictment found by them (*l*).

The duty of the grand jury in determining on the finding or rejecting of bills is to consider whether there is a fair and reasonable ground for requiring the party accused to answer the charge made against him. In general they hear only the case of the prosecutor; as the defendant, although aware of the intention to prefer a bill against him, as he now usually is, has no right to appear before them by himself or by attorney, and to urge any argument or adduce any evidence on his own behalf. There seems no objection, however, if anything should appear doubtful or ambiguous, on the case as presented to them, which is capable of being removed, to their sending for any one who may be willing to attend, or for any document which may assist them in arriving at the proper conclusion.

Duties on grand jurors as to finding bills.

It is true that they are not the final judges of the charge, and that they do not absolutely pronounce even an opinion on the guilt or innocence of the party accused; but still their duty,

(*i*) *R.* v. *Marsh*, 6 A. & E. 236.
(*k*) *Reg.* v. *M'Naughten*, 8 C. & P. 195, per *Alderson*, J.
(*l*) *R.* v. *Marsh*, *ubi sup.*

Duty as to finding Bills.

when there has been no previous hearing before a magistrate, is of grave and serious import, in which case the charge may, and probably will, remain undetermined till the ensuing sessions. They should remember that, in such a case, on their finding, the defendant, without any sifting of the evidence by justices, is liable to be apprehended, and compelled to find bail, or be imprisoned if he cannot obtain sureties; that he must, in order effectually to defend himself, incur expense for which, however innocent he may ultimately be found, the law affords him no recompense, unless through the difficult and uncertain course of an action, and then only when he can show the charge to be malicious as well as groundless; and that the character and fortunes of an honourable man may, for a time at least, be deeply affected in the opinion of the many who want moral discrimination to separate charge from proof, and to believe in the evidence of the life of the accused against the breath of an accuser. These considerations should induce a grand juror to pause, where there has been no committal by a magistrate, before he sanctions an accusation which leads directly to such consequences; and to weigh the evidence before him with the more scrupulous attention; because it is on one side only, and unsifted by the party against whom it is given. And again, when the defendant is, in truth, guilty, an injury may be done to the public by finding a bill on insufficient evidence; because it will bring the case prematurely to a final trial; and if an acquittal once be pronounced on an indictment, valid in form, no proof of guilt subsequently discovered, however decisive, can render the criminal again amenable to justice. The grand jury ought, therefore, to be satisfied on the means they have of forming a judgment, at best but imperfect, that there is a strong presumption of guilt in the party charged, before they find "a true bill" against him.

The cases in which grand juries at sessions have most need of caution are those of conspiracy, and of attempts to commit rape, or indecent assaults. Indictments of the first class are peculiarly liable to be perverted to indirect objects, as from the great latitude both of charge and proof, they are more calculated to excite apprehension, even in parties who are slightly and blamelessly connected with the transaction to which a criminal aspect is given. The other charges are always to be looked at with great anxiety, since in one, the mere imputation is ruin, and the other is often dictated by revenge; and both are easy to make and difficult to repel. In these cases, it may be safely adopted as a rule by grand juries, that no bill should ever be found, except on a case which, if *unanswered*, would probably lead to a conviction; and therefore no such bill should be returned "true" on the testimony of the accusing party, unless rendered probable by immediate complaint, or attendant circumstances, or confirmed by the evidence of others; for on such unsupported testimony no satisfactory conviction can be had; and a trial of this kind, which terminates in an acquittal,

Duty as to finding Bills.

produces nothing in the way of benefit to countervail the mischievous operation of its details on public morals.

Attendance of prosecutors and witnesses before the grand jury.

At the conclusion of the charge the parties who have bills to present should go with them before the grand jury, and those who are bound to prosecute and give evidence should be called and should have their bills ready prepared, or go to the office of the clerk of the peace to get them prepared there for them. The bills are engrossed on parchment, with the names of the witnesses written at the back in the order in which it is proposed to call them on the trial (*n*). The witnesses are then called and sent with the bills before the grand jury, and if parties bound to prosecute or to give evidence are not in attendance so to do before the grand jury are discharged, their recognizances may be forfeited, subject to the power of the prosecutor, where an offence is committed within the county of a city or town corporate, except in certain exempted places, upon giving notice and entering into further recognizances, to go before the jury of the next adjoining county under 38 Geo. 3, c. 52 ; and 5 & 6 Will. 4, c. 76, s. 109 (*o*).

Examining and swearing of witnesses before the grand jury.

The foreman, or member acting on behalf of the foreman, of every grand jury in England and Wales is authorized and required to administer an oath or affirmation, where by law an affirmation is allowed in lieu of an oath, to all persons whomsoever who shall appear before such grand jury to give evidence in support of any bill of indictment ; and all such persons attending before any grand jury to give evidence may be sworn and examined upon oath by such grand jury touching the matters in question (*p*). And every person taking any oath or affirmation in support of any bill of indictment who shall wilfully swear or affirm falsely shall be deemed guilty of perjury (*q*). And the name of every witness examined or intended to be examined shall be indorsed on such bill of indictment. And the foreman of such grand jury shall write his initials against the name of each witness so sworn and examined touching such bill of indictment (*q*). And since that act it is not necessary for any person to take an oath in open court, in order to qualify such person to give evidence before any grand jury, as was the case formerly (*r*).

Indorsing initially names of witnesses.

As to bill found on improper evidence.

It may be doubtful whether if evidence were given before the grand jury which was not rightly submitted to them, whereupon they found a true bill, and a conviction took place, the conviction would be invalidated (*s*), though in a case under the old law, when the practice was for the witnesses to be sworn on oath, or had their affirmation taken in open court before

(*n*) 19 & 20 Vict. c. 54, s. 1.
(*o*) See *post*, p. 130.
(*p*) 19 & 20 Vict. c. 54, s. 1.
(*q*) *Ibid.*
(*r*) *Ibid.* s. 2.
(*s*) See *Reg.* v. *Clements*, 2 Den. C. C. 251; 20 L. J., M. C. 193.

being examined by the grand jury, and this oath was neglected, and the prisoner convicted, he received a free pardon (*t*). The deposition of a witness, taken before the magistrates, who is dead or so ill as not to be able to travel, may be read in evidence before the grand jury under 11 & 12 Vict. c. 42, s. 17, upon proof of such facts, and that such deposition was taken in the presence of the accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, and that the deposition purports to be signed by the justice by or before whom the same purports to have been taken (*u*). In that case the proof of the illness of the witness and the other facts to make the deposition admissible were stated before the court (*x*), and the names of the witnesses to prove them put on the back of the indictment and afterwards proved on the trial.

Reading depositions in absence of witnesses.

It having been found that in certain cases the presenting of bills to grand juries, and their finding of them without any check, was perverted to indirect objects, such as the extorting of money, or revenge, and in many cases the details of the trial had a mischievous operation on public morals without any advantage to counterbalance the mischief, the legislature has interfered and enacted (*y*) that no bill of indictment for any of the offences following, viz.:—

Conditions precedent to the finding of certain bills.

Bills of indictment not to be presented in certain cases except under condition.

Perjury;
Subornation of perjury;
Conspiracy;
Obtaining money or other property by false pretences;
Keeping a gambling-house;
Keeping a disorderly house;
Any indecent assault;
Any misdemeanor under the second part of the Debtors' Act, 1869, for the Punishment of Fraudulent Debtors (*z*);

shall be presented to or found by any grand jury, unless (1) the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, (2) or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, (3) or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of her Majesty's attorney-general or solicitor-general for England, (4) or unless such indictment for such offence, if charged to have been committed in Ireland, be

(*t*) *R.* v. *Dickenson*, R. & Ry. 401; *R.* v. *Russell*, C. & M. 247.
(*u*) *Reg.* v. *Clements*, 2 Den. C. C. 251; 20 L. J., M. C. 193.
(*x*) But see as to the admissibility of depositions as evidence, *post*, *tit.* "Documentary Evidence, Depositions."
(*y*) 22 & 23 Vict. c. 17, s. 1.
(*z*) 32 & 33 Vict. c. 62, s. 18.

Vexatious Indictments.

preferred by the direction or with the consent in writing of a judge of one of the superior courts of law in Dublin, or of her Majesty's attorney-general or solicitor-general for Ireland, (5) or (in the case of an indictment for perjury) by the direction of any court, judge or public functionary authorized by an act (*z*) to direct a prosecution for perjury.

Not to prevent the presentment of a bill containing a count or counts for any of such offences in certain cases.

Then by 30 & 31 Vict. c. 35, s. 1, the above provisions shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace in the presence of the person accused, or proposed to be accused, by such bill of indictment, and transmitted or delivered to such court in due course of law, and nothing in the said act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred.

Indictment not complying with 22 & 23 Vict. c. 17, s. 1, and 30 & 31 Vict. c. 35, s. 1.

The indictment in the above cases respectively need not state that the conditions imposed by the statute have been complied with (*a*), but the statute in effect amounts to a direction to the officer of the court not to allow a bill to be presented unless the conditions have been fulfilled (*b*).

If a bill has been presented and found without a compliance with such conditions in fact, it would seem that the court, upon an application on affidavit of the fact, or proof on oath, would have jurisdiction to quash the indictment, though after plea pleaded (*c*); or if the indictment consists of several counts, and with respect to the charges in some of them the act has been complied with, and with respect to others not, the court may quash such counts as are not justified, and try the case on the rest (*d*); and in any case which is clearly within the statute this would appear to be the most convenient course, and was the one adopted by *Crompton*, J., at Monmouth assizes (*e*). Another course would be to plead to the jurisdiction of the court, as was also suggested in *Knowlden* v. *Reg.*, *ubi sup.*, and after conviction probably error in fact would lie (*f*). Where

(*z*) 14 & 15 Vict. c. 100, s. 19.
(*a*) *Knowlden* v. *Reg.*, 5 B. & S. 532; 33 L. J., M. C. 219; *Reg.* v. *Heane*, *ibid.* 115. See *Reg.* v. *Gregory*, 7 Q. B. 274.
(*b*) *Ibid.*
(*c*) See *Reg.* v. *Heane*, 4 B. & S. 947; 33 L. J., M. C. 115; *Knowlden* v. *Reg.*, *ibid.* 219.
(*d*) *Reg.* v. *Fuidge*, L. & C. 390; 33 L. J., M. C. 70.
(*e*) See *Knowlden* v. *Reg.*, *ubi sup.*
(*f*) *Ibid.*

Vexatious Indictments Act.

the indictment is preferred by the direction of the judge, the materials upon which he acts are in his discretion, *e. g.* he may choose to act on a newspaper report, and the direction may be given *ex parte* (*g*).

Where an indictment was found by the grand jury containing two counts, one of which charged the obtaining of a shawl by false pretences on a certain day, on which charge alone the prisoner was committed, and the second count charged the obtaining another shawl on a subsequent day, and no order of the court had been obtained for the joining of the second count, and an application to quash the second count before plea was refused, and the prisoner was tried on evidence given on both counts, and was convicted on both counts. On a case reserved, the court of crown cases held that the second count ought to have been quashed, and not the whole indictment, but quashed the conviction altogether, because the first count alone being triable, evidence was given which was inadmissible on that count (*h*).

But in order to preserve the right of any person to prefer a bill who is willing to show the bona fides of the proceeding by binding himself to prosecute and pay the costs of the defendant in case of an acquittal if the court should think fit so to direct, it is enacted by 22 & 23 Vict. c. 17, s. 2, that where any charge or complaint shall be made before any one or more of her Majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then, in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required, to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information or depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.

Justices must bind over a prosecutor by recognizance who desires to indict.

And in such a case, by 30 & 31 Vict. c. 35, s. 2, whenever any bill of indictment shall be preferred to any grand jury under the provisions of the above act, against any person who has not been committed to or detained in custody or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person the just and reasonable costs, charges and expenses of such accused person and his witnesses (if any), caused or occasioned by or consequent upon the pre-

(*g*) *Reg.* v. *Bray*, 3 B. & S. 255; 32 L. J., M. C. 70.

(*h*) *Reg.* v. *Fuidge*, L. & C. 390; 33 L. J., M. C. 74. But this must now be taken subject to the 30 & 31 Vict. c. 35, s. 1, *ante*, p. 108.

Vexatious Indictments Act.

ferring of such bill of indictment, to be taxed by the proper officer of the court; and upon nonpayment of such costs, charges and expenses within one calendar month after the date of such direction and order, it shall be lawful for any of the superior courts of law at Westminster, or any judge thereof, or for the justices and judges of the central criminal court (if the bill of indictment has been preferred in that court) to issue against the person on whom such order is made such and the like writ or writs, process or processes as may now be lawfully issued by any of the said superior courts for enforcing judgments thereof.

Costs on acquittal where party bound over to prosecute at his own request.

Where a prosecutor has required magistrates to take his recognizances under this section, if he does not go on with the prosecution he must have his recognizances forfeited, and will not be allowed to move to have his recognizances discharged, as such a course would defeat the object of the statute (*h*).

Section 3.

Of the process to compel the attendance and appearance of prosecutors and their witnesses: (1) such as are bound over to appear; (2) such as are not so bound—privilege from arrest when in attendance.

Process to compel attendance of prosecutor and witnesses to prosecute or give evidence.

When a charge is made before a magistrate or coroner, he may bind over the party making the charge to appear at the sessions to prosecute and give evidence, and also all who can give material evidence: and, on their obstinate refusal, may commit them for their contempt therein.

Binding prosecutor and witnesses.

The process to compel appearance before the justices in petty sessions is not treated of here, but, in addition to the powers conferred by the commission, in all cases where any person shall appear before any justice or justices of the peace charged with any indictable offence, the justice or justices having taken the depositions of the witnesses in writing (*i*), such justice or justices before whom any such witness shall be examined as aforesaid may bind by recognizance (*k*) the prosecutor and every such witness to appear at the court of general or quarter sessions of the peace at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, which said recognizance shall particularly specify the profession, art, mystery or trade of every such person entering into or acknowledging the same, together with his christian and surname, and the parish, township or place of his residence; and if his residence be in a city, town or borough, the recogni-

(*h*) *Reg.* v. *Hargreaves*, 2 F. & F. 790.
(*i*) Under 11 & 12 Vict. c. 42, s. 17.
(*k*) 11 & 12 Vict. c. 42, s. 1.

zance shall also specify the name of the street and the number, if any, of the house in which he resides, and whether he is owner or tenant thereof or a lodger therein. *Of the Recognizance to prosecute and give Evidence.*

A married woman is incapable of entering into a recognizance; but if when before the justice she altogether refuses to appear at the sessions, and to find sureties for such appearance, when such appearance is essential to the conviction of an offender, she may be committed (*l*). The usual course, where a married woman is a material witness, is to bind over her husband, or other competent person, as surety for her appearance. Infancy seems no objection to being thus bound (*m*).

When the recognizance has been duly acknowledged by the person entering into the same, it shall be subscribed by the justice or justices before whom the same shall be acknowledged, and a notice (*n*) thereof signed by the said justice or justices shall at the same time be given to the person bound thereby; and the several recognizances so taken, together with the written information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any), in every such case shall be delivered by the justice or justices, as he or they shall cause the same to be delivered to the proper officer of the court in which the trial is to be had, before or at the opening of the said court on the first day of the sitting thereof, or at such other time as the judge, recorder or justice who is to preside in such court at the said trial shall order and appoint (*o*).

Recognizance to prosecute or give Evidence.

Form of recognizance.

Be it remembered, that on the ——— day of ———, in the year of our Lord ———, C. D., of ———, in the township of ———, in the said county, farmer [*or* C. D., of No. 2, ——— street, in the parish of ———, in the borough of ———, surgeon, of which said house he is tenant], personally came before me, one of her Majesty's justices of the peace for the said county, and acknowledged himself to owe to our sovereign lady the queen the sum of ———*l.*, good and lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lady the queen, her heirs and successors, if he the said C. D. fail in the condition indorsed. Taken and acknowledged the day and year first above mentioned at ———, before me.

Condition to prosecute.

The condition of the within-written recognizance is such that whereas one A. B. was this day charged before me, J. S., justice of the peace within mentioned, for that [&c. *as in the caption of the depositions*], if therefore he the said C. D. shall appear at the next court of general quarter sessions of the peace to be holden in and for the (county) of ———*, and there prefer or cause to be preferred a bill of indictment for the offence aforesaid against the said A. B., and there also duly prosecute such indictment, then the said recognizance to be void or else to stand in full force and virtue.

(*l*) *Bennett* v. *Watson*, 3 M. & S. 1.
(*m*) *Ex parte Williams*, M'Clell. 493; 13 Price, 670.
(*n*) 11 & 12 Vict. c. 42, s. 2.
(*o*) *Ibid.* s. 20.

Form of Recognizance.

Condition to prosecute and give Evidence.

Same as the last form to the asterisk, and then thus—"and there prefer or cause to be preferred a bill of indictment against the said A. B. for the offence aforesaid, and duly prosecute such indictment and give evidence thereon as well to the jurors who shall then inquire of the said offence as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue."

Condition to give Evidence.

Same as the last form to asterisk, and then thus—"and there give such evidence as he knoweth upon a bill of indictment to be then and there preferred against the said A. B. for the offence aforesaid, as well to the jurors who shall then inquire of the said offence as also to the jurors who shall pass upon the trial of the said A. B. if the said bill shall be found a true bill, then the said recognizance to be void or else to stand in full force and virtue."

Notice of the said Recognizance to be given to the Prosecutor and his Witnesses.

——— } Take notice, that you, C. D., of ———, are bound in the sum
to wit. } of ———, to appear at the next court of general quarter sessions of the peace in and for the county of ———, to be holden at ———, in the said county, and then and there [prosecute and] give evidence against A. B.; and unless you then appear there and [prosecute and] give evidence accordingly, the recognizance entered into by you will be forthwith levied on you. Dated this ——— day of ———, 187—.

J. S.

Contumacy of witness.

If any such witness as is referred to in sect. 17 shall refuse to enter into or acknowledge such recognizance as aforesaid, it shall be lawful for such justice or justices of the peace, by his or their warrant, to commit him to the common gaol or house of correction for the county, riding, &c. in which the accused party is to be tried, there to be imprisoned and safely kept until after the trial of such accused party, unless in the meantime such witness shall duly enter into such recognizance as aforesaid before some one justice of the peace for the county, riding, &c. in which such gaol or house of correction shall be situate: Provided, nevertheless, that if afterwards, from want of sufficient evidence in that behalf or other cause, the justice or justices before whom such accused party shall have been brought shall not commit him or hold him to bail for the offence with which he is charged, it shall be lawful for the justice or justices, or any other justice or justices of the same county, riding, &c. by his or their order in that behalf, to order and direct the keeper of such common gaol or house of correction where such witness shall be so in custody to discharge him from the same, and such keeper shall thereupon forthwith discharge him accordingly (*p*).

If the witness be confined in any gaol as a prisoner he may be brought up before the sessions by writ of *habeas corpus ad*

(*p*) 11 & 12 Vict. c. 42, s. 20. See, before this statute, *Bennett* v. *Watson*, 3 M. & S. 1; *ante*, p. 111.

testificandum (*q*), or order of a judge of a superior court in writing under 16 & 17 Vict. c. 30, s. 9, see *post.*

Writ of *habeas corpus ad testificandum* or order of a judge.

Lord Preston, being committed by a court of quarter sessions for contempt in refusing to be sworn to give evidence to the grand jury there on an indictment of high treason, was brought by *habeas corpus* into the court of king's bench; and Chief Justice Holt said it was a great contempt, and that had he been there he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed (*r*).

Subpœna.

The usual process to bring before the grand jury or court such witnesses as have not been bound by recognizance to appear, whether on the part of the prosecution, or of the defendant (*s*), is by *subpœna ad testificandum;* which, whatever may have been the law in former times, is now to be obtained in all cases for either party, from the clerk of the peace, under the seal of the *custos rotulorum*, or from the crown-office (*t*). This writ, when issued by the clerk of the peace (or clerk of assize at an assize), is at the utmost only compulsory within the county where it is granted, and, therefore, if the witness lives beyond its limits, application must be made to the crown-office, from whence it may issue to any part of England (*u*). This appears to be still law, notwithstanding that by 45 Geo. 3, c. 92, s. 3, the service of every writ of *subpœna* upon any person in any one of the *parts of* the United Kingdom requiring the appearance of such person to give evidence in any criminal prosecution in any other of the *parts* of the same (*x*), is made as effectual in law as if the same had been served in that part of the United Kingdom where the person so served is required to appear; and the party disobeying it is liable to punishment by attachment in the court of queen's bench, as the highest court of criminal jurisdiction, and having power over all others. For that enactment only extends to give to a *subpœna* having validity throughout either England, Scotland, or Ireland, taken generally, the same validity in either of those parts of the United Kingdom; and contemplates such a *subpœna* as would be enforced by one of the courts having competent jurisdiction to compel the attendance of a witness in any county or place within either of those *parts* (*y*); so that it is by far the more effectual and advisable

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(*q*) 44 Geo. 3, c. 102, s. 1.

(*r*) *R.* v. *Lord Preston*, Salk. 278.

(*s*) *Defendants* seem to have only acquired the right to sue out a subpœna since 1 Ann. st. 2, c. 9, s. 3; see 2 Hawk. c. 46, s. 167.

(*t*) 2 Hale, 282; 2 Hawk. c. 46, ss. 165, 166, 167; 1 Chit. Cr. L. 320, 1st edit.; 1 Ann. c. 9.

(*u*) Cro. Circ. Comp. 9, 21. "The old jurisdiction of counties was local; they were like different kingdoms. There was no jurisdiction, no process out of the county; one county had no jurisdiction over the inhabitants of a distinct county;" per Lord *Mansfield*, 4 Burr. 2511, 2512.

(*x*) Viz., England, Scotland, and Ireland; *R.* v. *Brownell*, 1 A. & E. 598.

(*y*) Viz., England, Scotland, and Ireland.

Of the Subpœna.

course to sue out a *subpœna* from the crown-office, in order to bring the witness within reach of attachment from the court of queen's bench, in case of his making default in his attendance at the sessions (*z*). For disobedience to a *subpœna* from quarter sessions is not that manifest contempt for the authority of the court of queen's bench, which similar neglect of a crown-office *subpœna* is, and accordingly that court has not power to punish the witness for disobedience to a *subpœna* issued by the clerk of the peace (though served within the jurisdiction of the same quarter sessions), either by its general authority, or by virtue of the above statute (*a*): whereas disobedience to its own *subpœna* issued from the crown-office will be punished by attachment (*b*). In a case which is of a criminal nature, even in form (*e. g.*, indictment for stopping a way), a person present in court, if called as a witness, is bound to be sworn and give evidence, though not subpœnaed (*c*).

The form of a Subpœna to give evidence before the Grand Jury at the Quarter Sessions.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to A. B., C. D., E. F., and G. H. [*not putting more than four in one subpœna*], greeting: We command you, that all and singular business and excuses being laid aside, you, and every one of you, be, and personally appear in your own proper persons, before our justices assigned to keep the peace in and for our county of ———, and also to hear and determine divers felonies, trespasses, and other misdemeanours, in the said county committed, at the general quarter [*or* general] sessions of the peace, to be holden at ———, in and for the said county, on ——— day, the ——— day of ———, at the hour of ——— in the forenoon of the same day, to testify the truth, and give evidence before the grand inquest touching a bill of indictment to be preferred against ———, in a case of trespass and assault.

Or, if it is to give evidence for the prosecution on the trial of an *indictment*, thus:

On our behalf against ———, in a case of trespass and assault.

If for the defendant, thus:

Between us ———, in a case of trespass and assault.

Or if the subpœna is to give evidence in an *appeal* against an order of removal, thus:

In a certain appeal now depending between the churchwardens and overseers of the poor of the parish of A. appellants, and the churchwardens

(*z*) 2 Nolan, 541, note (4), 4th ed.

(*a*) *Ibid.*

(*b*) See *R.* v. *Ring*, 8 T. R. 585; *R.* v. *Booth*, Hil. 45 Geo. 3, 2 Nol. P. L. 541, n. The service should take place in time to give the party reasonable notice to attend. Thus service of a subpœna at half-past eleven in the morning, for a cause called on at two o'clock, is not sufficient, though the witness live close to the place of trial; *Barber* v. *Wood*, 2 M. & R. 172.

(*c*) *R.* v. *Sadler and others*, 4 C. & P. 218, tried by *certiorari* at nisi prius, *Littledale*, J.

and overseers of the poor of the parish of B. respondents, touching and concerning the removal of C. D. from the said parish of B. to the said parish of A. *Of the Subpœna.*

The close of the subpœna, in either case, is this :

And this you, or any of you, are by no means to omit, under the penalty upon each of you of 100*l.* Witness ———, at ———, aforesaid, the ——— day of ———, in the ——— year of our reign.

Y. Z., *Clerk of the Peace.*

If the party subpœnaed is supposed to be in possession of any documents necessary to the case of the party on whose behalf he will be called, a special clause, called a *duces tecum*, is to be inserted, requiring him to bring such documents with him. Subpœna duces tecum.

It is no answer to a rule for an attachment for non-production of a document before petty or quarter sessions on a crown-office subpœna for the witness to say that he was not bound to submit it to examination. He is bound to attend as a witness and bring the paper called for in obedience to the writ, and it is for the judge to decide whether the papers shall be examined or not (*d*); but if he is the officer of a corporation subpœnaed to produce documents in his custody as such officer, it seems he may put forward the orders of such corporation as his masters as an excuse for their non-production (*e*).

The subpœna is made out by the clerk of the peace, or by the master of the crown-office, and each of the witnesses must be personally served, either with a copy called a subpœna ticket (*f*), which is now most usual, or with a notice, also showing them the original subpœna or subpœna ticket, in the following form :— Service of subpœna.

To Mr. A. B.

By virtue of her majesty's writ of subpœna to you directed, and herewith shown unto you, you are personally to be and appear before her majesty's justices, &c. [*pursuing the form of the subpœna, as far as the words* "in a case of ———;" and this you are not to omit, under the penalty of 100*l.* Dated this ——— day of ———, in the ——— year of the reign ———, &c.

In order to obtain the attendance of a witness who is in prison or other confinement (*e. g.*, on board ship, &c.), at a trial in any court of record, a writ of *habeas corpus ad testificandum* where the witness is in prison, or order to bring up the prisoner under 16 & 17 Vict. c. 30, s. 9, is necessary, to obtain which an affidavit must be made by the party applying, stating the imprisonment of the party, that he is a material and necessary Habeas corpus, or order to bring up.

(*d*) *Reg.* v. *Greenaway*, 14 L. J., M. C. 190.

(*e*) If a clerk in a public office is subpœnaed to produce official documents, his comptroller must be applied to, to secure the production; *Austin* v. *Evans*, 9 Dowl. P. C. 408.

(*f*) *Maddison* v. *Shore*, 5 Mod. 355; *Goodwin* v. *West*, Cro. Car. 540, 522.

Habeas Corpus or Order to attend.

witness, that he is willing to attend, that the trial cannot safely be proceeded in without his presence, and that such trial, cause or matter, civil or criminal, is pending, and will be inquired into, tried and determined in the court of record named at a certain time and place; with such other circumstances as may show the necessity for the application. This writ may be granted by any one of the judges of the superior courts in England and Ireland, on application made at chambers (*g*), or, in the case of the order, a secretary of state, or any judge of the superior courts, has the power, in any case in which he may see fit so to do, on application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison or place under any sentence, or under commitment for trial or otherwise (except under process in any civil action, suit or proceeding) before any court, judge, justice or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired before such court, judge, justice or other judicature, and the person so ordered to be brought up shall be brought up under the same care and custody and be dealt with in like manner as a prisoner required by any writ of habeas of the superior courts of law at Westminster to be examined before them. If it be required to bring up a prisoner of war the application should be to the secretary of state (*h*). It is to be served on the person in whose custody the party is detained.

The form of a Writ of Habeas Corpus ad Testificandum to give evidence at the Court of Quarter Sessions.

Victoria, &c., to the gaoler of ———, greeting: We command you, that you have the body of A. B. detained as it is said in our prison under your custody, under safe and secure conduct, by whatsoever name the said A. B. may be called in the same, before our justices assigned, &c., at the general quarter sessions of the peace, to be holden at ———, in and for the said county, on, &c., then and there to testify the truth, and give evidence on our behalf before the grand inquest, touching a bill of indictment to be preferred against, &c., &c. [*as the case may be*], and immediately after the said A. B. shall have then and there given his testimony before our said justices, to return him the said A. B. to our said prison under safe and secure conduct, and have you then there this writ. Witness ———, in the ——— year of our reign, &c., &c.

Witnesses' expenses.

The money which is given with subpœnas, to secure the attendance of witnesses at the quarter sessions of the peace, demands but very brief notice. It has been frequently decided, that, in *civil* cases, a witness is not bound to attend in pursuance of a subpœna, unless a tender be made by the party requiring his attendance, sufficient to cover all the reasonable expenses of his journey out and home (*i*). Attendance upon

(*g*) 44 Geo. 3, c. 102, s. 1.
(*h*) *Furley* v. *Newnham*, Doug. 403.
(*i*) *Fuller* v. *Prentice*, 1 H. Blacks. 49; Tidd, 9th ed. 806; 1 Stark. Ev.

Expenses of Witness.

criminal prosecutions stands on a different ground. In cases of felony, and of certain aggravated misdemeanours, the prosecutor and witnesses will, as of course, be allowed reasonable compensation, not only for their journey, &c., but for their trouble and loss of time also (*k*); it therefore appears that, in such cases, the making any advance of money with a subpœna is rather a mere matter of prudence, in order to prevent the witness from being impeded for want of the means of travelling, than of absolute legal obligation (*l*); nevertheless it should not pass unnoticed, that the statute by which subpœnas served "*in any of the parts of the United Kingdom*" compels attendance in any other of the parts of it, provides, that no *attachment* shall issue for disobedience, unless reasonable charges of going to, and returning from, the place of trial shall have been tendered (*m*). This was doubtless inserted with a view to the very great distances to which witnesses might occasionally be called under the authority of this statute, without the *means* of bearing their expenses until they could make application to the court for recompense. In a civil case, two guineas were given to the wife of a publican living sixty miles from Lancaster, with a subpœna to attend and give evidence at the assizes held there. She did not at the time complain that the amount was too small. She had a sick infant at the breast. Her best route, in order to get coach, was through Liverpool, though farther in distance. The inside fare from that place was a guinea. She would have had to stay three days at Lancaster. She did not attend the assizes, and the court refused to make a rule absolute for an attachment against her, holding, that, under the circumstances, she might reasonably require an inside place out and home, and that two guineas was too little for her expenses (*n*).

The compensation, however, provided by statute for the attendance of witnesses in cases of *misdemeanour* is limited to the cases enumerated in the several statutes under which costs are allowed; and therefore in criminal prosecutions for other misdemeanours it behoves the prosecutor, in order to secure the attendance of his witnesses, to tender them sufficient to cover all reasonable expenses.

Privilege of prosecutor,

A defendant after remand on bail is privileged from arrest on his way from his home to the court, while at the court, and

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2nd ed. 77; *Chapman* v. *Pointon*, Stra. 1150; *Hallett* v. *Mears*, 13 East, 15; *Ex parte Roscoe*, 1 Merivale, 191; *Holme* v. *Smith*, 1 Marsh. 410.

(*k*) 7 Geo. 4, c. 64, s. 22. See *post*.

(*l*) 2 St. Tri. 124; 2 Hawk. c. 46, s. 168; 2 Hale, 282. In one case a witness subpœnaed for a defendant indicted for a conspiracy, attended the trial, but, before being examined, requested payment of his expenses, not having received any advance on account of them. Defendant refused to pay them: still, though the indictment was removed by *certiorari*, and came down for trial at the assizes as a civil record, he was compelled to give evidence; *R.* v. *Cooke*, 1 C. & P. 322, *A. Park*, J.

(*m*) 45 Geo. 3, c. 92, s. 4. See s. 3, *ante*, p. 113.

(*n*) *Dixon* v. *Lee and Hawkes*, 5 Tyrwhitt's R. 180; 1 Cr., Mee. & R. 645.

witnesses, jurors and defendant on bail—eundo, morando et redeundo.

thence from the court home again; and the same privilege exists with respect to prosecutors, jurors and witnesses (*o*). But it has been held in England that a defendant who has been tried and acquitted ceases thereupon to have any privilege, and may be arrested on his way home (*p*), whilst in Ireland it has been held that a defendant acquitted is privileged from arrest on his way home (*q*).

So a witness attending before a police magistrate on a charge of felony after a remand is privileged from arrest, eundo, morando et redeundo, though he was under recognizances or summons to appear, on the ground that a suitor has the right to the attendance of any person *without* whose presence full justice cannot be done (*r*).

But a voluntary prosecutor, or a common informer, going to obtain a summons from justices, is not privileged from arrest, nor, therefore, is he privileged when returning after having obtained his summons (*s*); but the inferiority of the tribunal, being a lawful tribunal, does not affect the principle upon which the privilege rests (*t*).

Arresting on civil process, in the face of the court, a party who is necessarily in attendance there, *e. g.*, by virtue of his office, or on subpœna, or at the request of a prosecutor, though without subpœna (*u*), or under recognizance to prosecute and give evidence, or give evidence only, or on some other lawful occasion, *e. g.*, business to be done there, as preferring a bill, or giving information against any person, or tendering a fine on an indictment, is a contempt (*x*), and the party so arrested may be discharged by the sessions after examination on oath. But if he was arrested on his way to or from the place of holding the sessions, or at the sessions town, out of view of the court, after the sessions are over, the application for his discharge must be to the court from which the process issued (*y*) as soon as possible after the arrest (*z*). It seems that if a necessary witness is so arrested, a court of quarter sessions may postpone a trial, or an appeal, till he is discharged by order of the court from which the process issued.

(*o*) *Gilpin* v. *Benjamin*, 4 L. R., Ex. 131; 38 L. J., Ex. 50.
(*p*) *Hare* v. *Hyde*, 16 Q. B. 394; 20 L. J., Q. B. 185.
(*q*) *Callans* v. *Sherry*, Alcock & Napier, 125.
(*r*) *Montague* v. *Harrison*, 3 C. B., N. S. 292; 27 L. J., C. P. 24.
(*s*) *Ex parte Cobbett*, 7 E. & B. 955; 26 L. J., Q. B. 293.
(*t*) *Ibid.*
(*u*) Per Lord *Kenyon*, in *Arding* v. *Flower*, 8 T. R. 536; *Meakins* v. *Smith*, 1 H. Bla. 636.
(*x*) 2 Hawk. c. 1, s. 18.
(*y*) See *Selby* v. *Hills*, 8 Bing. 166; Com. Dig. Privilege (A 1); *Clark* v. *Molineux*, 1 Lev. 159.
(*z*) *Reg.* v. *Burgess*, 8 A. & E. 275.

Section 4.

Jurisdiction of Grand Jury over Offences in Point of Locality—Their Discharge.

Limits of jurisdiction to inquire in point of locality.

The jurisdiction of the grand jury is, at common law, confined to offences committed (*a*) within the county, borough or precinct from whence they are summoned. No indictment, indeed, could be, on the face of it, valid, without showing that the offence was committed within that limit, unless in cases in which jurisdiction is given to them over other places by statute; and, in all other cases, although the charge be of a nature unaffected by locality, if it should appear that it was wholly committed in another county or borough than that in which it is indicted, the party must be acquitted. An inland sea belongs to the counties respectively by which it is bounded, and therefore the Bristol Channel, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded (*b*). The venue in the margin shall be taken to be the venue for all the facts stated in the body of the indictment; but as to bills for offences committed within a county of a city or town corporate, see *post*, p. 148. The grand jury, therefore, cannot inquire of any offences committed without the limits in respect of which they are impanelled, except enabled so to do by legislative provision. Therefore, for example, an indictment for obtaining goods, &c. by false pretences, must be found by a jury of the county where the goods were so obtained (*c*); and where money is obtained by means of false statements contained in a begging letter, and is transmitted to the prisoner in a letter through the post, the prisoner is triable where the letter is posted (*d*), but the offence of sending a threatening letter to obtain money is complete where the letter is sent by post in the place where it is delivered (*e*). By statute, grand juries in the central criminal court, by 4 & 5 Will. 4, c. 36, s. 22, may take cognizance of offences committed on the high seas or on board ship, in a place "where great ships go," though within a foreign country, *e. g.*, in a ship lying off Whampoa, in China, and twenty or thirty miles from the sea (*f*); and see now the jurisdiction conferred in indictable offences committed on the high seas on the quarter sessions of any county or place where the offender is apprehended or in custody (*g*). Where a statute, creating a new felony, directs that it may be tried in the county where the offender is apprehended, without containing negative

Bristol Channel.

In false pretences.

(*a*) *I. e.*, completed; *Reg.* v. *G. W. Rail. Co.*, 3 Q. B. 333.
(*b*) *Reg.* v. *Cunningham*, Bell, C. C. 72; 28 L. J., M. C. 66.
(*c*) *Reg.* v. *Stanbury*, L. & C. 128; 31 L. J., M. C. 88.
(*d*) *Reg.* v. *Jones*, 1 Den. C. C. 551; 19 L. J., M. C. 162.
(*e*) *R.* v. *Lloyd*, 2 East, P. C. 1131.
(*f*) *R.* v. *Allen*, Moo. C. C. 494.
(*g*) 24 & 25 Vict. c. 96, s. 115; 24 & 25 Vict. c. 97, s. 72; 24 & 25 Vict. c. 99, s. 36; and 24 & 25 Vict. c. 100, s. 68; *Reg.* v. *Peel*, 32 L. J., M. C. 65; L. & C. 231.

Place where offender is apprehended.

words, the provision is only cumulative, and he may still be tried in the county where the offence was committed (*g*). It seems that, by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either; though it is more correct to lay the venue where the fact was done.

Jurisdiction of county sessions in boroughs where holding of sessions is discontinued.

In boroughs and places where general or quarter sessions of the peace have, under 5 & 6 Will. 4, c. 76, ceased, or been discontinued to be holden, all such business which, under any general or local act, or any usage or custom, ought to be, or were usually heard, decided or transacted at such general or quarter sessions by the justices of peace, with the assistances of any juries there assembled, shall be hereafter heard, &c. by the general or quarter sessions for the counties, ridings or divisions, liberties or jurisdictions in which such boroughs are situate, and by the justices of peace and juries then assembled, respectively (*h*).

Each commission of the peace points out over what portions of the county or riding, division or county, the jurisdiction of the justices named in it extends. By the Municipal Corporation Act (*i*) no part of any borough, in or for which a separate court of quarter sessions shall be holden, shall be within the jurisdiction of the justices of any county, from which *such borough before the passing of that act was exempt*, any law, statute, letters patent, charter, grant or custom to the contrary notwithstanding. This provision strips the county sessions of jurisdiction over those places and districts, the which, being originally parts of counties at large, were by charter or otherwise made, or claimed to be made, subject to the concurrent power of both sets of justices (*k*); or by the operation of sects. 7 and 8 of 5 & 6 Will. 4, c. 76, were taken from the county, and included within the boundaries of any borough, the rest or ancient part of which was exempt from the jurisdiction of the county justices before the passing the act. The suburbs of ancient boroughs which, from comparative insignificance, have swelled to commercial importance, afford frequent instances of a state of things to which the above section applies. This is elucidated by a case respecting the parish of Clifton (*l*), at one time a part of Gloucestershire for every purpose, but afterwards added to Bristol, as to the right of voting for members of parliament for that city by the Boundary Act, 2 & 3 Will. 4, c. 64, sched. (O.) The "metes and bounds" fixed by that act for that purpose were adopted by the Municipal Act for Bristol, 5 & 6 Will. 4, c. 76, among the other boroughs included in its schedules; and the question was, whether, since that act, any justices of Gloucestershire had power to make an

(*g*) 1 Hale, 694; 3 Inst. 87.
(*h*) 1 Vict. c. 78, s. 50.
(*i*) 5 & 6 Will. 4, c. 76, s. 111.
(*k*) See *R.* v. *Musson*, 9 D. & R. 172.
(*l*) *R.* v. *Gloucestershire* (*Justices*), 4 A. & E. 689.

order for diverting a footpath in Clifton, and, next, if they had, whether a mandamus would lie to the Gloucestershire quarter sessions, commanding them to enrol it in the usual way. The court of king's bench held that, as to Bristol and the other boroughs mentioned in the first section of schedules A. and B. of the last-mentioned act, every place included within the bounds of any of those boroughs, as described by the Parliamentary Boundary Act, 2 & 3 Will. 4, c. 64, was made a part of them for *all* purposes; and, consequently, that the parish of Clifton was part of the borough of Bristol, *inter alia*, as to stopping up ways; so that the Gloucestershire justices had no jurisdiction within it. It seems, however, that in boroughs whose charters contained no clause of non intromittant, and consequently where the county justices, previously to the 5 & 6 Will. 4, c. 76, had concurrent jurisdiction with the borough justices, such concurrent jurisdiction still continues, notwithstanding the grant of a court of separate quarter sessions.

County and Borough Jurisdictions.

The powers of borough justices to try offenders at the quarter sessions for boroughs were universally abolished by 5 & 6 Will. 4, c. 76, s. 107; and recorders, each of whom singly constitutes a court of quarter sessions "in and for" the borough to which he is appointed, have cognizance of all crimes, offences and matters whatsoever cognizable by any court of quarter sessions of the peace for counties in England.

The above-mentioned sections appear to have the effect of excluding the county quarter sessions from jurisdiction within those boroughs previously exempt from their power, and to which a separate grant of quarter sessions has been made; but the county jurisdiction is necessarily continued in other boroughs, whether before 5 & 6 Will. 4, c. 76, they had or had not concurrent jurisdiction; thus, by sect. 111, the justices in and for the county in which any borough is situate, to which no grant of separate quarter sessions shall have been made, shall exercise the jurisdiction of justices of peace in and for such borough, as fully as by law they and each of them can or ought to do in and for the said county.

This section, therefore, which may be read with the 4 & 5 Will. 4, c. 27, passed the year before,—to the effect that the justices of the peace, or any the justices acting in and for any borough or franchise in England referred to in that act, not being empowered by charter or otherwise to determine felonies (*m*), shall commit every person charged with any such felony as a court of quarter sessions may have jurisdiction to try, to be tried at the general quarter sessions of the peace for the county, riding or division wherein such borough or franchise shall be situate, or at any adjournment thereof, and the justices of the peace acting in and for such county, &c. are thereby empowered to try persons so committed at such

4 & 5 Will. 4, c. 27, commitments by borough justices to county sessions.

(*m*) *E. g.*, Havering at Bower, in Essex, *ante*, p. 1.

quarter sessions or any adjournment thereof,—gives the quarter sessions of counties full power to hear and determine offences committed in such boroughs.

Cities and towns being counties.

Indictments for offences committed within cities and towns which are counties of themselves may be preferred, or if found be removed for trial before the assizes of the next adjoining county, under 38 Geo. 3, c. 52, and 14 & 15 Vict. c. 55, s. 19, and see *post*, pp. 134, 135.

Larceny in one jurisdiction and possession of the stolen property in another.

Also, by the common law, if one guilty of simple or compound larceny in one county carry away the stolen goods into another, he may be indicted for the simple or compound larceny in the county in which he committed it, or for a simple larceny in the county into which, or in any county through which, at any distance of time (*n*), he carried the goods; for as, in contemplation of law, the possession continues in the party robbed, every moment's continuance of the trespass and felony is a crime of the same description with the first taking, and amounts, in legal consideration, to a new taking; so that the offence of simple larceny must be regarded as complete in any of such counties (*o*); it being said that the larceny itself is ambulatory, but the aggravating circumstances fixed (*p*).

But now if any person shall have in his possession in any one part of the United Kingdom (*q*), any chattel, money, valuable security or other property whatsoever which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part.

(*n*) *R.* v. *Parkin*, Moo. C. C. 45.

(*o*) 1 Hale, 507; 2 *id.* 163; 3 Inst. 113; 2 East, P. C. 771. See as to acquittal of the *simple* larceny being, in such a case, no bar to indictment for the *compound*, and *vice versâ*, 2 Hale, 245.

(*p*) 1 Hale, 536; *R.* v. *Thomson*, 2 Russ. 174. But where the original taking, though created a felony by statute, was not a larceny at common law, subsequent possession in another county of the thing stolen cannot be considered a larceny. A prisoner was indicted at the Central Criminal Court for a common law simple larceny in stealing lead in Middlesex; and it appeared that the lead was taken from the roof of a church in Bucks, which is out of the jurisdiction of the Central Criminal Court: it was held that he could not be convicted there on the possession in Middlesex; *R.* v. *Millar*, 7 C. & P. 665 (*Park*, *Alderson*, *Patteson*, JJ.)

(*q*) 24 & 25 Vict. c. 96, s. 114.

Possession in one Jurisdiction of Goods taken in another.

And where R. stole a chattel at a place out of the county of M. and consigned it as a parcel by the railway company to the receiver in the county of M., who delivered it at the address in M., for the purpose of disposing of it for R., where it was seized by the police: it was held that R. was in constructive possession of the chattel in M. and was indictable and triable there (*r*).

The possession of a banker to whom a stolen note has been transmitted through the post, or of the post-office servants, through whose hands it passed, may be regarded as the possession of the thief or receiver (*s*). If, however, the original taking was committed in a place out of the jurisdiction of the common law, as at sea, the criminal who brings the stolen goods into this kingdom may now be tried for larceny in any county in which he may be apprehended or be in custody (*t*). For by 24 & 25 Vict. c. 96, the consolidated statute relating to larceny committed within the jurisdiction of the admiralty of England and Ireland, all indictable offences against that act are cognizable as if they had been committed on land in the county or place in which the offender shall be apprehended or be in custody. So, also, as to indictable offences under the 24 & 25 Vict. c. 97, consolidating the acts relating to malicious injuries to property. So, also, as to coinage offences under 24 & 25 Vict. c. 99, s. 36, and against the act relating to offences against the person (*u*).

Offences committed in Scotland, Ireland, or parts of the queen's dominions, though out of the United Kingdom, as the islands of Man, Guernsey, Jersey, &c., were in general only indictable there, and offenders apprehended here must have been sent there for trial.

Accessories, where triable.

Modern provisions extend the powers of grand juries and courts to inquire of offences which might otherwise escape punishment under the strict rules of the common law as to the locality of crime. Thus, it is provided, where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory, either before or after the fact to any such felony, may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony or any felonies committed in any county or place in which the act, by reason whereof such person shall have become such accessory, shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction

(*r*) *Reg.* v. *Rogers*, 37 L. J., M. C. 83; L. R., 1 C. C. R. 136.
(*s*) *Reg.* v. *Cryer*, Dears. & B. 324; 26 L. J., M. C. 192.
(*t*) 2 Inst. 113; 1 Hawk. c. 25, s. 52.
(*u*) 24 & 25 Vict. c. 100, s. 68.

Trial of Accessories.

to try the principal felony or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on land, or begun on the sea and completed on land, or begun on the land and completed on the sea, and whether within her majesty's dominions and partly without: provided that no person who shall be once duly tried, either as an accessory before or after the fact or for a substantive felony under that act, shall be liable to be afterwards prosecuted for the same offence (*v*).

Accessories to felonies on the *seas.*

And when any person shall within the jurisdiction of the admiralty of England or Ireland become an accessory to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed on the high seas (*w*).

Offences on borders of counties.

For the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, it is provided that, where any felony or misdemeanour shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards (*x*) from any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanour may be dealt with, inquired of, tried, determined and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein (*y*). This provision does not apply to any other than boundaries of counties *not* corporate, and prosecutions in those counties. Thus felony committed in the county of the city of London, on London bridge, and within five hundred yards of that part of the county of Surrey which consists of the borough of Southwark, was held not triable at the borough sessions for Southwark (*z*), and the offence must be laid in the indictment to have been committed where it is tried. Thus a bill was found at Stamford *borough* sessions for an assault; the offence was laid as committed at the parish of St. Mary, in the borough of Stamford, in the county of Northampton; the

(*v*) 24 & 25 Vict. c. 94, s. 7.

(*w*) *Ibid.* s. 9.

(*x*) The 500 yards is to be measured in a direct line from the border, and not by the nearest road; *Reg.* v. *Wood*, 5 Jur. 225, *Parke*, B.

(*y*) 7 Geo. 4, c. 64, s. 12.

(*z*) *R.* v. *Welsh*, 1 Moo. C. C. 175. See *Reg.* v. *Great Western Rail. Co.*, 3 Q. B. 333.

Offences on Borders of Counties.

indictment was removed by *certiorari*. The venire went to the sheriff of Lincolnshire, and the party was convicted there. The judgment was arrested (*a*), for to make the trial good in either county under 7 Geo. 4, c. 64, s. 12, the offence must have been tried in the same county in which it is laid; nor does sect. 20 cure a venire into a wrong county, but only improper or imperfect venue (*a*).

By 7 & 8 Vict. c. 61, s. 4, no *judicial proceeding*, &c. is invalidated by reason of any error in stating the name of the county to which a portion of it (attached to another county by sect. 1) originally belonged, instead of the county to which it will belong under this act (sect. 1), or the converse.

Offences committed on journeys.

And further, "for the more effectual prosecution of offences committed *during journeys* from place to place," it is enacted that, where any felony or misdemeanour shall be committed on any person, or on or in respect of any property in or upon any carriage whatever, employed on any journey, or on any person, or in respect of any property on board any vessel whatever, employed on any voyage or journey upon any navigable river, canal, or inland navigation; such felony or misdemeanour may be dealt with, inquired of, tried, determined and punished in any county, through any part whereof such carriage or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanour shall have been committed, in the same manner as if it had been actually committed in such county. And in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal or navigation shall constitute the boundary of any two counties, such felony or misdemeanour may be dealt with, inquired of, tried, determined and punished in either of the counties through or adjoining to or by the boundary of any part whereof such carriage or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanour shall have been committed, in the same manner as if it had been actually committed in such county (*b*). And this enactment is not confined to public conveyances, but applies to any carriage or wagon on a journey (*c*), and railway trains also are within the act (*d*).

As to coinage offences committed in two or more counties.

By 24 & 25 Vict. c. 99, s. 28, when any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons acting in concert in different counties or jurisdictions shall commit any offence against this

(*a*) *Reg.* v. *Mitchell and another*, 2 Q. B. R. 636.
(*b*) 7 Geo. 4, c. 64, s. 13.
(*c*) *Reg.* v. *Sharpe*, Dears. C. C. 415.
(*d*) *Reg.* v. *French*, 8 Cox, C. C. 252.

Coinage Offences in two or more Counties.

act, every such offender may be indicted and the offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been wholly committed within such one county or jurisdiction.

As to receivers of property either stolen or unlawfully obtained, &c.

The receivers of any chattel, money, valuable security, or other property (see definition in the act), knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanour only, be dealt with, indicted, tried and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanour may by law be tried, in the same manner as such receiver might be dealt with, indicted, tried and punished in the county or place where he actually received such property (*e*). A receiver sending a stolen bank note by post into the county of W. has possession of the note in W. within the meaning of this section, the possession of the post office authorities being his possession (*f*). So in indictments against persons employed in the public service of the queen, or as a constable, or in the police, for larceny or embezzlement may be found by a jury of the county or place in which he shall be apprehended or be in custody (*g*).

Receivers.

Possession by the post.

Larceny or embezzlement by public servants.

Wreckers.

Whosoever shall plunder or steal any part of any ship which shall be in distress or wrecked, or any goods thereof, may be indicted either in the county or place in which the offence shall have been committed, or in any county or place next adjoining (*h*).

Embezzlement.

In an indictment for embezzlement, the venue may be laid in the county in which the clerk or servant who has received the money, &c. denied having received it; for till his refusal to account for it, he had committed no offence (*i*).

Conspiracy.

A bill for conspiracy may be found by the grand jury of any county wherein an act was done by any of the conspirators in furtherance of the common design (*k*).

Trial in a different county by statute.

Whenever a statute authorizes the *trial* of an offence in a different county from that where it is committed, the grand jury of the former acquire, by necessity, a right to present it (*l*).

Form of finding.

The grand jury must find *a true bill*, or *no bill*, which is now usually done by indorsing the words "*a true bill*," or

(*e*) 24 & 25 Vict. c. 96, s. 96.
(*f*) *Reg.* v. *Cryer*, 26 L. J., M. C. 192; D. & B. 324.
(*g*) 24 & 25 Vict. c. 96, s. 70.
(*h*) *Id.*
(*i*) *R.* v. *Taylor*, 3 B. & P. 596. See other cases, *post*, tit. "Embezzlement by Clerks."
(*k*) *R.* v. *Brisac and Scott*, 4 East, 164; *Deacon's case*, Fost. 9.
(*l*) Dick. Q. S. 5th ed. 164.

"*not a true bill*," as their decision is; and they cannot take on themselves, as a petty jury may, to return a special or conditional finding, or to alter the charge by selecting parts of *counts* as true, and rejecting the rest; but this rule does not prevent them, when there are several counts, from finding "a true bill" as to the charge contained in one, and ignoring it as to the charge contained in the other (*m*). Thus, if the indictment contained one count for riot, and the other for an assault, they find a true bill as to the assault, and indorse not a true bill as to the riot; this finding leaves the indictment, as to the count found, just as if there had originally been no other, every count containing an integral charge, and therefore having all the operation of a distinct bill (*m*). So they may find "a true bill" against a prisoner, and "not a true bill" as to a previous conviction also charged against him; or a "true bill" against one or more of several persons, and "not a true bill" against another or others.

Mode of finding the bill.

Ignoring part of a bill.

When the grand jury have found one or more bills preferred before them to be true or not true, as the case may be, one of their number, in company with one or more others, returns into court with the bill and presents it to the court through the clerk of the peace, who refers to the indorsement on the back, and then publicly announces the nature and contents of the bill in this manner, addressing the grand jurymen, who have come into court, as follows: "Gentlemen of the grand jury, you present a true bill (*or* not a true bill, *as the case may be*) against A. B. for felony (*or* misdemeanour, *as the case may be*)." The grand jurymen present should give their attention to what the clerk of the peace says, in order that any mistake made by him may be at once corrected.

Bringing bills into court.

After the court has ascertained that all the bills intended to be preferred are exhausted, the grand jury receives its discharge from the chairman or recorder: but if they have not left the building or separated, they may be sent for back into court, so as to receive and find another bill (*n*). If the grand jury ignore a bill, a fresh bill against the same person for the same offence ought not to be presented to them, and if such fresh bill is sent before them they should take no notice of it, for if after they have come to a conclusion once, if a second bill could be preferred, so might any number, and their labours might never end (*o*). The court may refuse to receive a second bill so returned (*p*).

Discharge of grand jury.

Though the grand jury returned on the first day of the sessions commonly serves the whole sessions, the court may

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(*m*) *R.* v. *Fieldhouse*, Cowp. 325.
(*n*) *Reg.* v. *Holloway*, 9 C. & P. 43.
(*o*) *Reg.* v. *Humphreys*, C. & M. 601; *Reg.* v. *Austin*, 4 Cox, C. C. 385.
(*p*) *Ibid.*

command another to be returned and sworn. The ordinary instance of which in Lord *Hale's* time was, where the grand jury having brought in all their bills, are discharged by the court, after which, but before the end of the sessions, some new felony or misdemeanour is committed, and the party is taken or brought to gaol, or some former offender is taken and brought in, in like manner (*q*).

Discharge of accused by proclamation.

A prisoner should not be discharged immediately after a bill against him is thrown out, or until after proclamation for any one who has any further charge against him to go before the grand jury, which should not be made till the end of the session (*r*).

As to a grand juror afterwards sitting on the petty jury, see *post*, p. 212.

As to the postponement of preferring a bill, see *post*, p. 200.

(*q*) 2 Hale, 156.

(*r*) It would seem from Dalton, ch. 185, that formerly no prisoner was arraigned till after all the bills had been returned; see *post*.

CHAPTER IV.

OF THE INDICTMENT.

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Section 1.

TRANSMITTING INDICTMENTS FOUND AT SESSIONS TO THE ASSIZES FOR TRIAL.

When a true bill is thus found and returned into court it becomes an "indictment."

Indictments found at sessions for offences over which the sessions have jurisdiction by the terms of their commission, may be transmitted for trial at the next assizes without certiorari. By 4 Edw. 3, c. 2, passed while the justices had only power to inquire into felonies and trespasses done within their county as keepers of the peace without authority to determine them, they were to send indictments found before them to the justices of gaol delivery, who were to hear and determine them at the next gaol delivery within the county, whether the parties were in gaol or admitted to bail; and this course, though not usual at this day, on account of the power of hearing and determining such offences given to the quarter sessions by 18 Edw. 3, c. 2, is still legal. Accordingly where indictments found by the grand jury for the North Riding of Yorkshire against a prisoner at the quarter sessions for that riding for certain misdemeanours, were transmitted by them to the next assizes for that county, annexed to a certificate signed by the deputy clerk of the peace for the riding, certifying the finding of them, with the witnesses at the back, and signed by the foreman of the grand jury as found true bills, Mr. Baron *Wood* refused to try them, on the ground that they were not removed by certiorari, and that new indictments were not found at the assizes, and discharged the prisoners; but having stated the case to the judges for guidance in future cases, they held that the indictments should have been tried at the assizes (*a*); but it has been said that indictments

Of indictments found at sessions and transmitted for trial at the assizes by the justices.

(*a*) *R.* v. *John Wetherell*, R. & Ry. 381. See also 4 Inst. 168; 2 Hawk. P. C. c. 5, s. 32; *ibid.* c. 6, s. 2; *ibid.* c. 8, s. 57; Bac. Ab. *Justices of the Peace*, E. 2; Crown C. Comp. 14, 27; 2 Hale, 32—46.

Transmission of Indictments.

found in respect of offences which never came within the commission of the peace, such as treason, forgery, perjury, &c., are void, and if transmitted would not be tried by the judge (*c*), a fresh bill being in such cases necessary (*d*).

Offences in counties of cities or towns.

Indictments for offences committed within counties of cities or towns corporate, including Bristol, Chester, Exeter and Berwick-on-Tweed, except London, Westminster and Southwark (as to which, see 4 & 5 Will. 4, c. 36), may be preferred (as in 38 Geo. 3, c. 52, is authorized to be done, *i.e.*, by prosecutors entering into a recognizance in 40*l.* for paying the extra costs attending the prosecution out of the county of the city, &c.) to the jury of the county next adjoining to the county of such city or town corporate, sworn and charged to inquire for the king for the body of such adjoining county at any sessions of oyer and terminer, or general gaol delivery (*e*). Again, if the venue in any indictment removed into the king's bench by certiorari be laid in a county of a town, &c., that court may order the trial to be by a jury of the county next adjoining, and may award proper writs of venire and distringas accordingly, without subjecting the prosecutor to recognizance for paying extra costs (*f*).

Certain offences in boroughs to be triable at county quarter sessions.

And, by 5 & 6 Will. 4, c. 76, s. 110, persons committed for trial at any court of gaol delivery, general or quarter sessions of the peace for any borough, charged with offences which the recorder thereof, after 1st May, 1836, will not have jurisdiction to try, may be lawfully removed (*g*) to the gaol or house of correction of the county, there to remain and take his trial at the next quarter sessions for the same, if the offence be there cognizable (*h*); and if not, then before the judges of oyer and terminer, and gaol delivery, at the next circuit. Parties bound by recognizances to prosecute, &c. are to appear and give evidence, &c., &c.

All matters cognizable by virtue of any local act of parliament or otherwise by any justice of peace, or by the general or quarter sessions having jurisdiction within any place, which, since the passing of the act for regulating municipal corporations, 5 & 6 Will. 4, c. 76, or 6 & 7 Will. 4, c. 103, *has ceased, or under any future act may cease*, to be within and to be part of any borough, or the liberties thereof, shall be cognizable by the general or quarter sessions of the county, riding, division,

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(*c*) *R.* v. *Haynes*, Ry. & M. 298; but see now 5 & 6 Vict. c. 38, s. 2, at p. 131.

(*d*) *Reg.* v. *Rigby*, 8 C. & P. 770; see also *ante*, p. 10.

(*e*) 38 Geo. 3, c. 52, ss. 2 and 12; 5 & 6 Will. 4, c. 76, s. 109; 14 & 15 Vict. c. 55, ss. 19, 23 and 24.

(*f*) 38 Geo. 3, c. 52, s. 1; *R.* v. *Nottingham*, 4 East, 208.

(*g*) The removal of prisoners in custody for trial in counties of cities and towns is provided for by 38 Geo. 3, c. 52, ss. 4, 5.

(*h*) As recorders have the same cognizance of offences as county sessions, this seems useless in practice. See 5 & 6 Will. 4, c. 76, s. 105.

liberty or jurisdiction within which such place is situate, in the same manner, and subject to the same provisions as the same were within the jurisdiction of the justices of the peace for that borough or place, or of the general or quarter sessions of the same (*i*).

Transmission of Indictments.

If a bill be found at the sessions which that court has no jurisdiction to try, it may be removed by a judge of assize to the assizes, and the recognizances for the prosecution, &c. at the sessions are in such case obligatory for the assizes; for by 5 & 6 Vict. c. 38, s. 2, "It shall be lawful for any judge of one of her Majesty's superior courts at Westminster, acting under any commission of oyer and terminer and gaol delivery for any county, to issue, if he shall think fit, any writ or writs of certiorari or other process directed to the justices of the peace acting in and for such county, riding, division or liberty, or to the recorder of any borough situated within the said county, commanding the said justices and recorder severally to certify and return into the court holden under the authority of such commission of oyer and terminer and gaol delivery, all indictments or presentments found or taken before any of the said justices of the peace or recorder of any offences which, after the passing of that act, such justices or recorder have not jurisdiction to try, and the several recognizances, examinations and depositions relative to such indictments and presentments: and also, if necessary, by writ or writs of habeas corpus, to cause any person or persons who may be in the custody of any gaol or prison charged with any such offence, to be removed into the custody of the keeper of the common gaol of the county, so that the same offences may be dealt with, tried and determined according to law under the authority of the said commission."

Removal by judge of assize of indictments for offences to try which the court of quarter sessions has no jurisdiction.

And by section 3, every recognizance which shall have been entered into for the prosecution of any person at any court of sessions of the peace for any offence which, after the passing of this act, such court will not have jurisdiction to try, and every recognizance for the appearance as well of any witness to give evidence upon any bill of indictment or presentment for any such offence, as of any person to answer our lady the Queen for or concerning any such offence, or to answer generally before such court, shall, in case any writ of certiorari or habeas corpus be issued for the purpose of removing such indictment or presentment, or such person so in custody as aforesaid, be obligatory on the parties bound by such recognizance to prosecute and appear and give evidence, and do all other things therein mentioned with reference to the indictment or presentment, or person so removed as aforesaid, before the justices of oyer and terminer and gaol delivery acting in and for that county, in like manner as if such recognizance had been originally entered into for prosecuting such offence, appearing or giving evidence, or

Recognizances to be obligatory for the assizes.

(*i*) 1 Vict. c. 78, s. 30.

Recognizances to be obligatory for the Assizes.

doing such other things before the said justices of oyer, terminer and gaol delivery. Provided always, that one week's notice shall have been given either personally or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the court of oyer and terminer and gaol delivery instead of the said court of sessions of the peace. Provided also, that the judge who shall grant such writ of certiorari or habeas corpus shall cause the party applying for such writ or writs, whether he be the prosecutor or party charged with such offence, to enter into a recognizance in such sum, and with or without sureties, as the judge may direct, conditioned to give such notice as aforesaid to the parties bound by such recognizance to appear before the said court of oyer and terminer and gaol delivery instead of before the said court of sessions of the peace respectively, and to do such other things with reference to the indictment, presentment or person removed as such court or judge shall direct.

A week's notice required.

Recognizance of party removing.

Defendant may remove indictment, found in a city or town, to be tried in next adjoining county.

So, after indictment found by any grand jury of a county of a city or town corporate, "if it shall appear to any court of oyer and terminer or general gaol delivery for the county of any city or town corporate, that such an indictment is fit and proper to be tried by a jury of any next adjoining county, it shall and may be lawful for the said court of oyer and terminer or general gaol delivery, *at the prayer of any defendant*, to order such indictment and the several recognizances, examinations and depositions relative to such indictments, to be filed with the proper officer, to be by him kept among the records of the courts of oyer and terminer or general gaol delivery for such next adjoining county, and to cause the defendant or defendants in such indictments to be removed by writ of habeas corpus to the gaol of such next adjoining county, which writ the said court is hereby directed and authorized to issue if such defendant or defendants be in the prison of such city or town corporate; and if he, she or they be not in such prison to commit such defendant or defendants to the gaol of such next adjoining county, and to cause the prosecutors and witnesses against such defendant and defendants to enter into a recognizance or recognizances to prosecute and give evidence against such defendant or defendants at the sessions of oyer and terminer and general gaol delivery for such next adjoining county, and that the same proceedings and trial shall be had, and the same judgment shall be given in such last-mentioned court of oyer and terminer or general gaol delivery, as would and might be had and given in cases of indictments or inquisitions for the like offences committed within such next adjoining counties" (*h*).

Recognizances to be transmitted to the

By 38 Geo. 3, c. 52, s. 7, "All and every person and persons before whom any recognizances entered into for the prosecution

(*h*) 38 Geo. 3, c. 52, s. 3.

of any person or persons for any offence or offences committed within the county of any city or town corporate, and for the appearance of witnesses to give evidence on such indictments, or for the appearance of any person to answer, shall be entered into, or by whom any examination or deposition shall be taken touching any such offence or offences as aforesaid, are required to return the same to the next court of oyer and terminer and general gaol delivery for such next adjoining county as aforesaid, *upon such prosecutor or prosecutors as aforesaid* leaving at the dwelling-house or other place of abode of the person or persons before whom such recognizance or recognizances shall be entered into, or by whom such examination or deposition shall be taken, ten days before the holding of any sessions of oyer and terminer and general gaol delivery for such next adjoining or other county as aforesaid, notice in writing of his or their intention to prosecute such indictment or inquisition at such last-mentioned session of oyer and terminer and general gaol delivery for any offences committed within the county of any city or town corporate, and that after the delivery as aforesaid of any of the said notices, it shall not be lawful for any person or persons to prefer any bill or bills of indictment for any offence or offences mentioned in the said recognizances or any of them at or to any sessions of oyer and terminer or general gaol delivery for the county of such city or town corporate" (*i*). It is a condition precedent that the prosecutor should in such a case have entered into a recognizance in 40*l.* to pay the additional costs of such removal (*k*). assizes of next adjoining county.

For the purposes of the above act the county of York shall be considered as the next adjoining county to the county of the town of Kingston-upon-Hull; the county of Northumberland as the next adjoining county to the county of the town of Newcastle-upon-Tyne (*l*).

As to commitments for offences not triable at quarter sessions by justices of a county of a city or of a town, see 14 & 15 Vict. c. 55, s. 19.

Section 2.

of the indictment.

The indictment commences, *The jurors for our lady the queen* (*m*), *upon their oath* (*n*), *present that*, and is sent to the grand jury, written on parchment, with the names of the witnesses indorsed. Commencement of indictment.

(*i*) See also 60 Geo. 3 & 1 Geo. 4, c. 4, s. 6.
(*k*) 38 Geo. 3, c. 52, s. 12.
(*l*) *Ibid.* s. 9.
(*m*) The jurors intended are those mentioned in the caption; *Reg.* v. *Turner*, 2 M. & R. 214, *Parke*, B. See as to "*of* our lady the queen," *Broome* v. *The Queen*, 12 Q. B. 834; 17 L. J., M. C. 14.
(*n*) This includes those who have made affirmation or declaration (30 & 31 Vict. c. 35, s. 8).

Rule as to Joinder of Defendants.

It is a rule at common law that where the felony is such as several may join in, *e. g.* housebreaking, larceny, &c., and it is believed that several have joined in committing it, in several degrees, *e. g.* as principals in the first or second degree, or as accessories before or after the fact, they may all be indicted jointly (*n*); and the like in misdemeanours, where all are principals, *e. g.* extortion, battery, &c. (*o*). So, though the several parties may have acted separately, if the grievance, *e. g.* the nuisance, is the result of all their acts jointly, they may be joined in an indictment stating the acts to have been several (*p*). This is the more usual and convenient course: though a distinct indictment might, in point of law, be maintained against each, as all offences are, in their nature, several (*q*).

When allowable.

Nature of a joint indictment.

Such joint indictment, indeed, is in its nature several also; for the issues upon it are joined distinctly between the crown and each defendant, the defendants may plead in different ways, and although they plead similar pleas, may, in cases of felony, procure several trials by severing in their challenges. So, also, some may be convicted and others acquitted, except where the offence is one which cannot be committed by less than two, as conspiracy; or less than three, as riot; when if the jury acquit all the parties charged on the record but one in the first case, or two in the second, all must be acquitted, unless it is laid and found that the offence was committed with others to the jurors unknown. Thus, several may be joined in an indictment for publishing a libel, where all joined in the publication (*r*), and for obtaining money under false pretences, when all were present aiding and assisting in the common object of fraud (*s*). Three were *jointly* charged with procuring certain other persons to utter a forged will. The only evidence for the crown was of *separate acts*, done at separate times and places by each of the persons charged as accessories; at the end of that evidence, one pleaded guilty. For the rest it was said, that only *one* could on the evidence be convicted. It was held, however, that the rest might be convicted (*t*). And several may be guilty of jointly using a gun on a Sunday, with intent to destroy game, against 1 & 2 Will. 4, c. 32, s. 3 (*u*).

When not allowable.

But where the offence of each is entirely distinct in its nature, or arises out of some personal duty or omission, each ought to be separately indicted, or, at all events, severally charged. Thus indictments against two or more jointly for

(*n*) 2 Hale, 173.
(*o*) *R.* v. *Benfield and Saunders*, 2 Burr. 984.
(*p*) *R.* v. *Trafford and others*, 1 B. & Ad. 874.
(*q*) *Reg.* v. *Atkinson et al.*, Lord Raym. 1248; Salk. 382.
(*r*) *R.* v. *Benfield and Saunders*, 2 Burr. 984.
(*s*) *R.* v. *Young and others*, 1 Lea. 505.
(*t*) *Reg.* v. *Barker and others*, 1 C. & K. 442.
(*u*) *Reg.* v. *Littlechild*, L. R., 6 Q. B. 293; 40 L. J., M. C. 137. See *R.* v. *Clarke*, per Lord *Mansfield*, Cowp. 610; Paley on Conv., ed. Macnamara, p. 262.

Rule as to Joinder of Defendants.

perjury, as common scolds, or for exercising a trade without serving an apprenticeship, are bad; for the acts complained of are essentially and necessarily several (*x*). And though several defendants may be included in one indictment for several distinct misdemeanours of the same kind, as for severally keeping disorderly houses (*y*), it is neither discreet nor proper; for the court might (at all events, before plea, or, as it seems, even before the jury is charged with them) quash such an indictment for any inconvenience shown to arise from the joinder of different counts against different offenders (*z*); or, if the objection is not made till after the jury has been charged, might put the prosecutor to his election (*a*). Objection to an indictment for improper joinder of defendants in it, is too late after verdict (*b*).

Joinder not allowable, when.

If two or more be jointly charged with having committed a single offence, they cannot be separately convicted of separate parts of it, except by statute (*c*). But both may be convicted, or one only, and the other acquitted of the whole charge (*d*).

Any number of receivers of the same stolen property may be charged with substantive felonies in the same indictment.

Receivers of stolen property.

By 24 & 25 Vict. c. 96, s. 93, whenever any property (as defined by the act) whatsoever shall have been stolen, taken, extorted, obtained, embezzled or otherwise disposed of in such a manner as to amount to a felony, either at common law or by virtue of this act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

On a joint indictment for receiving, persons may be convicted separately; and by 24 & 25 Vict. c. 96, s. 94, if upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or

(*x*) *R.* v. *Phillips and others*, 2 Stra. 921; *Anon.*, 6 Mod. 210.
(*y*) 2 Hale, 174, cited *R.* v. *Kingston and others*, 8 East, 46.
(*z*) *Ibid.*; see Lord Raym. 1248, *ante*, p. 134.
(*a*) See p. 137.
(*b*) *Reg.* v. *Hayes*, 2 Moo. & R. 156.
(*c*) See *infra*.
(*d*) See *R.* v. *Hempstead*, R. & R. 344; also *R.* v. *Butterworth*, R. & R. 520; and *R.* v. *Messingham*, 1 Moo. C. C. 257. In *R.* v. *Harris, Balls, and Moses*, 7 C. & P. 416, three were jointly indicted at the Central Criminal Court for feloniously using plates containing impressions of forged notes. It was held that a singly using the plates by each of the three while alone would not suffice for a conviction; but the jury must select some one particular time after all three had become connected, *viz.*, a time when they were all *present together* at one act, or assisting in such one act, as by two using and one watching at the door to prevent disturbance, and the like.

Joinder of Defendants—Receivers of Stolen Property.

parts of such property. This section applies to a case where two prisoners are jointly indicted for receiving certain property, and the proof is that the one received the whole of the property at one time and place, and the other the whole of the same property at another time and place (*f*).

As to the joinder and non-joinder of accessories with the principal offenders, see 24 & 25 Vict. c. 94, *post*, tit. "Accessories," Chap. VIII.

As to joinder of offences.

In point of law, several offences, which may be tried by the same rules, and which in point of law have the same legal class and character; *i. e.* several felonies, or several misdemeanours, may be charged in several counts in one indictment (*g*). Thus counts for felony at common law may be joined with counts for felony by statute; counts for a felony with aggravations which render it capital, with counts for a felony which is not capital; counts for riots and aggravated assaults, punishable by hard labour, with counts for common assaults for which that punishment cannot be inflicted; and nothing in the act for abolishing benefit of clergy (*h*), prevents the joinder in an indictment of counts which might have been joined before that act passed. However, where not only the degree, but the legal character of the offence is different, and the modes and incidents of trial differ, it is not usual to join a charge of felony with a charge of misdemeanour.

However, in *Reg.* v. *Jones* (*i*), where an indictment contained several counts for felonious stabbing and one for a common assault, the objection for misjoinder was taken *late* in the case, and *Williams*, J., left the case to the jury on the other counts, without noticing that for assault. The verdict of "*Guilty*" was entered on a count for felony, on application of prosecutor's counsel. The fifteen judges held the conviction *right* (*k*). So where an indictment charged the felony of assaulting with intent to rob in one count, and misdemeanour of an attempt to rob in the second count, and the jury found a verdict of guilty of the first named offence, the thief was punished accordingly; it was held not to be arguable on a case reserved, that, on objection taken in arrest of judgment, the indictment was bad for misdemeanour (*l*).

Rule that the charge should correspond with the proof.

One of the rules for framing an indictment is that the charge should correspond with the intended proofs; and though on the face of an indictment every count should import to charge a different offence, whether founded on the same or different facts; yet in practice the use made of the legal right to join several charges of *felony*, is commonly no other than the charging the same offence in different counts of the same indict-

(*f*) *Reg.* v. *Reardon*, L. R., C. C. R. 31; 35 L. J., M. C. 171.
(*g*) 2 Hale, 173; 1 Chit. Crim. Law, 1st ed. 254; and *post*.
(*h*) 7 & 8 Geo. 4, c. 28, s. 6.
(*i*) 8 C. & P. 776.
(*k*) See 1 East's P. C. 409, *et seq.*
(*l*) *Reg.* v. *Ferguson*, Dears. C. C. 427; 24 L. J., M. C. 61.

Joinder of Counts.

ment in different ways, to meet the several aspects which it is apprehended the case may assume in evidence, or in which it may be regarded in point of law by the court, in order to satisfy that rule; *e. g.*, where it is doubted whether the goods stolen or the house in which a larceny was committed belong to or is occupied by A. or B., one count may state the goods, &c., as A.'s, and a second as B.'s (*m*); though the powers of amendment now conferred by statute may in many cases obviate the necessity in this particular instance.

Where offences distinct.

For if before the accused has pleaded, or the jury is charged with him, it is objected that an indictment for *felony* actually embraces charges of offences essentially distinct, *e. g.*, stealing and receiving stolen goods, the property of the same person, at different times exceeding three in number, the court might, in its discretion, quash the indictment (*n*); but, since 34 & 35 Vict. c. 112, s. 19, is not likely to do so in the case of receivers, if the receiving is charged within twelve months; they will also quash it, even after the jury has been so charged, if it appears clear that from legal defect the indictment cannot be sustained in arrest of judgment (*o*).

Prosecutor called upon to elect upon which charge he will proceed.

If such joinder is only discovered after the jury is so charged, the court may, in its discretion, compel the prosecutor to elect on which charge he will proceed (*p*); but in misdemeanours the practice of quashing on account of the invalidity of the indictment, or of putting the prosecutor to elect, never seems to have existed (*q*). This is, however, now to be taken subject to the 24 & 25 Vict. c. 96, s. 5, by which it is lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing not exceeding three which may have been committed by him *against the same person* within the space of six months from the first to the last of such acts *and to proceed* thereon for all or any of them. Months in the above statute mean calendar months (*r*).

In larcenies.

The ordinary course is to charge in the indictment that the three larcenies charged had been committed within the six months; but it is no objection either on motion to quash or in arrest of judgment or demurrer that such allegation is omitted, because there is no objection in point of law to putting several felonies in one indictment, though it is in the discretion of the judge to prevent a person being tried for several offences at one time (*s*).

In embezzlements.

The duty to elect is also subject to sect. 71 of the same act, which makes it lawful to charge in the indictment *and proceed* against the offender for

(*m*) *R.* v. *Thompson*, 2 East, P. C. 515.
(*n*) *Reg.* v. *Wilson and others*, 6 Q. B. 620; 14 L. J., M. C. 3; *Young* v. *Rex* (in error), 3 T. R. 106; 1 Leach, 1105; *R.* v. *Dunn et al.*, 1 Ry. & M. N. P. C. 146; 1 Ch. Cr. L., 1st ed. 303.
(*o*) *R.* v. *Hayes*, 2 Moo. & R. 196; *Young* v. *Rex* (in error), *ubi sup.*
(*p*) *Young and others* v. *Rex*, 3 T. R. 106; Chitt. Cr. Pl. 254; *Reg.* v. *Holman*, L. & C. 177.
(*q*) Chitt. Cr. Pl. 254.
(*r*) 13 & 14 Vict. c. 21, s. 41.
(*s*) *Reg.* v. *Heywood*, 33 L. J., M. C. 133; L. & C. 457.

Obligation to elect on which Charge to proceed.

any number of distinct acts of embezzlement or of fraudulent application or disposition not exceeding three, which may have been committed by him against the same master or employer within the space of six months from the first to the last of such acts.

In charges of stealing and receiving.

By sect. 92 of the same act (*o*), by which in any indictment containing a charge of feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same or any part or parts thereof knowing the same to have been stolen, and in any indictment for feloniously receiving any property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same: and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election; but it shall be lawful for the jury who shall try the same to find a verdict of guilty either of stealing the property or of receiving the same or any part or parts thereof knowing the same to have been stolen, and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving the same or any part or parts thereof knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same, or any part or parts thereof, knowing the same to have been stolen.

Accessories before and at the fact and the receiver.

An accessory before the fact can now, as formerly an accessory at the fact could, be indicted and tried in all respects as a principal felon (*p*), and there is no inconsistency in the same person being found guilty as an accessory before the fact, and of being a receiver of the stolen goods (*q*). There is no objection therefore to indicting the receiver and the thief together as principals in one count for the larcenies, and in another as receivers, and thereupon a verdict of acquittal may stand as to the thief, and a general verdict of guilty as to the receiver (*r*); but where the evidence to prove the receiving shows circumstances which makes the prisoner an accessory at the larceny, that is, a principal thief in the second degree, the prisoner cannot be convicted of receiving, which must be an independent act beyond the stealing (*s*). And even where a person was charged in the first count of an indictment with stealing certain goods, and in the second count with receiving the same so as aforesaid feloniously stolen, knowing them to have been stolen, and he was acquitted upon the first count and found guilty

(*o*) 24 & 25 Vict. c. 96.
(*p*) 24 & 25 Vict. c. 94, s. 1; *Reg.* v. *Hughes*, 29 L. J., M. C. 71; Bell, C. C. 242.
(*q*) *Reg.* v. *Hughes*, *ibid.*
(*r*) *Ibid.*
(*s*) *Reg.* v. *Perkins*, 2 Den. C. C. 459; 21 L. J., M. C. 152.

upon the second, the averment implied from the words so as aforesaid feloniously stolen, that the goods were stolen by him, was rejected as irrelevant, and the conviction was held good (*t*). So if in felony, charges requiring an essentially different state of facts to support them, though *referring* to the same transaction, be joined, the court will, in general, compel the prosecutor to make similar election (*u*); but where the joinder is in respect of a count of robbing with a count for assaulting with intent to rob, an election would now hardly be required since the 24 & 25 Vict. c. 96, s. 41, *post*, p. 141.

Rule as to Election.

Election in cases of felony.

But in cases of *misdemeanour* the discretion of the court is otherwise exercised; for although, in such cases, different counts may be introduced applicable to the same facts as in case of felony, no objection can be made in any way even to the joinder of counts applicable to different *facts*, so that the legal character of the substantive offences charged be the same though the judgment differ (*v*). Thus it is the constant practice to receive evidence of several assaults or libels on the several counts of the same indictment; and, on the other hand, an indictment for an assault by one or more *on several* is valid, though an award of a joint fine would be bad and the parties assaulted could not join in an action, when each person injured is to recover separate damages (*x*). So an assault with intent to ravish may be charged with a common assault,—a count for assaulting a peace officer in the execution of his duty with a common assault (*y*),—conspiracy with false pretences, false pretences and forgery at common law (*z*).

Election in misdemeanours.

In applying the rule that the proof should correspond with the allegation, it must be borne in mind that the higher charge includes the less, and therefore the indictment should charge the highest offence which the evidence will sustain; and thus parties indicted for murder may be found guilty of manslaughter, and if indicted for burglary with a charge of larceny in the burglary count, may be convicted of stealing in a dwelling-house or from the person, or of simple larceny, according to the proof; or if indicted for larceny as a servant, may be convicted of simple larceny; or if for larceny in a dwelling-house to the value of 5*l.*, in the same manner of simple larceny; or upon an indictment for an assault occasioning actual bodily harm

The degree of offence to be charged.

The greater includes the less.

(*t*) *Reg.* v *Huntley*, Bell, C. C. 238; 29 L. J., M. C. 70.

(*u*) *R.* v. *Gough*, 1 M. & Rob. 71.

(*v*) Per Lord *Ellenborough*, in *R.* v. *Jones*, 2 Campb. 132. So conspiracy, and charges of other misdemeanours, may be joined; *R.* v. *Johnson*, 3 M. & S. 539.

(*x*) *Dictum* of Lord *Mansfield* in *R.* v. *Benfield and Saunders*, 2 Burr. R. 980, 984; 2 Hawk. ch. 25, s. 80, denying *R.* v. *Clendon*, Strange, 870; Lord Ray. 1572. *R.* v. *Benfield and Saunders*, an indictment against two for libel on two, held good.

(*y*) *R.* v. *Finucane and another*, per *Parke*, J., 5 C. & P. 551.

(*z*) *R.* v. *Collier*, 5 C. & P. 160; *Reg.* v. *Moah*, D. & B. 550; 27 L. J., M. C. 204.

A greater Offence charged includes a less.

under the 47th section of 24 & 25 Vict. c. 100, of a common assault (*a*); or for unlawful and malicious wounding, of a common assault (*b*); or for an indictment for stabbing, cutting and wounding with intent to maim or to disable or to do some grievous bodily harm, of a common assault (*c*). And upon an indictment for assaulting and carnally knowing and abusing a girl between the age of ten and twelve years, of a common assault (*d*); or upon an indictment for rape, of a common assault (*e*). But where it may be doubtful whether the aggravation of an offence will be proved, it is always well to insert a count without them, on which without difficulty a verdict may be taken.

The necessity for accuracy in determining whether the charge should be of the graver or lighter class of offence is not now so great as formerly, when, if the indictment charged the full offence and the evidence showed only an attempt to commit it, or if a misdemeanour was charged and a felony proved, the prisoner was entitled to his acquittal (*f*); for now by the 14 & 15 Vict. c. 100, s. 9, if, on the trial of any person charged with any felony or misdemeanour it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same. And by sect. 12 of the same act, "if upon the trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts unless the court before which such trial may be had shall think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony—in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour;" and again, by 24 & 25 Vict. c. 96, s. 88, if upon the trial of any person indicted for the misdemeanour of obtaining money, &c., by false pretences "it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not

On charge of felony or misdemeanour, conviction may be had of attempt.

On misdemeanour no acquittal if felony proved.

In false pretences no acquittal if larceny proved.

(*a*) *Reg.* v. *Oliver*, Bell, C. C. 287; 30 L. J., M. C. 12; *Reg.* v. *Yeadon*, 31 L. J., M. C. 70; L. & C. 81.
(*b*) *Reg.* v. *Taylor*, L. R., 1 C. C. R. 194; 38 L. J., M. C. 106.
(*c*) *Reg.* v. *Walker*, 2 Moo. & R. 646; *Reg.* v. *Stanton*, 5 Cox, 324.
(*d*) *Reg.* v. *Guthrie*, L. R., 1 C. C. R. 241; 39 L. J., M. C. 95.
(*e*) *Re Thompson*, 6 H. & N. 193; 30 L. J., M. C. 19; *Wilkinson* v. *Dutton*, 3 B. & S. 821; 32 L. J., M. C. 152.
(*f*) 2 Hale, 171; *R.* v. *Harmwood*, 1 East, P. C. 411.

Proof differing from Allegation.

by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for larceny upon the same facts." And again, if upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted; but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob: and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he is tried (*g*).

In robbery conviction may be of assault with intent to rob.

So, by sect. 72 (*h*), if upon the trial of any person indicted for embezzlement or fraudulent application or disposition as aforesaid, it shall be proved that he took *the property in question* in any such manner as to amount in law to larceny he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement or fraudulent application or disposition, but is guilty of simple larceny; or of larceny as a clerk, servant or person employed for the purpose, or in the capacity of a clerk or servant, or as a person employed in the public service, or in police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement or fraudulent application or disposition as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement or fraudulent application or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition or larceny as aforesaid shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition or embezzlement upon the same facts.

In embezzlement conviction may be of larceny, or larceny as a clerk or servant, &c.

In larceny conviction may be of embezzlement.

It is required under this section that the property in question in the indictment must be taken in such manner as to prove a larceny instead of an embezzlement, or vice versâ, to justify

(*g*) 24 & 25 Vict. c. 96, s. 41.
(*h*) 24 & 25 Vict. c. 96.

Embezzlement proved to be Larceny, and vice versâ.

the verdict of guilty of larceny on the indictment for embezzlement and vice versâ; therefore it would seem not to reach a case where a servant, such as a foreman of a flour mill, employed to sell flour on credit or for ready money, who disposes of flour and conceals the transaction from his employer, receives the price from the purchaser and puts the money into his own pocket, and is afterwards indicted for larceny of the flour, inasmuch as his offence is embezzlement of the money and not larceny of the flour. In such a case he still would be entitled to be acquitted on such indictment, as there is neither larceny nor embezzlement of the flour (*c*).

Where upon an indictment for larceny embezzlement of the property in question is proved, the verdict must be not guilty of the larceny but guilty of embezzlement; and it will not do for the jury to find a verdict of guilty upon the indictment (*d*).

In felonious poisoning, &c. conviction may be of misdemeanour, poisoning, &c. with intent to injure only.

And again, by 24 & 25 Vict. c. 100, s. 25, if upon the trial of any person for the felony of administering poison or other destructive or noxious thing so as thereby to endanger life, or so as thereby to inflict upon such person any grievous bodily harm, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of the misdemeanor of administering poison or other destructive or noxious thing with intent to injure, aggrieve or annoy such person, then and in every such case the jury may acquit the accused of such felony and find him guilty of such misdemeanour; and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanour.

Preferring second indictments.

If, however, a bill is thrown out, or if a party is acquitted on a charge of felony, merely on the ground that the proof establishes an act short of the felony *charged* (not being an indictment for robbery upon which it appears to the jury that the defendant did not commit the robbery, but did assault with intent to rob, in which case the latter verdict may be returned (*e*), or an indictment for a felony or misdemeanour where an attempt to commit is proved, or a felonious poisoning and a misdemeanour of the same nature is proved, or in any other like cases met by statute, as above mentioned), he may be again indicted for it, if it amounts to a misdemeanour, or for felony, if the crime is in fact another kind of felony (*f*); and in these cases the court will order him to be detained, in order to give an opportunity for preferring a better indictment to

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(*c*) See *Reg.* v. *Betts*, Bell, C. C. 90; 28 L. J., M. C. 69.
(*d*) *Reg.* v. *Gorbutt*, D. & B. 166; 25 L. J., M. C. 47.
(*e*) 24 & 25 Vict. c. 96, s. 41.
(*f*) *E. g.*, if first indictment be for mere burglary, with intent to steal, and fails, a second may be for the larceny though committed at same time: for they are several offences, as burglary may be when there is no larceny, and *vice versâ;* so a man acquitted of stealing a horse has been arraigned and convicted of stealing the saddle, though both were done at the same time; 2 Hale, P. C. 244—246.

Preferring a second Indictment.

a subsequent grand jury (*g*). This is often the only course to effect the ends of justice: *e. g.*, in a case where, from the uncertainty of being able to prove the false pretences, so as to take advantage of 24 & 25 Vict. c. 96, s. 88, the prosecution is for larceny, and fails on the ground that the money, &c. was obtained under a particular false pretence first sworn to by the prosecutor at the trial, or by a conspiracy to defraud him; and the like is the case where the indictment be for false pretences, the proof of which fails, but a conspiracy to defraud appears.

Before preferring a second indictment after an acquittal of the prisoner on the first, the proper course is to take the party again before a magistrate, who will hear the witnesses again, and bind them over to appear at the next sessions, where a fresh bill may be preferred to the grand jury (*h*).

Allegations unnecessary to be proved.

Though an indictment, according to Lord *Hale*, should be "a plain, brief and certain narrative of an offence committed by some person, and of the necessary circumstances that concur to ascertain the fact and its nature," it is extremely difficult to trace anything like principle in the application of this rule; for though we find it laid down, generally, that the charge must be certain and definite in allegation, in order that the party charged may know the particulars of the accusation which he is called on to answer (*i*), yet formerly many allegations were required on this ground which might be wholly untrue in fact. For instance, it was necessary to allege in the body that every material fact occurred at a certain time and place (*k*), in order, as it was said, to show that the grand jury had jurisdiction to find the bill, and that it might be known whence the petty jury are to come who are to try it; yet, at the trial, the fact may be shown to have occurred at any other time whatever, or (except in cases where local description is requisite) at any other place within the jurisdiction of the court; besides that since 6 Geo. 4, c. 50, s. 12, the jury is no longer of the *visne*. Again, it was necessary to allege the number, quantity and value of articles stolen or embezzled; and yet it was quite immaterial whether in these respects the proof corresponded with the allegation (*l*); and now by the 14 & 15 Vict. c. 100, s. 24, it is enacted, that "No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears upon the record," or of the words "with force and arms," or of the words "against the

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(*g*) See *ante*, p. 127; 4 Bla. C. 305; Bac. Abr. *tit. Indictment* (D. 2). As to *auterfois acquit*, see *post*.

(*h*) 4 Bla. C. 305. See *post*,

(*i*) *Reg.* v. *Rowed*, 3 Q. B. R. 180.

(*k*) *Reg.* v. *O'Connor*, *post*. If place is omitted, the indictment is bad in arrest of judgment, notwithstanding 7 Geo. 4, c. 64, s. 20.

(*l*) If an indictment charges the stealing of *nine* books, proof of stealing *one* is sufficient for conviction; per Lord *Ellenborough*, *R.* v. *Johnson*, 3 M. & S. 548.

Defects in indictment cured by statute.

peace," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes" (*m*), or *vice versâ*, nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper perfect venue, nor for want of a proper or formal conclusion, nor for want of imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing or the amount of damage, injury or spoil in any case where the value or price or the amount of damage, injury or spoil is not of the essence of the offence. And, indeed, prior to this such apparent defects had been cured after verdict or judgment, after plea or otherwise, by 7 Geo. 4, c. 64, s. 20; see *post*, "Judgment." The want of a similiter is cured also after verdict by 7 Geo. 4, c. 64, s. 21.

Further rules for framing indictments.

It is almost as difficult to lay down any general rules applicable to the framing of indictments as to extract anything like principle from the decisions respecting it. The best rules that can be given are that in addition to the rule which we have already discussed, viz., that the charge should as nearly correspond with the intended proofs in all respects as possible; secondly, that where the means of committing the offence are of the essence of the charge, as in obtaining money by false pretences, those means should be specified truly (*n*); thirdly, that where the law has applied particular terms of art to the description of a crime (as "*feloniously*" (*o*), "*wilfully*" (*p*), "*of malice aforethought*," "*burglariously*" (*q*), &c.) they should be carefully inserted, as it is not sufficient to use equivalent expressions; fourthly, that where an indictment is founded (*r*) on a statute, the language of the statute should be accurately followed (*s*), and the offence stated to be "contrary to the form of the statute in such case made and provided" (*t*); fifthly,

Statement of the means.

Words of art.

(*m*) This provision does not cure the want of these words or either of them in an indictment for an offence created by statute, *e. g.*, stealing a bank note. *R.* v. *Pearson*, 1 Moo. C. C. 313; *R.* v. *Radcliffe*, 2 id. 68, decided upon similar words in 7 Geo. 4, c. 64, s. 20.

(*n*) *R.* v. *Mason*, 2 T. R. 581. See *Reg.* v. *Goldsmith*, 42 L. J., M. C. 94; L. R., 2 C. C. R. 74; see *Reg.* v. *Nott*, 12 L. J., M. C. 143, per *Williams*, J.

(*o*) *Reg.* v. *Gray*, L. & C. 365; 33 L. J., M. C. 78.

(*p*) *R.* v. *Davis*, 2 Lea. 556.

(*q*) *Holford* v. *Bailey*, 13 Q. B. 446; 9 Co. 66; see *Reg.* v. *Gray*, 32 L. J., M. C. 78.

(*r*) Fost. Cr. L. 423, 424.

(*s*) *R.* v. *Davis*, 2 Lea. 556.

(*t*) If the offence is indictable at common law, this conclusion will not hurt, and may be rejected as surplusage.

that all inconsistency and repugnancy should be avoided; for although an averment which is altogether superfluous may be rejected as surplusage, for *utile per inutile non vitiatur* (*u*); yet if an averment be part of the description of the offence, or be embodied by reference in such description, it cannot be so rejected, and its introduction will be fatal. It may, however, be observed, in the language of Lord *Ellenborough*, that "except in particular cases where technical expressions are required, there is no rule that other words should be employed than such as are in ordinary use, or that in indictments or other pleadings a different sense is to be put on them than what they bear in ordinary acceptation; and if, where the sense be ambiguous, it is sufficiently marked by the context or other means in what sense they are intended to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words, which is either absolutely inconsistent therewith, or, being apparently so, is not accompanied by anything to explain or define them. If the sense be clear, nice exceptions ought not to be regarded" (*x*): thus the word *until* may be construed to be inclusive or exclusive of the day to which it is applied, according to the context and subject (*y*), and the statement may be either according to the fact, or to the legal operation (*z*).

What Averments material to be proved.

Descriptive averments material.

The words *said*, *aforesaid*, *same*, and *there*, generally refer to the last antecedent, if the matter itself, *viz.* that which makes sense of the indictment, and is its reasonable construction, does not hinder (*a*). The last antecedent, says *Tindal*, C. J., is the last word which can be made an antecedent, so as to have a meaning (*b*), and reference may be so made to a former count (*c*). The words, "the said E. R." in a second count, applying to a person mentioned in the first count, means it to be the same person merely, and does not incorporate the description of the person, as that she was a female child between ten and twelve years of age (*d*). The words "property aforesaid before then feloniously stolen" in a count for receiving, following a count for stealing the same goods, does not include the description of the person by whom they were alleged to be

Words of reference.

(*u*) See *Reg.* v. *Kealey*, 2 Den. C. C. 69; 20 L. J., M. C. 57.

(*x*) See *R.* v. *Stevens and Agnew*, 5 East, 259. Also 1 Chit. C. L. 173. Lord *Hale* inveighs against these "unseemly niceties," 2 Hale's P. C. 193.

(*y*) *R.* v. *Stevens*, 5 East, 244.

(*z*) Thus, under the repealed act 3 & 4 W. & M. c. 9, s. 5, it was held no objection to state that the lodging stolen from was let by the owner's wife, though such a letting was in law a letting by the husband; *R.* v. *Healey*, 1 Moo. C. C. 1.

(*a*) *R.* v. *Wright*, 1 A. & E. 434. See Co. Lit. 20; *R.* v. *Countesthorpe*, 2 B. & Ad. 487; *Spyer* v. *Thelwall*, Tyr. & G. 191; 4 How. St. Tr. 747. See 2 Roll. Ab. *tit. Parols*, E. p. 252, *l.* 12; Com. Dig. *tit. Parols* (A 14).

(*b*) *R.* v. *Wright*, 1 A. & E. 445.

(*c*) *Reg.* v. *Waverton*, 21 L. J., M. C. 7.

(*d*) See *Reg.* v. *Martin*, 9 C. & P. 215.

Words of Reference.

stolen (*e*). And the words "so as aforesaid feloniously stolen," similarly placed, carry no further meaning (*f*); and in such case the words "so as aforesaid" may be rejected as irrelevant (*g*). So a count against a receiver alleged that *Francis Morris* received, and proceeded to allege that the said *Thomas Morris* well knew the same to be stolen, and it was held that the words "the said Thomas Morris" could be rejected (*h*). If the first count *describe the wife of defendant*, and the third mentions "*the said wife*" of defendant, this sufficiently refers to this person mentioned as his wife in the first count (*i*). An indictment will be bad where a relative refers with equal uncertainty to two antecedents (*j*). *Same* is more explicit, and may be said always to apply to the last antecedent, though *said* does not necessarily do so (*k*). "*So as aforesaid*" may be rejected as irrelevant (*l*). "*Then*" (*ad tunc*) means the very time at which the event referred to happened; it therefore involves the same day: and such is the known sense of the word in pleading. But of "*instantly*," the more natural and usual sense is instantly *after;* the pleader may mean five minutes, an hour, some time on the succeeding day, or even a longer time. In precedents the words "*instanter*" and "*incontinenter*" do not dispense with a direct allegation of time (*m*).

Clerical errors.

Though every crime should appear charged on the face of the record with scrupulous certainty (*n*), *i. e.* so as to support itself by its own expressions, yet an omission of a letter, which does not change the word into another of a different meaning, as undertood for understood, receivd for received, depaired of for despaired of, Segrave for Seagrave, &c., would never have avoided an indictment (*o*).

Indictment cured by verdict, when.

Where the offence charged has been created or subjected to greater degree of punishment by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute (*p*). And this has been held to apply where the objection was taken after plea, and before trial or verdict, and the objection overruled and a verdict taken (*q*). Error, however, still lies, if the indictment, though following the words of the statute, is bad by the general rules of law and not merely defective in such a manner as that the

(*e*) *Reg.* v. *Hughes*, Bell, C. C. 242; 29 L. J., M. C. 71.
(*f*) *Reg.* v. *Huntley*, Bell, C. C. 238; 29 L. J., M. C. 70; *Reg.* v. *Craddock*, 2 Den. C. C. 31.
(*g*) *Ibid.*
(*h*) *R.* v. *Morris*, 1 Lea. 127; *Reg.* v. *Crispin*, 11 Q. B. 913; *post*, pp. 147, 155.
(*i*) *Reg.* v. *Dent*, C. & K. 249.
(*j*) *R.* v. *Graham*, 1 Lea. C. C. 87; *Ogle's case*, 2 Hale, P. C. 186.
(*k*) Per Powell, J., *Reg.* v. *Rhodes*, 2 Lord Raym. 888.
(*l*) *Reg.* v. *Huntley*, Bell, C. C. 238; 29 L. J., M. C. 70.
(*m*) Per cur., *Reg.* v. *Brownlow*, 11 A. & E. 119.
(*n*) 1 Chit. Cr. L. 172, 1st edit.
(*o*) *Beech's case*, 1 Lea. C. C. 133; *R.* v. *Hart*, *id.* 145.
(*p*) 7 Geo. 4, c. 64, s. 21.
(*q*) *Reg.* v. *Goldsmith*, 42 L. J., M. C. 94; L. R., 2 C. C. R. 74.

issue found upon it required such proof at the trial as that the verdict must be taken to have cured it (*r*). For there are many cases in which, if the statutory form of words was followed, no offence would be charged, *e.g.*, if an indictment charged a man with destroying his own will, contrary to 24 & 25 Vict. c. 96, s. 29, or with taking his own pigeons or house doves contrary to sect. 23 of the same act (*s*), or with killing "cattle" without adding what sort (*t*). Terms of the same legal import as those used in the statute seem to suffice (*u*). Indictment following words of statute.

Whatever may have been intended by these provisions, they appear not to apply to any objection which, before they were enacted, might be taken at the trial or raised on demurrer; but merely to objections made *in stay or reversal of judgment*. In practice, therefore, it would not be safe to act on them in framing indictments; the requisites of which must be considered as before, though the above sections may be useful in preventing objections made *after* verdict, *viz.*, in arrest of judgment (*x*).

Words merely tautologous will be rejected if the indictment is in other respects good in itself (*y*); and an indictment which is bad, from its sense being obstructed by particular words, may be made good by rejecting them as insensible and useless (*z*). Tautology.

The indictment will be good, though after the words "in manner and form following," "that is to say," or, "as follow, that is to say," an instrument be not recited verbatim (*a*), if its effect only is intended to be set out, for then the substance is sufficient (*b*).

"Until" will be construed either inclusive or exclusive of the day to which it is applied, according to the context and subject-matter (*c*).

Where an act is in itself unlawful, allegation of evil intent is

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(*r*) *Reg.* v. *Martin*, 8 A. & E. 481; and see the cases on the Polish notes, *R.* v. *Moses*, *&c.*, 7 C. & P. 416—429; 1 Moo. C. C. 466—470; and per *Coleridge*, J., in *Reg.* v. *Nott*, 12 L. J., M. C. 143.

(*s*) See per Lord *Denman*, 8 A. & E. 486; *Reg.* v. *Norton*, 8 C. & P. 196.

(*t*) *R.* v. *Chalkley*, R. & R. 258. See *post*, on "False Pretences." Another instance in which it will not suffice to lay the offence charged in the words of the act which creates it, is that of a woman who endeavours to conceal the birth of her child by "disposing" of its body otherwise than by "secret burying" it; in which case, the way how it was "disposed of" must be stated. *Reg.* v. *Hounsell*, 2 Moo. & R. 292, *Maule*, J. So "entering land by night for the purpose of destroying game," is not completely laid without adding "there," though that word is not in the act. *Fletcher* v. *Calthorp*, 6 Q. B. 880; 11 L. J., M. C. 49; but this case has been reflected upon in *Cureton* v. *Reg.*, 1 B. & S. 208, 216.

(*u*) *R.* v. *Grevil*, 1 Anderson's Rep. 195. See Index, *tit.* "Accessory."

(*x*) But see the course pursued in *Reg.* v. *Goldsmith*, L. R., 2 C. C. R. 74; 42 L. J., M. C. 94.

(*y*) *R.* v. *Morris*, 1 Lea. 109; *Reg.* v. *Crispin*, 11 Q. B. 913; see *ante*, p. 146, *post*, p. 155.

(*z*) *R.* v. *Redmond*, 1 Lea. 477.

(*a*) *R.* v. *May*, 1 Lea. 192; *R.* v. *Hart*, *id.* 145; 2 East, P. C. 978; Doug. 193; Cowp. 229.

(*b*) *Cureton* v. *Reg.*, 1 B. & S. 208; 30 L. J., M. C. 149.

(*c*) *R.* v. *Stevens*, 5 East, 244.

Allegation of Intent.

matter of form not necessary to be proved by extrinsic evidence. But if an evil intent accompanying a particular act is necessary to constitute that act a crime, the intent must be laid in the indictment, and proved; but it is sufficient to allege it in the prefatory part (*d*).

Parts of the indictment.

The chief points common to all indictments are,

1. The commencement (*i. e.*, the venue, and presentment of grand jury);
2. The description of the accused (*i. e.*, name, addition, mystery, &c.);
3. The statement of the time when the offence was committed;
4. The statement of the place where the offence was committed;
5. The description of the person against whom or whose property the offence was committed;
6. The statement of the offence itself;
7. The statement of the means by which the offence was committed;
8. The conclusion.

Venue.

1. An indictment, as we have seen already, commences thus:—"*Herefordshire (to wit).—The jurors for our Lady the Queen upon their oath present that*"—

The *venue*, that is, the county, borough and county of a corporate city or town, or other borough or place where the indictment is found, and for which the sessions are holden, and over which the court has jurisdiction, as considered in the last chapter, is expressed in the margin. Stat. 7 & 8 Vict. c. 61, s. 4, provides against *any judicial proceeding* being invalidated by any error in stating the name of a county to which a detached part of it annexed by that act to another county originally belonged, instead of the county to which it would belong under that act or conversely. The omission of the words *to wit*, though unusual, seems immaterial (*e*). It was also proper to allege, in the body of the indictment, that every fact material to the charge took place, not only in the county or borough in which the indictment is preferred, i. e., that laid in the margin, (which may suffice, if the offence is not one in which local description is of the essence of the charge (*f*),) but also at some specific parish, hamlet, town, vill, or place within that county or borough, from which parish, &c. before 6 Geo. 4, c. 50, s. 12, a jury of the visne or neighbourhood might have come (*g*). For if *all* allegation of place was omitted there, and no special reference to the county or borough, &c. in the margin made, the indictment was formerly bad on

Detached part of county.

(*d*) *R.* v. *Phillips*, 6 East, 464.
(*e*) See the precedent of a caption in 2 Hale, 166.
(*f*) *Post*, pp. 153, 154.
(*g*) See *post*, *ibid.*

demurrer, and also in arrest of judgment, notwithstanding 7 Geo. 4, c. 64, s. 20; for that act by the words "want of a *proper* or *perfect* venue" did not intend to cure defects of venue, unless the jurisdiction in respect of locality of the court in which the indictment is found, is made to appear in the body of it. The allegation that facts material to the charge occurred in a particular county, was held necessary as not only that which authorizes the grand jury to entertain the bill, but was also the warrant for the sheriff to summon the petty jury who must pass between the crown and the prisoner (*h*): but now, by 14 & 15 Vict. c. 100, s. 23, it is not necessary to state any venue in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof, shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue (*i*). *Venue.*

The names of the grand jurors who find the bill do not appear in the indictment itself; but when it is removed by *certiorari*, they appear in the caption (*j*).

2. The usual mode of describing the defendant is thus:— "*A. B. late of the parish of* ——— *in the county of* ———, *labourer.*" Description of accused.

The christian and surname of the defendant, if known, should be stated with correctness (*k*); except in an indictment against the inhabitants of a county or parish, who may be so described without naming any of them (*l*). But if the name of a prisoner is unknown, and he refuses to disclose it, an indictment may be sustained against him as "a person whose name is to the jurors unknown, but who is personally brought before the said jurors by ———, the keeper of the prison of ———" (*m*). A man cannot be indicted with an *alias dictus* of the christian name, as "*John*, otherwise *Robert*," though to an alias of the surname there is no objection (*n*). If he has more than one christian

(*h*) *Reg.* v. *O'Connor*, 13 L. J., M. C. 33, 36; 1 Hale, 652; 2 Hale, 166; Cro. El. 101, 606, 751; 2 Hawk. c. 25, s. 34, p. 128.

(*i*) See further as to venue, *ante*, pp. 121 *et seq.*

(*j*) So stated to the court by the officers of Q. B.; *R.* v. *Marsh*, 6 A. & E. 240. See *ante*, p. 25, and *post*, "Of Certiorari."

(*k*) See *R.* v. *Morris*, 1 Lea. 127; *Reg.* v. *Crispin*, 11 Q. B. 913; *ante*, p. 146, *post*, p. 155.

(*l*) Hawk. b. 2, c. 25, s. 68; see *post*.

(*m*) *R.* v. ——, R. & Ry. 489.

(*n*) 1 Ld. Raym. 562, surnames being originally acquired by assumption. See cases collected, 5 B. & A. 552.

Description of the Defendant.

name given him in baptism, as John Thomas, they are considered in law as forming one christian name, and should be set out correctly in their order (*o*). The proper name of a bastard is that he has gained by reputation and not his mother's name, unless so gained (*p*); but any misnomer can only be taken advantage of by a plea in abatement, when it may be amended forthwith according to the truth (*q*).

Additions to the defendant's name practically obsolete.

To prevent the inconvenience of troubling one person for another, it was enacted by the statute of additions (*r*), that in all indictments on which process of outlawry lies, additions shall be made to the *defendants'* names, of their state or degree, or mystery, and of the towns or hamlets, or places, and the counties of the which they be or were or be or were conversant; but this statute though not expressly repealed is practically obsolete since the stat. 7 Geo. 4, c. 64, s. 19 (*post*, p. 190), which enables the court to amend the indictment according to the truth upon a plea in abatement, and the 14 & 15 Vict. c. 100, s. 24, which provides that no indictment shall be insufficient for the want of or imperfection in the addition of any defendant.

Gentleman, and esquire, were good additions under that statute for the estate and degree of a man, gentlewoman for that of a woman, clerk for a clergyman, or graduate at Oxford or Cambridge; yeoman was a good addition for the estate and degree of a person having freehold land of 40*s.* a year (*s*); and labourer for that of a man; but neither yeoman or labourer were good additions for that of a woman; and widow, single-woman, wife of ——— and spinster, were good additions of the estate and degree of a woman; but burgess, and citizen, and servant, are all of them too general, and therefore not good additions of the estate or degree either of a man or woman (*t*).

In indictments against the greater nobility—that is, says Lord Coke, dukes, marquises, earls, viscounts, and barons, being dukes, &c. of particular counties or places, the estate and degree is named first, and afterwards the town or county—thus, *Edward, Duke of Buckingham, late of N. in the county of G.*—omitting the family surname of the accused—but if stated it does not vitiate (*u*); and so it is when one is named of a city which is a county of itself, *I. S. pannarius de London in com. civitatis London.* But in case of the lesser nobility, as bannerets, baronets, and knights, and all under them, the town and county are named before the addition, thus, "A. B. of ——— in the county of ——— knight." Garter, principal

(*o*) *Jones* v. *Macquillin*, 5 T. R. 195.
(*p*) *R.* v. *Clark*, R. & Ry. 358.
(*q*) 7 Geo. 4, c. 64, s. 19, *post*, p. 191.
(*r*) 1 Hen. 5, c. 5, A.D. 1413.
(*s*) 1 Bla. C. 406.
(*t*) Hawk. b. 2, c. 23, s. 111; 2 Inst. 668; 2 Hale, P. C. 176; Ld. Raym. 1179; *R.* v. *Checketts*, 6 M. & S. 38.
(*u*) See as to description of a peer being the party injured, *post*, p. 155.

king at arms, and clarencieux, being titles conferred by the crown, are not additions, but parts of the name which should follow it (*x*). Foreign dignities give no man here higher title than that of esquire, unless the possessors be lords or knights here, in which case they should be described accordingly (*y*). A variance in stating marquis for earl, or knight for baronet, was formerly fatal, for the dignity is not merely an addition, but being the very appellation by which the party is commonly known, becomes on that account actually part of his name (*z*).

Description of Defendant.

The word *mystery* includes all lawful arts, trades, and occupations; and if one, under the degree of a gentleman, has divers of such arts, trades, or occupations, he may be named by any of them (*a*).

With respect to residence, it is a good addition of this kind to name the party *late* of a parish named (*b*), in which respect this addition differs from that of the *estate*, *degree* or *mystery*.

Addition of town, hamlet, county or place of residence of defendant.

3. The time when the offence is alleged to have been committed is usually stated thus:—"*On the —— day of June in the —— year of our Lord.*" The day of the month and the year when the offence was committed is stated, in order that the party may be able to defend himself against a second charge for the like offence (*c*); though it is not necessary to sustain the precise allegation in proof, in any case where time is not of the essence of the offence (*d*); but it is material to show that the prosecution was commenced in due time, where it is enacted that it shall be commenced within a particular time (*e*). It is not, however, necessary to allege *time* to any charge of mere negation or omission (*f*). Formerly, if in an indictment the offence was laid on an uncertain or impossible day, or on a future day, or on different days, or on such a day as rendered the indictment repugnant to itself, the objection was fatal, either on demurrer or in arrest of judgment even after verdict; and though such objection has long since been cured by verdict (*g*), it was still open to the defendant to raise it before plea by way of demurrer, or on motion to quash the indictment until such objection was made no longer available by 14 & 15 Vict. c. 100, s. 24. If time is material to constitute a statutable offence, the time stated in the indictment will on motion in arrest of judgment be taken as the true time. Thus, where

Statement of time.

(*x*) *Holt* v. *Ward*, 2 Stra. 850; *Dethick's case*, Cro. El. 542.
(*y*) 2 Inst. 665, 667, 669.
(*z*) 2 Hawk. c. 25, ss. 71, 72.
(*a*) 2 Inst. 668.
(*b*) *Ibid.* 669.
(*c*) *R.* v. *Catherall*, Stra. 900.
(*d*) 14 & 15 Vict. c. 100, s. 24, *ante*, p. 143.
(*e*) *E.g.* prosecutions under the Prison Act, 1865 (28 & 29 Vict. c. 126, s. 50); or for game offences under 9 Geo. 4, c. 69, s. 4. See *R.* v. *Willace*, 1 East, P. C. 186; 1 Ld. Raym. 582; 10 Mod. 248.
(*f*) *R.* v. *Holland*, 5 T. R. 616.
(*g*) 7 Geo. 4, c. 64, s. 20.

Allegation of Time.

it was made a statutory misdemeanour to exhibit lights to persons at sea "between September and April," an allegation that the defendant exhibited lights *on the 9th March*, was held sufficient without specifically averring that he did so, "*between* September and April" (*g*); and if the dates are material, but are laid under a videlicet, it will be taken after verdict that they were proved as laid (*h*). It seems that where an offence is laid as contrary to the form of a statute, it is not necessary to state it to have been committed "after the passing of the act," though it took place very recently before, if the time when it took place is laid and proved to be after the act passed (*i*). If, in point of fact, an offence is committed after a day fixed by a statute, as that on and after which an offence may be laid and tried as if committed in the county in which the offender is apprehended, and the statute does not vary the nature and character of the offence, the having laid the day in the indictment before the day fixed by the statute will not vitiate (*k*). In criminal pleading the word "*being*" (*existens*) will, unless necessarily connected with some other matter (*e. g.*, by the word *then*) relate to the time of the indictment rather than of the offence (*l*).

In burglary.

It is not necessary to state the hour of committing the offence, except where its indictable nature or character is made by statute to depend on the hour of its being committed. Thus, as burglary must be committed in the night-time and could not be committed in twilight, it was held necessary in cases of that offence to allege a certain hour in the night at which it was committed, in order that the fact might appear on the face of the indictment to have been done after the twilight of the evening, and before that of the morning (*m*). To put an end to this technical difficulty, it was provided (*n*), that so far as the same is essential to the offence of burglary, the night shall be considered to commence at nine of the clock in the evening of each day, and to conclude at six of the clock on the morning of the next succeeding day. This enactment has now been repealed, and whether it is re-enacted or not must depend upon the 24 & 25 Vict. c. 96, which fixes the same hours to be deemed to be night for the purposes of that act (sect. 1). And by a subsequent section the punishment for burglary is fixed (sect. 52), but in no other way does the act touch the offence of burglary. In indictments on the above enactment the offence should still be stated as committed on or about some hour certain between the above hours,

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(*g*) 6 Geo. 4, c. 104, s. 52; *R.* v. *Brown*, M. & M. 163. See note to *Harding* v. *Stokes*, Tyr. & Gr. 605.

(*h*) *Reg.* v. *Scott*, D. & B. 47; 25 L. J., M. C. 128; *Ryalls* v. *Reg.*, 11 Q. B. 781; 18 L. J., M. C. 69.

(*i*) See judgment of *Parke*, B., in *Harding* v. *Stokes*, Tyr. & Gr. 605.

(*k*) *R.* v. *Treharne*, 1 Moo. C. C. 298.

(*l*) See 1 Ch. Cr. L. 2nd ed. 220, and *Reg.* v. *Silversides*, 3 Q. B. R. 408.

(*m*) *R.* v. *Waddington*, 2 East, P. C. 513; 1 Hale, 549; 2 Hawk. c. 25, ss. 76, 77.

(*n*) 7 Will. 4 & 1 Vict. c. 86, s. 4.

adding, "in the night of the same day;" though in *Davies and others* v. *The King* (*in error*) (*o*), the court appeared to approve the argument, that in an indictment on 9 Geo. 4, c. 69, s. 9, for unlawfully by night entering, or being armed on any land for the purpose of destroying game, it was unnecessary to mention the hour of the night; that period, as far as relates to the purposes of that act, having been fixed by a separate section (*p*) to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise; but that case turned principally on another ground. *Allegation of Time.*

4. The old formula, in alleging the place where the offence was committed, was:—"*At the parish of* ———, *in the county of* ———" (*q*), or in reference to the previous description of the prisoner, "*at the parish aforesaid, in the county aforesaid.*" If the offence was committed on the boundary or boundaries of two or more counties, or within 500 yards of the boundary, &c. of the county where the indictment is to be tried, or if it was begun in one county and completed in another, it should be laid in the county where the trial is to be, "in the same manner as if it had been actually and wholly completed therein" (*r*); so that if not tried in the county where the fact actually happened, the parish laid may be that in which the prisoner is tried. Description of place.

It is essential to the validity of the indictment where *local description* is of the essence of the offence, to lay every material fact to have taken place at some specific parish or place situate within the county or borough, &c. stated in the margin; as in cases of nuisance to highways, keeping disorderly houses, arson, burglary, housebreaking, stealing in the dwelling-house (*s*), being found by night armed with intent to break into a dwelling-house and to commit a felony therein (*t*); being armed at night in a close for the purpose of killing game, forcible entry, &c. In other offences it will be sufficient to show them to have in fact occurred at any place within the same jurisdiction, though other than that laid; the original reason for this particularity having long since ceased to operate. It was formerly considered desirable that the jury who should try the offence should come from the visne or neighbourhood of the place where it was committed, in order that they might be familiar with the parties and the circumstances; whereas in modern times not only is the venire awarded from the body of the county (*u*), but it is usual cautiously to abstain from swearing jurors who happen to come

(*o*) 10 B. & C. 89.
(*p*) 9 Geo. 4, c. 69, s. 12.
(*q*) The court takes judicial notice that a parish so laid is in England; *Reg.* v. *Sharp and Vaux*, 8 C. & P. 436.
(*r*) 7 Geo. 4, c. 64, s. 12, *ante*.
(*s*) It is enough to lay a house to be in parish of B., though it is divided for *ecclesiastical* purposes into three districts, each called a parish; *Reg.* v *Howell*, 9 C. & P. 437, *Littledale*, J.
(*t*) *Reg.* v. *Jarrald and another*, L. & C. 301; 32 L. J., M. C. 278.
(*u*) 6 Geo. 4, c. 50, s. 13, *ante*, p. 92.

Allegation of Place.

from the neighbourhood of the transaction, lest they should bring local prejudices to the trial of the issue, and decide from other sources than the evidence given on oath. And now, where the offence does not require local description by 14 & 15 Vict. c. 100, s. 23, the venue in the margin is to be taken to be the venue for all the facts stated in the body of the indictment (*x*).

Parish situated in more than one county.

Where a parish is situate in more than one county, it is proper to allege the offence to have been committed "*in that part of the parish of A. which lies in the county of B.;*" but "*in the parish of A., in the county of B.,*" is sufficient (*y*), except in cases requiring local description, as housebreaking (*z*). By 7 & 8 Vict. c. 62, s. 4, no *judicial proceeding* is invalidated by reason of any error in stating the name of the county to which a detached portion [attached to another county by sect. 1] originally belonged, instead of the county to which it will belong under sect. 1; or the converse.

Time and place should be repeated to every material fact, but the words "*then and there*," referring to the last antecedent, will sufficiently express both. Where the circumstances stated in indictments for misdemeanours are merely continuous, as in assaults with aggravation, one mention of time and place as applicable to *all* circumstances will suffice; but this is otherwise in felonies, where distinct and independent circumstances are necessary to the charge (*a*). In cases where time and place are of the essence of the charge, a *scilicet* will not aid a variance in proof.

Description of person against whom the offence is committed.

5. The indictment must be so certain as to the party against whom the offence was committed, as to enable the prisoner to know and understand who that party is, and what charge he is called on to answer (*b*). The property wrongly taken must be laid in some person (*c*); but an indictment for *attempting* to steal "the goods and chattels" of the prosecutor, without specifying or describing them, was held sufficiently certain, and not liable to be quashed (*d*); but an indictment upon the 24 & 25 Vict. c. 96, s. 58, for being by night armed with weapons with intent to break into a dwelling-house and commit a felony therein, must state the ownership of the house, to prevent the prisoner being taken by surprise, for the statute meant to require that the intention should have reference to a particular house (*e*), because it intended to require proof of an intention to break into some particular definite dwelling-house and com-

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(*x*) See the section cited "Venue," *ante*, p. 149.
(*y*) *R.* v. *Perkins*, 4 C. & P. 363.
(*z*) Per *Patteson*, J., *Reg.* v. *Brookes*, 1 C. & M. 543. However, it would then be sufficient to convict on for the *larceny*.
(*a*) 1 Chit. Cr. L. 220, 2nd ed.; 2 Hale, 178; *R.* v. *Cotton*, Cro. El. 738.
(*b*) 2 Curw. Hawk. 319.
(*c*) *Reg.* v. *Marsh*, 1 Den. C. C. 505; 19 L. J., M. C. 12.
(*d*) *Reg.* v. *Johnson*, L. & C. 489; 34 L. J., M. C. 24.
(*e*) *Reg.* v. *Jarrald*, L. & C. 301; 32 L. J., M. C. 258.

Description of Person injured.

mit some definite felony; and proof of a general intention to break into houses is not sufficient. The names of the owner of the property taken or injured being a matter of description must be strictly proved as laid, and there is no obligation in the court to amend under the statute. In describing a peer the christian name when known should be set forth, followed by the style and title, if a peer or peeress (*g*); but the addition of the surname will not render it insufficient (*h*); but if a person has a title of office or dignity, as "His Royal Highness the Duke of Cambridge," and there is a doubt as to the capability of proving his christian names, it is better to leave out the christian names and describe him by his title of dignity only (*i*); but except where the dignity is a necessary part of the description, no addition is requisite, as the statute of additions applies to *defendants* only (*k*). An Irish peer not sitting in the English House of Lords cannot prosecute by his title of dignity, but should be described by his proper name, with addition of degree and title, as James Hamilton, Esq., Earl of Clanbrassil, in that part of the united kingdom called Ireland (*l*). And if a party be so described that he cannot be mistaken, the description will suffice; and therefore an indictment for an assault on "John, parish priest of D.," was held sufficiently certain (*m*); an indictment for larceny, laying the goods stolen as the property of Victory Baroness Turkheim, by which style the prosecutrix was known, was held good, though her real name was Selina Victoire (*n*); and where the prosecutor, a foreigner, was described as Charles Frederick, Duke of Brunswick, that being the title by which he continued to be known, though no longer reigning Duke, it was held good (*o*). So, where an assault was alleged to have been made on *Henry* Bennett, and him the said *William* Bennett to have been wounded, the indictment was held good in arrest of judgment (*p*). The misspelling of a surname, when its usual pronunciation is satisfied by the manner in which it is written in the record, as "Whyneard" for "Winyard," is sufficient (*q*). Where the indictment described the prosecu-

Titled personages.

Misspellings.

(*g*) *R.* v. *Pitts*, 8 C. & P. 771, per *Erskine*, J., after consulting the judges; *Willion* v. *Berkley*, Plowden's R. 223.
(*h*) *Ibid.*
(*i*) *Reg.* v. *Frost*, Dears. C. C. 474; 4 L. J., M. C. 116.
(*k*) 2 Hale, 182. As to stating dignities of parties prosecuted, see *ante*, p. 150.
(*l*) *R.* v. *Graham*, 2 Lea. 549. An Irish peer, who was killed in an affray at Windsor, was thus described in an indictment for manslaughter: *Henry Sandford, Esquire, Baron Mount Sandford*, of C. in that part of the United Kingdom, &c., and it was held good; *R.* v. *Brinklett*, 3 C. & P. 416.
(*m*) Dyer, 285.
(*n*) *R.* v. *Sulls*, 2 Lea. 861.
(*o*) *Reg.* v. *Gregory*, 8 Q. B. 508; 15 L. J., M. C. 38.
(*p*) *Reg.* v. *Crispin*, 11 Q. B. 913; 17 L. J., M. C. 128.
(*q*) *R.* v. *Foster*, R. & Ry. 412.

Description of Person injured.

tor as Darius and the evidence was that his name was Trius, it was held to be a question of fact for the jury, and not of law for the court, whether the two were *idem sonantia* (*r*). A mere statement of the christian name, without further description, where the surname of the party is known, will not suffice (*s*). Where the name and addition of the injured party cannot be ascertained, as where a body of a murdered person is found who cannot be identified, or goods are found on a highwayman, &c., the indictment may allege the party to be "to the jurors *unknown* (*t*). To support the description of "unknown" there must be evidence showing that the name could not reasonably have been supposed to be known to the grand jury (*u*). "Unknown" was held sufficient where there was evidence that the party injured, a bastard child who died at twelve days old unbaptized, had been called by its mother Mary Ann (*v*). The averment that the name was unknown, implies the acquisition of a name, and is not, therefore, applicable to the case of a bastard child which has acquired no name either by reputation or baptism (*x*). A bastard which had never acquired a name is sufficiently identified by showing the name of its parent, thus—"A certain illegitimate male child then lately born of the body of A. B. (the mother)" (*y*). A bastard should not be described by his mother's name till he has acquired it by reputation (*z*). A bastard child, six weeks old, who was baptized on a Sunday, and down to the following Tuesday had been called by its name of baptism and mother's surname, was held by *Erskine*, J., to be properly described by both those names in an indictment for its murder (*a*); but where a bastard was baptized "Eliza," without mentioning any surname at the ceremony, and was afterwards, at three weeks old, suffocated by the prisoner, an indictment, styling it "Eliza *Waters*," that being the mother's surname, was held bad by all the judges, as the deceased had not acquired the name of *Waters* by reputation (*b*). *Semb.* "Eliza" would have sufficed (*c*). In the previous case of *R.* v. *Frances Clark* (*d*), an indictment stated the murder of "*George Lakeman Clark*, a base-born infant male child, aged three weeks,"

Party unknown.

Acquisition of name by reputation.

(*r*) *Reg.* v. *Davis*, 2 Den. C. C. 231; 20 L. J., M. C. 20.
(*s*) Hawk. b. 2, c. 25, s. 72.
(*t*) 2 Hale, 181.
(*u*) *Reg.* v. *Stroud*, 1 C. & K. 187.
(*v*) *R.* v. *Smith*, 1 Moo. C. C. 402.
(*x*) *Reg.* v. *Willis*, 1 Den. C. C. 80.
(*y*) *Reg.* v. *Mary & Jane Hogg*, 2 M. & Rob. 380. See *Reg.* v. *Hicks*, where an indictment for child murder was held bad for not stating the name of the child or accounting for its omission; 2 M. & Rob. 302.
(*z*) *R.* v. *Clark*, R. & Ry. 358.
(*a*) *Reg.* v. *Evans*, 8 C. & P. 765.
(*b*) *R.* v. *Ellen Waters*, 1 Moo. 457.
(*c*) See *Reg.* v. *Stroud*, C. & Kir. 187.
(*d*) R. & Ry. 358.

by the prisoner, its mother. The child had been christened *George Lakeman*, being the names of its reputed father, and was called so, and not by any other name known to the witnesses. Its mother called it so. There was no evidence that it had been called by or obtained its mother's name of *Clark*. The court held him improperly laid *Clark*, and as nothing but the name identified him in it, the conviction was held bad (*e*). However, in *Reg.* v. *Biss* (*f*), an indictment against a married woman for murder of a legitimate child, which stated "that she, in and upon a certain *infant male child, of tender years*, to wit, of the age of six weeks, and not baptized, feloniously and wilfully, &c. did make an assault, &c.," was held insufficient by all the judges, as it neither stated the child's name, nor that it was "to the jurors unknown." *Semble*, it would have sufficed to state him as "a certain male child, &c. of tender age, that is to say, about the age of six weeks, and not baptized, born of the body of E. B." (*g*). Where a party is as usually known by one name as another, he may be described by either, and by the name which he has assumed, even though shown not to be his right name (*h*). Where the party injured has a mother or father of the same name, it is better to style the prosecutor the "younger," as it may be presumed that the parent is the party meant; for George Johnson means G. J. the elder, unless the contrary is expressed (*i*). But this was held immaterial where it sufficiently proved who Elizabeth Edwards, the party described assaulted, was, viz., the daughter of another Elizabeth Edwards (*j*). No indictment is any longer to be held insufficient because any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name (*k*); and variances may be amended (*l*).

Description of Person injured.

Defective description cured.

Variances may be amended according to the proof.

It was formerly necessary in cases of offences committed against the property of partners or joint owners, to state the names of all of them correctly; but now by 7 Geo. 4, c. 64, s. 14, it is enacted, "that in any indictment or information for any felony or misdemeanour, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to, or be in the possession of more than one person, whether such persons be partners in trade (*m*), joint-tenants, parceners, or tenants in common, it

Partners in trade.

Joint tenants.

(*e*) See *R.* v. *Sheen*, 2 C. & P. 634.
(*f*) 8 C. & P. 773.
(*g*) See 2 C. & P. 635, *n.* See also *R.* v. *Sheen*, 2 C. & P. 634.
(*h*) *R.* v. *Morton*, R. & Ry. 510; *R.* v. *Berriman*, 5 C. & P. 601; *Anon.*, 6 C. & P. 408.
(*i*) *Singleton* v. *Johnson*, 9 M. & W. 67.
(*j*) *R.* v. *Peace*, 3 B. & A. 579.
(*k*) 14 & 15 Vict. c. 100, s. 24.
(*l*) *Ibid.* s. 1.
(*m*) Legal partnership unnecessary; *R.* v. *Eleanor Gaby*, R. & Ry. 178.

Laying the Property.

shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another *or others*, as the case may be; and whenever in any indictment or information for any felony or misdemeanour it shall be necessary to mention for any purpose whatever any partners, joint-tenants, or parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid. And this provision shall be considered to extend to all joint-stock companies and trustees (*o*), that is to say, not being corporations with a corporate title, but even in such a case under the companies acts, if no certificate of incorporation be produced the proper description is *and others* (*p*); but a partner and manager in an industrial society may have so much control given to him and be placed in so independent a position as to the property of the society, as to justify the laying the property of the society in him alone (*q*). By section 15 of the same act, property of counties, ridings and divisions, whether real or personal, may be laid to belong to the inhabitants of the county generally, without naming them. By sect. 16, property provided for the use of the poor of a parish, township or hamlet, &c., to be used in the poor or workhouse, or by the master or workmen employed there, may be laid generally in the overseers of the poor for the time being, without naming them (*r*), and materials, tools or implements provided for the repair of roads, not under the supervision of commissioners or trustees, as turnpike, may be stated in like manner to be the property of the surveyor or surveyors of highways. By sect. 17, articles provided for any turnpike road may be laid as the property of the commissioners of such road (*s*); and by sect. 18, in indictments for offences relating to any matter within the cognizance of commissioners of sewers, the property may in like manner be described as in such commissioners, without naming them. The property of chattels, &c. used in the poor houses provided under the poor law act, may be laid in the "guardians of the union" or "(of the parish of ——) in the county of ——" they being a corporation by statute, as formed by the poor law commissioners (*t*). As the poor law commissioners, though not incorporated, had a seal of office, an indictment alleging that an order made by them was made by "the poor law commissioners for England and Wales,"

Partners, &c.

Joint stock companies and trustees not being corporations.

County property.

Parish property.

Road repair, materials.

Turnpike road commissioners.

Guardians of a union.

(*o*) *Reg.* v. *Pritchard*, L. & C. 34; 30 L. J., M. C. 169.
(*p*) *Reg.* v. *Frankland*, L. & C. 276; 32 L. J., M. C. 69.
(*q*) *Reg.* v. *Webster*, L. & C. 77; 31 L. J., M. C. 17; *Reg.* v. *Burgess*, L. & C. 229; 32 L. J., M. C. 185.
(*r*) See *R.* v. *Went*, R. & Ry. 359.
(*s*) See also 3 Geo. 4, c. 126, s. 60.
(*t*) 5 & 6 Will. 4, c. 69, s. 7; 5 & 6 Vict. c. 57, s. 16. District boards for management of district schools or asylums take real and personal property as a corporation; 7 & 8 Vict. c. 101, s. 45. As to the particular buildings which may be "workhouses," within 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69, see *Cantrell* v. *Windsor Union* (*Guardians*), 4 New. C. 348, and 5 Vict. c. 18.

Property how laid.

was held good after verdict (*u*). But when an act expressly provided that property might in an indictment be laid in "the trustees of the poor of ——," it was held necessary to add their names, they not being incorporated (*x*). Property may be laid as the owner's though it has never been in his actual possession, but in that of his agent only (*y*). The property of a corporation must be laid to be their property in their corporate name (*z*); but in the absence of the proper proof of incorporation, as under the Companies Acts the certificate of incorporation, they rank as ordinary partnerships (*a*). Property under the view, cognizance or management of the commissioners of sewers may be described as belonging to the commissioners within or under whose view, &c. any such things shall be, without naming them (*b*). Property of friendly societies may be described as the property of the trustees for the time being (*c*); and of industrial provident societies registered under 25 & 26 Vict. c. 87, in the society by its corporate name.

Trustees of the poor.

Of corporations.

Commissioners of sewers.

Friendly societies.

Industrial provident societies.

Monies or valuable securities, embezzled by persons in the public service, may be described as the queen's property (*d*). Cattle or goods stolen from the possession of a bailee, *e. g.*, an innkeeper, warehouseman, carrier, laundress, tailor, pawnbroker, or agister, may be laid as the property of either owner or bailee, at the option of the prosecutor. Iron stolen from the bed of a canal while it was being cleansed, was held rightly laid in the canal company though they were not carriers, inasmuch as the canal company would restore goods found under such circumstances to the owner if he could be found, if not they would keep it themselves (*e*). So a box of a club, kept in a room in a public-house, was held to be rightly laid in the landlord (*f*). So the landlord of an inn has a special property in goods of his guest left behind in the inn unintentionally (*g*).

Public monies.

Special property of bailee.

A member of a co-operative society who has the sole management of the shop, and is answerable for all the property and monies coming to him in the course of such management, has such a property in the goods and monies as to justify the laying of the property in him as against another member of the society who is alleged to have stolen it (*h*). A bailee, parting with

(*u*) *Reg.* v. *Crossley and another*, 10 A. & E. 132.
(*x*) *R.* v. *Sherrington*, 1 Lea. 513.
(*y*) *R.* v. *Remnant*, R. & R. 136.
(*z*) *R.* v. *Beacall*, 1 Moo. 15.
(*a*) *Reg.* v. *Frankland*, L. & C. 276; 32 L. J., M. C. 69.
(*b*) 7 Geo. 4, c. 64, s. 18.
(*c*) 18 & 19 Vict. c. 63, s. 18.
(*d*) 24 & 25 Vict. c. 96, ss. 69, 70.
(*e*) *Reg.* v. *Rowe*, Bell, C. C. 93; 28 L. J., M. C. 128.
(*f*) *R.* v. *Wymer*, 4 C. & P. 391.
(*g*) See *Reg.* v. *Rowe*, Bell, C. C. 95; 28 L. J., M. C. 128.
(*h*) *Reg.* v. *Webster*, L. & C. 77; 31 L. J., M. C. 17; *Reg* v. *Burgess*, L. & C. 299; 32 L. J., M. C. 185, *ante*, p. 158.

Laying the Property.

the possession of goods under a mistake to a person not entitled to receive them, does not cease to be bailee, and retains a sufficient property to lay them as his property in an indictment (*i*).

Property in bailee.

The possession of a servant being that of his master, if derived from him, he has no special property in them as a bailee has, so that the property in stolen goods cannot be laid in him (*k*), or

In married woman.

in a married woman (*l*), though living apart from her husband, unless such goods, money, &c. are declared to be her separate property under the Married Women's Property Act, 1870, in which case they may be alleged to be her property (*m*). Goods let with a lodging and stolen from it must be laid to be the lodger's, except he have stolen them himself; in which case the property is to be laid in the owner or person letting to hire (*n*). Goods seized under a *fi. fa.* may, if stolen before sale, be described as the original owner's (*o*). Goods stolen by A., and then stolen from him, may be laid either as his in respect of the possession, or as the true owner's (*p*). A child's clothes or necessaries should, it seems, be alleged to be the property of the child, though it is of tender age; but it seems that they may be alleged to belong to the parent (*q*). Shrouds and coffins, when stolen from graves, are in general to be laid as the property of the personal representatives, if known. They may be laid as the property of a person unknown, where such is the fact (*r*); or if there be no will or administration,

In case of intestacy.

of the ordinary (*s*); and now by 21 & 22 Vict. c. 95, s. 19, between death of intestate and grant of letters of administration, the judge of the Court of Probate takes the place of the ordinary, or they may be laid to be the property of the persons who caused the deceased to be buried, and if the parish has not been at the expense of burial, then of the person who paid the expenses, but not of the parish officers. If before administration is taken out to an intestate his property is stolen, it should be laid as being vested in the ordinary or judge of Court of Probate, though administration is granted before the indictment (*t*). Property stolen from a *feme sole* may be laid as hers by her maiden name, though she marries before indictment found (*u*).

(*i*) *Reg.* v. *Vincent*, 2 Den. C. C. 464; 21 L. J., M. C. 109.
(*k*) *R.* v. *Hutchinson*, R. & R. 412.
(*l*) *R.* v. *Wilkins*, 1 Lea. 525; 1 Hale, 513.
(*m*) 33 & 34 Vict. c. 93, s. 11.
(*n*) 24 & 25 Vict. c. 96, s. 74.
(*o*) *R.* v. *Eastall*, 2 Russ. on Cr. 153.
(*p*) 2 East, P. C. 654.
(*q*) *Ibid.*
(*r*) See *ante*, p. 156; Archb. Crim. Pl. 17th ed. 40; 2 East, P. C. 652.
(*s*) *Reg.* v. *Johnson*, D. & B. 340; 27 L. J., M. C. 52.
(*t*) *Reg.* v. *Smith*, 7 C. & P. 147; *R.* v. *Green and Woodley*, per *Parke*, B., Berks Lent Ass. 1837; Dick. Q. S. 194, 5th ed.
(*u*) *R.* v. *Turner*, 1 Lea. 536.

Mode of charging offence.

6. The charge must specify some particular and definite act (*x*); except where a person is indicted as a "common barrator," or a "common scold," or as "keeping a common brothel or gambling house;" in which cases the offence embraces a succession of acts, by which it is not only proved, but in which it consists. But, though in the case of an indictment against a party, as a common barrator, brothel, or gaming-house keeper, this general charge will suffice on the record, the courts have always compelled the prosecutor to give notice to the defendant before the trial of the particular facts on which he intends to rely in support of the accusation (*y*).

Particulars of the charge.

Particularity required.

7. The crime must be positively and explicitly stated on the record, in such a manner as to give the party indicted notice by distinct averment what the charge is which he must be prepared to defend (*z*); thus an indictment on 24 & 25 Vict. c. 96, s. 58, for being found by night armed with a dangerous weapon with intent to break into any building and to commit any felony therein, must specify the building intended and it seems the felony (*a*); but it is not necessary that all the facts by which a charge will be *evidenced*, *e. g.*, on a charge of inciting to commit an offence, the particulars of the incitement or solicitation need not be shown (*b*), though the offence must either be charged in certain technical language known to the law, or sufficient must be stated to show, on the record itself, that an indictable offence has been committed. Thus, as only certain false pretences, such as those of existing facts, are within the statute, making the obtaining of goods or money by such pretences indictable, the indictment must show on its face what the false pretences were, in order that the court might judge whether they are sufficient or not (*c*), and, in general, where the means of effecting the object form the essence of the charge, it is necessary to

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(*x*) *Reg.* v. *Rowed*, 3 Q. B. 180; see *R.* v. *Robe*, Stra. 999, which was an indictment for extortion.

(*y*) 2 Hawk. c. 25, s. 59; *R.* v. *Curwood*, 3 A. & E. 815. So, where the counts of an indictment for a conspiracy are framed in a general form, particulars will be ordered, and must give the defendants the same information as a special count would have done, but need not state the specific acts which the defendants are charged with, or the times and places at which they are alleged to have occurred; *R.* v. *Hamilton*, 7 C. & P. 448. The same course was taken by discretion of the court on indictments for misdemeanours, where more than one act of embezzlement was laid according to 7 & 8 Geo. 4, c. 29, s. 48, and the persons from whom the money was received are named; *R.* v. *Hodgson*, 3 C. & P. 422; *R.* v. *Bootyman*, 5 C. & P. 300.

(*z*) *Reg.* v. *Jarrald*, L. & C. 301; 32 L. J., M. C. 258. See *R.* v. *Perrott*, 2 M. & S. 389.

(*a*) *Ibid.*

(*b*) *R.* v. *Higgins*, 2 East, 5; *R.* v. *Perrott*, *ubi sup.*

(*c*) *R.* v. *Mason*, 2 T. R. 581; but see now *Reg.* v. *Goldsmith*, L. R., 2 C. C. R. 74; 42 L. J., M. C. 94.

Setting forth the Means.

set them forth, but not otherwise (*d*). Thus, it is never necessary to specify the means by which a theft or burglarious entry was effected; but, in an indictment for obtaining money under false pretences, it is necessary to set out at length the pretences used, and to prove them as laid (*e*). But it has been holden, that in an indictment for soliciting another to commit a crime, it is not necessary to particularize any of the solicitations adopted (*f*). So, on an indictment for a conspiracy at common law to effect objects prohibited by statute, the object being set out, the means by which it was to be effected need not be stated (*g*).

And where a statute made it a felony to assist a prisoner to escape "by any means whatever," the indictment is sufficient, though it does not state the means which were used (*h*). Where it was said by Lord *Campbell* (*i*), that that was not like an indictment for obtaining goods by false pretences, in which the false pretences must be set out, in order that the court may see whether they are within the statute.

Defence need not be negatived. Charge should be direct.

On the one hand, nothing necessary will be supplied by intendment; on the other, no matter of defence need be anticipated by a negative. The charge must always be positive, and never introduced with a "that *whereas*," or by way of recital (*k*). The charge must never be in the disjunctive, as "published *or* caused to be published," so as to leave it uncertain on the record which branch of the alternative the prosecutor intends to charge (*l*); though if it be expressed in the copulative, as "published *and* caused to be published," it will suffice to prove either (*m*). So if the character in which the party is indicted is left uncertain, as if he is charged as a servant *or* deputy, or is indicted in a manner which will apply to either of two definite offences, without specifying which, the indictment is bad for uncertainty (*n*). If a statute uses words

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(*d*) *R. Sparling*, 1 Stra. 497; *R.* v. *Lloyd*, 2 East, P. C. 1121; *Reg.* v. *Nott*, 12 L. J., M. C. 143.

(*e*) *R.* v. *Mason*, 2 T. R. 581, which case, however, has been reflected upon in *Heyman* v. *The Queen*, L. R., 8 Q. B. 102; and *Reg.* v. *Goldsmith*, L. R., 2 C. C. R. 74; 42 L. J., M. C. 94. So the falsity of the pretences relied upon must be specifically alleged, and the general statement of "did falsely pretend," &c., is not sufficient on demurrer and before verdict; *R.* v. *Perrott*, 2 M. & S. 379. But see 7 Geo. 4, c. 64, s. 21.

(*f*) *R.* v. *Higgins*, 2 East, 5; *R.* v. *Fuller*, 1 B. & P. 180; *R.* v. *Nield*, 6 East, 417, 424.

(*g*) *Reg.* v. *Rowlands*, 2 Den. C. C. 364; 21 L. J., M. C. 81.

(*h*) *Reg.* v. *Holloway*, 2 Den. C. C. 287.

(*i*) *Ibid.* 296.

(*k*) Hawk. b. 2, c. 25, s. 60.

(*l*) 2 Stra. 900. See Archb. Cr. Pl. 16th ed. p. 59.

(*m*) See *R.* v. *Middlehurst*, 1 Burr. 400. "Causing to be done," generally speaking, proves "doing;" 2 Hawk. P. C. ch. 25, 62. For an averment of intent to do one or another unlawful act is divisible; *R.* v. *Dawson*, 3 Stark. 62.

(*n*) *Ibid.* See Archb. Crim. Pl. 16th ed. p. 59.

in the alternative, so as to distinguish between them, *e. g.*, "stab *or* cut," the distinction must be attended to in the indictment, and the offence is improperly laid as "stabbing *and* cutting" (*o*). An indictment upon 11 Geo. 4 & 1 Will. 4, c. 66, s. 20, for destroying, defacing and injuring a register of baptism, is not uncertain or double (*p*); but if two acts are laid, each excluding the notion of the other, and there is no statement as to which is the specific charge, as in *Reg.* v. *Stocker* (*q*), there is, in fact, no charge at all, and the indictment is bad (*r*), and may be quashed before plea on that ground. Charge must not be uncertain or double.

But the defect in an indictment that the charge is laid in the alternative is a formal defect only (*s*), and can only be taken advantage of by demurrer or motion to quash before the jury are sworn (*t*). Formal defects.

Repugnancy in any material point will also vitiate on demurrer or motion to quash; but the objection must be taken before the jury are sworn (*u*), unless the indictment is so insensible that no intendment can possibly be made by the court so as to support it after verdict; but stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, is not to make the indictment insufficient (*v*); but a merely superfluous averment, which can be rejected without affecting the description of the offence, may be rejected as surplusage, being the mere introduction of an additional circumstance not necessary to constitute the offence (*x*). Thus where the indictment alleged that the defendant on *Henry B.* did make an assault, and him the said *William B.* did beat, &c., the words the said William B. were rejected as surplusage after verdict (*y*); and where a florin was described as current silver coin of the goods and chattels of S. F., inasmuch as money does not fall within the description "goods and chattels," these words were rejected as surplusage, and the averment "current silver coin of S. F." held to be a sufficient description of the property. For it is not necessary to prove the offence laid in the indictment to the whole extent as laid, provided the proof constitute an offence of the same quality as that charged; but an indictment for felony will not support a conviction for a misdemeanour (*z*); and it is the same whether Repugnancy. Surplusage.

(*o*) *R.* v. *M'Dermot*, R. & R. C. C. R. 356; and see *R.* v. *Duffin*, *id.* 365; *R.* v. *Williams*, 1 Moo. Cr. C. 108.
(*p*) *Reg.* v. *Bowen*, 1 Den. C. C. 22.
(*q*) 5 Mod. 138.
(*r*) See *Reg.* v. *Bowen*, *ubi sup.*
(*s*) *R.* v. *Middlehurst*, 1 Burr. 400.
(*t*) 14 & 15 Vict. c. 100, s. 25.
(*u*) *Ibid.*
(*v*) *Ibid.* s. 24; *ante*, p. 143.
(*x*) *Reg.* v. *Crispin*, 11 Q. B. 913; *R.* v. *Jones*, 2 B. & Ad. 611, 616.
(*y*) *Reg.* v. *Crispin*, 11 Q. B. 913; 17 L. J., M. C. 128.
(*z*) *R.* v. *Westbeer*, Stra. 1137, or *vice versâ*. See *ante*, p. 140.

Clerical errors.

the offence is by statute or at common law (*a*). The indictment will not be vitiated by mere clerical or grammatical errors, unless they alter the sense, or render it so wholly uncertain that the real meaning cannot be gathered (*b*).

Terms of art.

There are certain terms of art which the law has applied to the legal description of certain offences; and these must always be inserted (*c*). Thus, no statement of facts, however clearly amounting to a felony, will supply the place of the word *feloniously* (*d*); no allegation of a breaking a dwelling-house in the night with intent to steal, will charge a burglary, if the word *burglariously* be omitted (*e*); no charge of murder can be properly expressed without the words "malice aforethought" and "*murder*" (*f*); the word *riotous* is essential to indictments for rioting; *maintained*, to indictments for maintenance (*g*); and "with *a strong hand*," to indictments for forcible entry (*h*); but a conclusion, such as "and so the defendant did commit wilful and corrupt perjury," may be rejected as surplusage (*i*); and an indictment showing on the facts stated a misdemeanour at common law not being perjury, strictly speaking, will be supported, though it do not contain those words (*k*).

Written instruments.

Written instruments, as libels, threatening letters, warrants, orders of justices, &c., which form part of the gist of the offence charged, need no longer be set out verbatim, in words and figures. But in indictments for larceny, or embezzlement, or destroying or concealing, or obtaining by false pretences any instrument made the subject of larceny by statute, or in any case where it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print or figures, it is sufficient to describe such instrument by any name or designation by which it is usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof (*l*), or otherwise describing the same or the value thereof. The same relaxation of the rule is now permitted in indictments for forgery, or uttering an instrument, or writing, no copy or *fac-simile* of which need now be set forth; and the instrument may be described as in an indictment for stealing it (*m*). So as to

Bank notes.

bank notes, it is provided that where it shall be necessary to

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(*a*) *R.* v. *Jones*, 2 B. & Ad. 611, 614.
(*b*) *Reg.* v. *Stokes*, 1 Den. C. C. 307; 17 L. J., M. C. 116.
(*c*) 2 Hawk. P. C., bk. 2, c. 25, s. 55.
(*d*) 2 Hale, 171, 184; *Reg.* v. *Gray*, L. & C. 365; 33 L. J., M. C. 78.
(*e*) 2 Hale, 171, 184; *Holford* v. *Bailey*, 13 Q. B. 446.
(*f*) Foster, C. L. 304.
(*g*) *R.* v. *Johnson*, 1 Wils. 325.
(*h*) *R.* v. *Wilson*, 8 T. R. 357.
(*i*) *Reg.* v. *Hodgkiss*, L. R., 1 C. C. R. 212; 39 L. J., M. C. 14; *Ryalls* v. *The Queen*, 11 Q. B. 781; 18 L. J., M. C. 69.
(*k*) *Reg.* v. *Hodgkiss*, L. R., 1 C. C. R. 212; 39 L. J., M. C. 14.
(*l*) 2 East, P. C. 602, 777; 14 & 15 Vict. c. 100, ss. 5, 7.
(*m*) 24 & 25 Vict. c. 98, s. 42.

make any averment as to any money or bank note of the Bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note (*n*). The words "according to the tenor following," or "in the words and figures following," will make it necessary that the instrument should follow, correctly set out, though it might not have been necessary to have so set it out; and the prisoner, if in felony, will be acquitted for any variance, unless the record be amended at the trial, under the power conferred on it by the 12 & 13 Vict. c. 45, s. 10, and 11 & 12 Vict. c. 46, s. 4 (*o*); but mere literal variances, not altering or changing a word into another word, are not material; whereas if it be only intended to set out the substance, it may be introduced by the words "in substance as follows," or "to the effect following," or "in manner and form following;" and if the instrument produced in evidence be in substance the same with that set out, it will suffice (*p*); the use of these latter words, where a literal copy is requisite, will entitle the defendant to demur or move to quash before the jury are sworn (*q*). No indictment is now insufficient for the omission of the words "as appears by the record" (*r*). The words "*with force and arms*" were formerly inserted in all indictments for offences committed with violence; but now the want of such averment is not to make an indictment insufficient by 14 & 15 Vict. c. 100, s. 24, *ante*, p. 143. The common expressions, "*not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil;*" "*being an evil-disposed person,*" &c., being merely superfluous, should be omitted.

Stating written Documents.

Where an offence is created by statute, or where the punishment of either a common law or statutory offence is increased by statute, it is necessary to charge the defendant with having committed or omitted the act under the circumstances and with the intent mentioned in the statute, so as to bring it within the exact meaning of the enactment; and it is rarely safe to depart from its exact language (*s*); and the employment of any words of the act applicable to the offence, such as "feloniously" (*t*) or "knowingly," where the statute requires guilty knowledge as part of the offence, and the words unlawfully and fraudulently will not supply the place (*u*), cannot be dispensed with; but if the words of the statute are fol-

Statutory offences.

(*n*) 14 & 15 Vict. c. 100, s. 18.
(*o*) See *post*, p. 231.
(*p*) *Cureton* v. *Reg.*, 1 B. & S. 208; 30 L. J., M. C. 149.
(*q*) *Wright* v. *Clement*, 3 B. & A. 503; 14 & 15 Vict. c. 100, s. 25.
(*r*) 14 & 15 Vict. c. 100, s. 24, *ante*, p. 143.
(*s*) 2 Hale, 170. However see *ante*, p. 146. The conclusion *contra formam statuti* will not cure such a defect; 2 Hale, 170.
(*t*) *Reg.* v. *Gray*, L. & C. 365; 33 L. J., M. C. 78.
(*u*) *R.* v. *Jukes*, 8 T. R. 536.

Statutory Offences.

lowed in describing the offence, it will be held after verdict sufficient to warrant the punishment imposed by the statute. If a statute makes it criminal to do an act "*unlawfully* and maliciously" (*e. g.*, 7 & 8 Geo. 4, c. 30, s. 2, burning houses), it must be so laid; and stating that it was done "feloniously, voluntarily, and maliciously," is not enough (*x*). So where an act in creating an offence used the word "unlawfully," as well as "feloniously, wilfully, and maliciously," an indictment which charged the act as done only "feloniously, wilfully, and maliciously," was held bad in arrest of judgment (*y*). "*Unlawfully* and maliciously" in an indictment are not equivalent to "*wilfully* and maliciously" in a statute (*z*).

Of negativing exceptions.

If the statute on which the indictment is framed contains exceptions embodied in the enacting clause, it will be necessary to negative them, in order to bring the case within the main provision (*a*). But where the exceptions are contained in a *distinct* clause or proviso of the same act, or in a subsequent statute, or if, though in the same section with the enacting clause, they are not incorporated with it by necessary connection, or by words of reference subjoined, it is not necessary to notice them in the charge, by way of qualifying the offence, for it lies on the party accused to bring his case within them by way of defence, on not guilty (*b*). And by 7 Geo. 4, c. 64, s. 21, which directed that where the offence charged had been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

Public acts.

In any indictment on a *public* act, whether general or local, it is unadvisable to recite the act, because the judges are bound to take notice of all public acts. It is sufficient to conclude "against the form of the statute in such (or that) case made and provided," as the court takes judicial notice of it (*c*); but if the act be cited, and the title is inaccurately stated, nevertheless if it is stated with sufficient clearness to enable the judge, without any doubt, to know the act referred to, such inaccuracy is no ground of objection (*d*).

Private acts.

A *private* act, *viz.*, one not public in its nature or having a public clause, must be set out in pleading (*e*); but the court

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(*x*) *R.* v. *Turner*, 1 Moo. C. C. 239.
(*y*) *R.* v. *Ryan*, 2 Moo. C. C. 15.
(*z*) *R.* v. *Davis*, 1 Leach, C. C. 493. See *R.* v. *Scofield*, *post*.
(*a*) 2 Hale, 170. See *Spieres* v. *Parker*, 1 T. R. 144; Dwarris on Statutes, 515.
(*b*) 2 Hale, 171. See *Gill* v. *Scrivens*, 7 T. R. 31; *Morell* v. *Harvey*, 4 A. & E. 684; *R.* v. *Hall*, 1 T. R. 320; *Steel* v. *Smith*, 1 B. & A. 94. See, also, 7 B. & C. 57.
(*c*) 2 Hale, 172.
(*d*) *Reg.* v. *Westley*, Bell, C. C. 193.
(*e*) 2 Hale, 172.

will intend it to be correctly set out till the contrary is shown, which may be done by the production of a copy of the act purporting to be printed by the queen's printer (*f*); but now all acts made since 1851 are to be deemed public acts, and be judicially noticed unless the contrary be declared (*g*). *Private Acts.*

In mentioning articles which are the subject of charge, they should be described specifically by the names by which they are commonly known; and their number, quantity and value used to be set forth, though they need not have been proved as laid, except where the value, &c. were of the essence of the offence; but an indictment for attempting to steal goods in a house cannot specify the goods, because they cannot be known (*h*). Money does not fall within the definition of "goods and chattels" (*i*); nor does a subsisting mortgage deed. The proof as to the description of articles should correspond with the description; but a variance between the description and proof may be amended at the trial under 14 & 15 Vict. c. 100, s. 1. Any matter unnecessary to be proved need no longer be alleged, and the want of any averment of the value or price, except where the value or price is of the essence of the offence, is now cured by 14 & 15 Vict. c. 100, s. 24. Names and descriptions of things. Variance amendable.

If a statute makes a *distinction* between things belonging to the same class, or commonly comprehended within one general term, it was formerly held to be essential to indicate the particular thing, and the general term not to be sufficient (*k*): thus where a statute (*e. g.* 15 Geo. 2, c. 34) specified "lambs" as well as "sheep," and the indictment was for stealing sheep, evidence of stealing lambs was held not to support it (*l*). But since that case, where an indictment was for stealing sheep under 7 & 8 Geo. 4, c. 29, s. 25, and the jury found the animal to be a lamb, it was held good, though the act specified lamb as well as sheep (*m*); and where the sex of the stolen animal could not be ascertained from inspecting those parts of the skin and flesh which remained, an indictment charging the stealing of a "sheep" was held sufficient, even assuming that the sheep stolen was not a wether, but a "ram, ewe or lamb;" for those words may be rejected, the word "sheep" in the act being a generic term (*n*); but any variance in the description of any

(*f*) 8 & 9 Vict. c. 113.
(*g*) 13 & 14 Vict. c. 27, s 7.
(*h*) *Reg.* v. *Johnson*, L. & C. 489; 34 L. J., M. C. 94.
(*i*) *R.* v. *Guy*, 1 Lea. 276; *R.* v. *Morris*, 2 Lea. 525; *Reg.* v. *Radley*, 1 Den. C. C. 450; 18 L. J., M. C. 184.
(*k*) *R.* v. *M'Dermot*, R. & Ry. 356; *R.* v. *Duffin*, *id.* 365.
(*l*) *R.* v. *Loom and others*, 1 Moo. C. C. 160; *R.* v. *Cook*, 2 East's P. C. 616. A charge of stealing "one sheep" is not supported by proof of stealing an animal under a year old, called a "lamb teg:" it should have been laid "one lamb;" *R.* v. *Birkett*, *supra*. A charge of stealing lambs is supported by proof of finding the carcases in the owner's ground, and only the skins carried away; *R.* v. *Rawlins*, 2 East's P. C. 617.
(*m*) *Reg.* v. *Spicer*, 1 Den. C. C. 82.
(*n*) *R.* v. *M'Culley*, 2 Moo. C. C. 34.

Names and Descriptions of Things.

matter or thing mentioned in any indictment may be amended at the trial (*o*).

Laying the intent.

What the law forbids to be done, it becomes illegal to do wilfully; on which account the doing it will be the subject-matter of an indictment as a contempt of the statute (*p*), without the addition of any corrupt motives (*q*), for disobedience of an act of parliament is indictable on the principles of the common law, though a pecuniary penalty may be also provided for it (*r*). But the intention of the party at the time he commits an act charged as an offence is often as necessary to be proved as any other fact laid, though it can only be proved by overt acts, every man being supposed to intend the necessary consequence of his own acts (*s*). When more than one criminal intent is averred, the averment is divisible, and only one need be proved; *e. g.*, if a person is charged with assaulting a child with intent to abuse *and* carnally know her, he may be convicted of an assault with an intent to abuse her only (*t*).

Intent partible.

Charging previous conviction.

In any indictment for any offence punishable under 24 & 25 Vict. c. 96, and committed after a previous conviction or convictions for any felony, misdemeanour, or offence or offences punishable upon summary conviction, it shall be sufficient after charging the subsequent offence to state that the offender was at a certain time and place convicted of felony, or of an indictable misdemeanour, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise

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(*o*) 14 & 15 Vict. c. 100, s. 1.

(*p*) *Crowther's case*, Cro. El. 655.

(*q*) Per *Ashurst*, J., *R.* v. *Sainsbury*, 4 T. R. 457, cited 2 A. & E. 612.

(*r*) *R.* v. *Jones*, 2 Stra. 1146, indictment for not taking on defendant the office of overseer on a regular appointment.

(*s*) *R.* v. *Farrington*, R. & R. 207.

(*t*) *R.* v. *Dawson*, 3 Stark. N. P. 62; *R.* v. *Jones*, 2 B. & Ad. 611, 616. Also *Shaw's case*, 2 R. 789; *Figgins* v. *Cogswell*, 3 M. & S. 369. As to intent in uttering a counterfeit half-crown in charity, see *Page's case* (on 2 Will. 4, c. 34, s. 7), 8 C. & P. 22; and *Alldy's case* for erasing and altering a stamped post-horse licence, both before Lord *Abinger*, C. B, 8 C. & P. 136.

In *R.* v. *Hunt and another*, 2 Camp. 583, an information charged that defendant "composed, printed, and *published*" a libel. The proof was of publication only—Lord *Ellenborough* held it sufficient for a conviction, adding, "If an indictment charges that the defendant 'did *and caused* to be done' a particular act, it is enough to prove either. The distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified."—Defendants convicted.

In *R.* v. *Williams*, 2 Camp. 646, defendant was charged with "composing, *printing*, and publishing" a libel. His MSS. were produced and shown to have been delivered by him to a printer, who printed and sold copies by his orders. These copies differed from the indictment, and from the MSS. which was adhered to in it. *Lawrence*, J., "Defendant may be acquitted of 'printing,' and found guilty of 'composing and publishing.'" —Defendant convicted.

describing the previous felony, misdemeanour, offence or offences, and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanour, or a copy of such summary conviction, purporting to be signed by the clerk of the court or other officer, having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate or copy a fee of five shillings, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction without proof of the signature or official character of the person appearing to have signed the same (*u*). Under the Larceny Act.

The rules contained in the above 116th section, in relation to the form of and the proceedings upon an indictment for any offence punishable under that act, committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a crime as defined by the Prevention of Crimes Act, 1871, after previous conviction for a crime, whether the crime charged in such indictment, or the crime to which such previous conviction relates, be or be not punishable under the 24 & 25 Vict. c. 96 (*x*). Under the Prevention of Crimes Act, 1871.

The expression "crime" in that act (sect. 20) means in England any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under 24 & 25 Vict. c. 96, s. 58.

And under the Coinage Act (24 & 25 Vict. c. 99), s. 37, where any person shall have been convicted of any offence against this act or any former act relating to the coin, and shall afterwards be indicted for any offence against this act committed subsequent to such conviction, it shall be sufficient in any such indictment after charging such subsequent offence to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer, having or purporting to have the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court, and for every such certificate a fee of six Under Coinage Act.

(*u*) 24 & 25 Vict. c. 96, s. 116.
(*x*) 34 & 35 Vict. c. 112, s. 9.

Charging previous Conviction.

shillings and eight pence, and no more, shall be demanded or taken.

In order to take advantage of the Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), so as to render it obligatory on the judge to pass a sentence of seven years' penal servitude upon a conviction after a previous conviction, the indictment must allege the previous conviction, and a plea of confession or the verdict of the jury must be taken on the question of identity (*y*). Though it is more usual to aver the previous conviction after the allegation of the particular offence, it does not affect the validity of the indictment if such an averment be made at the beginning (*z*).

Conclusion at common law.

8. The ordinary conclusion of an indictment at common law is "*against the peace of our said lady the Queen, her crown and dignity.*" These words should be used (*a*) except in an indictment for a mere nonfeasance at common law, when it is said their omission would not prejudice (*b*), and they should equally be employed in an offence against a statute.

An indictment for an offence against public decency need not conclude *ad commune nocumentum* since the 14 & 15 Vict. c. 100, s. 24(*c*); at any rate, the objection must be taken before the jury are sworn.

Formerly, even when the conclusion was an important part of the indictment, to conclude an indictment for a common law offence as *contra formam statuti*, though improper, was not fatal, and those words might be rejected as surplusage (*d*). And now neither the omission of the words against the peace, nor the want of a proper or formal conclusion, render the indictment insufficient, since the 14 & 15 Vict. c. 100, s. 24, *ante*, p. 143.

Conclusion on statutes.

Where an offence is created by statute, the words *contrary to the form of the statute in such case made and provided*, should be inserted either before or after the words "against the peace," &c. Where the matter charged was no offence at common law, the omission of these words did so entirely vitiate, that no judgment could have been given on it (*e*); but now by

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(*y*) *Reg.* v. *Willis*, 41 L. J., M. C. 102; *Reg.* v. *Summers*, L. R., 1 C. C. R. 182; 38 L. J., M. C. 62.

(*z*) *Reg* v. *Hilton*, Bell, C. C. 20; 28 L. J., M. C. 28.

(*a*) Whether in misdemeanour, *R.* v. *Taylor*, 5 D. & R. 422; common law felony, *R.* v. *Cook*, R. & Ry. 176; 2 Russ. C. & M. 172; or felony created by statute, *ibid.*

(*b*) Fortescue, 131.

(*c*) *Reg.* v. *Holmes*, Dears. C. C. 207; 22 L. J., M. C. 122.

(*d*) *R.* v. *Matthews*, 5 T. R. 162; *Williams* v. *The Queen*, 7 Q. B. 253.

(*e*) 1 Hale, 172, 189, 192. For every offence for which a party is indicted is supposed to be prosecuted as an offence at common law, unless the prosecutor, by reference to a statute, shows that he means to proceed on it; and without such express reference, if it be no offence at common law, the court will not look to see if it be an offence by statute; per *Lawrence*, J., in *Lee* v. *Clark*, 2 East, 340; Doct. Plac. 332; 2 Hawk. c. 25, s. 116; *R.* v. *Deacon*, R. & M. 273.

14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be held insufficient for the *omission* of the words "against the peace," nor for the *insertion* of the words "against the form of the statute," instead of "against the form of the statutes," or vice versâ. *Of the Conclusion.*

Before the statute, questions had arisen in cases where there were more than one statute referring to the offence, the proper conclusion should be contrary to the form of the statute or statutes; but these questions have now become immaterial since the statute.

But where the matter charged was an offence at common law, and was heightened in degree by a statute, or some new punishment was superadded by statute, the indictment need not have concluded *contra formam statuti*, but would have stood as a mere indictment for the common law offence, and judgment for the statutory punishment passed (*f*).

Obstructing the execution of powers granted by statute is an offence at common law, and ought not to conclude *contra formam statuti* (*g*).

Besides these necessary parts of the conclusion, it was formerly usual to introduce others of mere moral inference, as "to the great displeasure of Almighty God;" "to the evil example of all others;" and "to the great damage" of the party directly aggrieved; but these were all clearly unnecessary, before the 14 & 15 Vict. c. 100, s. 24, which now enacts, that no indictment shall be insufficient for want of a proper or formal conclusion.

The bill of indictment being prepared must be engrossed; that is, fairly written on parchment, without a stamp. Formerly, all indictments were in Latin; but, by 4 Geo. 2, c. 26, they must be in English, and written in a legible hand, under the penalty of 50*l*. The indictment should be written in words at length, without abbreviations or figures (*h*).

If the bill be not found, or if the indictment is defective and quashed (as to which see *post*, Chap. V. Sect. 5, p. 185), a new and more regular one may be framed and sent to a subsequent grand jury, for their finding (*i*). So that the mere insufficiency of the finding affords no future indemnity to the party indicted (*k*); but if a bill be ignored by a grand jury, it is not proper to send up a second bill for the same offence against the same person before the same jury, whose labours, if this were permitted, might be protracted very unreasonably, so that parties having Fresh indictment.

(*f*) *Williams* v. *The Queen*, 7 Q. B. 250, overruling the dictum of Lord *Hale* (2 Hale, 191) to the contrary.
(*g*) *R.* v. *Smith*, 2 Doug. 441.
(*h*) See 2 Hale, 170; Archb. Crim. Pl. & Ev. 16th ed. p. 57.
(*i*) 1 Chitt. Cr. L. 325, 1st ed.; Bac. Ab. *tit. Indictment* (D. 2); see *ante*, pp. 127, 128.
(*k*) 1 Ch. Cr. L. 325, 1st ed.

bills to prefer should wait till all their witnesses are arrived and the evidence complete before sending in the bill (*l*).

Section 3.

of prosecution by presentment.

By grand jury.

Presentments may be by the oath of any twelve of the grand jury at common law, for offences within their own knowledge (*m*), with the exception hereafter mentioned as to highways and turnpike roads. If the offence is one of which they can thus take legal cognizance, no bill is sent before them (*n*). They deliver their presentment into court to the clerk of the peace, who puts it into the form of an indictment, on which process may issue, as in the ordinary case of an indictment found; but the presentment in its first state is only considered a bill on which an indictment is framed (*o*).

The most usual presentment was by a grand jury at common law, or by a justice of peace (*p*), under 13 Geo. 3, c. 78, s. 24, for default in repair of some "highway, causeway, or bridge;" but that act is now repealed by 5 & 6 Will. 4, c. 50, s. 1, so that the power of *a justice* to present any bridge is gone (*q*). By sect. 99, it is declared unlawful to take or commence any legal proceeding by way of presentment (*e. g.*, by a grand jury or justice) against the inhabitants of any parish, or other person, on account of any *highway* or *turnpike road* being out of repair; but as county bridges are excepted out of that act by sect. 5, the power of a justice to present such a bridge is continued, and a hundred bridge is included in the exception (*r*).

(*l*) *Reg.* v. *Humphreys*, Car. & M. 601; *Reg.* v. *Austin*, 4 Cox, C. C. 385.

(*m*) 2 Hale, 161; Lambard, l. 4, c. 5. The form of a presentment by a grand jury resembles an indictment (see, however, Andrews's R. 285), except in its commencement, which is here subjoined.

Monmouthshire, to wit. Be it remembered, that at a general quarter session of the peace of our Lady the Queen, holden at ——— for the said county, on ——— the —— day of ——— A.D., &c. ——— before A. B. and C. D., Esqrs., and the Rev. P. Q., clerk, and others, their companions, justices of our said Lady the Queen, assigned, &c. It is presented by the oath, [*as to adding* "or affirmation," *ante*, p. 102] of M. N., O. P., Q. R., &c. (*stating the names of the grand jurors*), good and lawful men of the said county, then and there sworn and charged to inquire for our said Lady the Queen, and the body of the said county, as followeth, that is to say: Monmouthshire aforesaid; the jurors, *&c., as in an indictment.*

(*n*) 2 Hawk. bk. 2, c. 25, s. 1.

(*o*) 4 Bla. Com. 301.

(*p*) See *R.* v. *Derbyshire* (*Inhabitants*), 3 B. & Ad. 147.

(*q*) See *R.* v. *Mawgan* (*Inhabitants*), 8 A. & E. 496.

(*r*) *Reg.* v. *Half Hundred of Chart and Longbridge*, 39 L. J., M. C. 107.

Presentments.

This mode of prosecution by a grand jury, even for non-repair of a county bridge, is, however, disused.

Presentments of constables.

In many counties constables were accustomed from early times to make presentment at the quarter sessions of various offences within their districts. They were, however, of no validity, unless they went before the grand jury, and made oath to the truth of the facts which they presented (*s*). As much expense and vexation had arisen from presentments by constables, which they were required to sign at a petty sessions, in order to their being delivered by the high constables to the ensuing quarter sessions, it was enacted by 7 & 8 Geo. 4, c. 38, that "no petty constables shall be required, at any petty session or elsewhere, to make, nor shall any high constable be required at any general gaol delivery, great session, or general or quarter session of the peace in England, to deliver any presentment respecting popish recusants, persons absenting themselves from their parish church, or any other place of religious worship licensed by authority, rogues and vagabonds, inmates, retailers of brandy, ingrossers, forestallers, regrators, profane swearers and cursers, servants out of service, felonies and robberies, unlicensed or disorderly ale-houses, false weights and measures, highways and bridges, riots, routs, and unlawful assemblies, and whether the poor are well provided for, and the constables are legally chosen and sworn." As this enumeration comprises almost, if not all matters, which ever were presented, it may be fairly assumed that presentments by constables will be discontinued, and that in future indictments will be substituted in the necessary cases; particularly as a presentment when made by a constable carries no case further till it is taken up by a private prosecutor.

Section 4.

of prosecution by information.

Prosecutions by information at the quarter sessions can only be instituted in cases where, by a penal statute, an informer is allowed to take this course to recover the penalty (*t*); but this proceeding is generally disused.

(*s*) See *R.* v. *Bridgwater and Taunton Canal Company*, 7 B. & C. 514, sub nom. *R.* v. *Somersetshire (Justices)*, 1 Man. & R. 272.

(*t*) See 21 Jac. 1, c. 4; 18 Eliz. c. 5; 31 Eliz. c. 5; 1 Chitt. Cr. L. 1st ed. p. 167.

CHAPTER V.

OF PRELIMINARIES TO TRIAL.

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SECTION 1.

OF FORMING A SECOND COURT.

Dividing the court.

In counties.

WHEN the grand jury have been charged, and have retired to their room to consider the bills brought before them, the justices have to consider whether the quantity of business to be transacted, and the time which will be required for its execution, demand the sitting of a second court. Where the business, from the extent of the jurisdiction or any other cause, is likely to occupy an inconvenient length of time, advantage may be taken of the 21 & 22 Vict. c. 73, s. 9, which enacts, that whenever and so often as any court of quarter sessions, or general sessions, or adjourned quarter sessions of the peace, is assembled for the despatch of business, the justices then present may, if and when in their discretion they see fit so to do, appoint two or more justices, one of whom shall be of the quorum, to form a second court for the purpose of hearing and determining such business as may be referred to them ; and the proceedings by and before such second court shall be as good and effectual in the law, to all intents and purposes, as if the same were had before the court assembled and sitting as usual in its ordinary place of sitting, and shall be enrolled and recorded accordingly.

And when a second court is formed, as aforesaid, and orders, rules and regulations have been made for the apportionment of business, such orders, rules and regulations shall continue in force as long as may be thought expedient, without the necessity of renewing such orders, rules and regulations, at each succeeding session (*a*).

(*a*) 21 & 22 Vict. c. 73, s. 10.

In Counties.

The clerk of the peace, or his deputy, whenever a second court is formed as aforesaid, shall appoint a fit and sufficient person to record the proceedings so had before the justices at such second court; and such proceedings shall be delivered over to the clerk of the peace, or his deputy, and shall be deemed to be a part of the records of the session, as if the same proceedings had been recorded by the clerk of the peace himself. And it shall be lawful for the justices assembled at the sessions to make an order upon the treasurer of the county to pay to the clerk of the peace such sum as they shall deem a fit and reasonable remuneration to the clerk of the peace for such purpose as aforesaid. And it shall be lawful for such justices to appoint an additional crier and to grant him such remuneration, to be paid by the treasurer of the county.

By the 21 & 22 Vict. c. 73, s. 8; the 59 Geo. 3, c 28; 7 Will. 4 & 1 Vict. c. 19, s. 4; 5 & 6 Vict. c. 38, s. 4, are recited, and it is enacted, that the said act of 59 Geo. 3, and the said sections, shall be repealed.

In Middlesex.

The power of dividing the court of quarter sessions in Middlesex seems, however, to rest upon the 5 & 6 Vict. c. 38, s. 4, which was in force at the passing of the 14 & 15 Vict. c. 55, s. 14, by which former enactment it was given, "if it should appear advisable, having regard to the business to be disposed of;" and, by the latter act, in such case the assistant judge was to appoint a deputy, who must have been approved of by a secretary of state, and the deputy assistant judge is competent to preside without any of the county justices.

In boroughs.

The 7 Will. 4 & 1 Vict. c. 19, ss. 1, 2, 3, empowering recorders to divide the courts of quarter sessions in boroughs, is still in force, which in effect applied the 59 Geo. 3, c 28 (now repealed), the statute then in force as to counties and boroughs. That statute was passed with reference to the 12 Ric. 2, c. 10, by which justices were to keep their sessions in every quarter of the year at the least, and by three days if need be, upon pain to be punished according to the discretion of the king's council at the suit of every man that would complain.

By 7 Will. 4 & 1 Vict. c. 19, s. 1, it is enacted, that whenever it shall appear to the recorder, or other person presiding at the quarter sessions of a corporate city or town, that the sessions "are likely to last more than three days, including the day of assembling, it shall and may be lawful for such recorder, or other person so presiding, at his discretion, to order a second court to be formed, and to appoint, by writing under his hand and seal, a barrister at law, of not less than five years' standing, to preside and try such felonies and misdemeanours as shall be referred to him therein whilst the said recorder or other person is sitting at such quarter sessions." And the clerk of the peace is to appoint a deputy for such second court, and the recorder is himself to appoint an additional crier. Such barrister is to be styled "assistant barrister."

And the recorder may at any time during the sitting of the

Dividing the Court in Boroughs.

second court, if he is of opinion that it is no longer required, direct the assistant barrister at a proper opportunity to adjourn it; provided that no such recorder shall order such second court, unless it shall have been certified to him before such sessions under the hand or hands of the mayor or of two of the aldermen of such town, that the council have resolved that it will be expedient, and for the benefit of the inhabitants, that the same should be exercised, nor unless the name of the barrister proposed to be appointed shall have been approved of by a secretary of state.

The assistant barrister is entitled to ten guineas a day, and the assistant clerk of the peace to two guineas, and the additional crier to half a guinea a day; but they are in no case to claim remuneration for more than two days. The remuneration is to be paid out of the borough fund by the treasurer of the borough, upon the certificate of the recorder (*b*).

The proper time for exercising the authority conferred by these statutes is when the grand jury have received their instructions from the chairman, and have retired to their room. The most natural distribution, in order to relieve jurors and witnesses from the labour and expense of lengthened attendance, and to meet the convenience of counsel, seems to be, that when the division takes place, one court should undertake that portion of the criminal business consisting of undefended cases, while the other takes the defended cases. Appeals and matters over which the sessions have summary jurisdiction should be decided before the full bench.

Section 2.

PRELIMINARIES TO TRIAL—PROCESS TO PROCURE THE ATTENDANCE OF THE ACCUSED.

Upon the finding of the bill by the grand jury, the court proceed to try it, if they have jurisdiction to try, and their hands are not stayed by a writ of *certiorari*, or an application to postpone the trial; as to the former, see as to "Certiorari," *post*, and as to the postponement of a trial, see *post*, p. 200.

The first step is to procure the attendance of the accused, in order to arraign him on the charge. If in custody, the gaoler causes him to be placed at the dock, on being called to do so by the clerk of the peace; but if not in custody, and has been bailed, he is called upon to surrender; and if he does not answer, it is necessary to consider the steps to be taken to procure his attendance.

Process to bring party indicted into court after bill found against him.

Where any indictment shall be found by the grand jury in any court of general or quarter sessions of the peace against any person who shall then be at large, and whether such per-

(*b*) 7 Will. 4 & 1 Vict. c. 19, s. 2.

son shall have been bound by recognizance to appear to answer to the same or not, the person who shall act as clerk of the peace at such sessions at which the said indictment shall be found, shall at any time afterwards, after the end of the sessions of the peace at which such indictment shall have been found, upon application of the prosecutor, or of any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate of such indictment having been found; and upon production of such certificate to any justice or justices of the peace for any county, riding, division, liberty, city, borough or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice or justices, and he and they are hereby required to issue his or their warrant to apprehend such person so indicted, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough or place, to be dealt with according to law; and afterwards if such person be thereupon apprehended and brought before any such justice or justices, such justice or justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit him for trial, or admit him to bail in manner hereinafter mentioned. Or if such person so indicted shall be confined in any gaol or prison for any other offence than that charged in the said indictment at the time of such application and production of the said certificate to such justice or justices as aforesaid, it shall be lawful for such justice or justices, and he and they are required, upon its being proved before him or them upon oath or affirmation that the person so indicted and the person so confined in prison are one and the same person, to issue his or their warrant, directed to the gaoler or keeper of the gaol or prison in which the person so indicted shall then be confined as aforesaid, commanding him to detain such person in his custody until by her Majesty's writ of *habeas corpus* he shall be removed therefrom for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of his custody by due course of law (*c*).

Process after Indictment found.

Certificate of indictment being found and warrant thereon.

If the accused be under recognizance to appear, but be in the prison of the court under commitment, he may be brought up by order of the court, for it is enacted, that where recognizances shall have been entered into for the appearance of any person to take his trial for any offence at any court of criminal jurisdiction, and a bill of indictment shall be found against him, and

If there be recognizance to appear, but the party be in prison.

(*c*) 11 & 12 Vict. c. 42, s. 3.

Where accused in the prison of the jurisdiction when indictment found.

such person shall be then in the prison belonging to the jurisdiction of such court under warrant of commitment or under sentence for some other offence, it shall be lawful for the court, by order in writing, to direct the governor of the said prison to bring up the body of such person in order that he may be arraigned upon such indictment without writ of *habeas corpus*, and the said governor shall thereupon obey such order (*a*).

Certificate of Indictment being found.

Form of certificate.

I hereby certify that at a court of general quarter sessions of the peace, holden in and for the (county) of ——— at ——— in the said (county) on ——— a bill of indictment was found by the grand jury against A. B., for that he (*&c., stating shortly the offence*), and that the said A. B. hath not appeared or pleaded to the said indictment.

Dated this ——— day of ——— 18 .

J. D.,
Clerk of the peace of ——— for the said (county) (*b*).

Process to compel appearance.

There is besides the now almost obsolete process in outlawry, in which proceeding the most scrupulous exactness is required, as where indictments are found in misdemeanour or crime inferior to felony, against parties who are not under recognizance to appear there, and do not appear, the prosecutor, if desirous to proceed to outlawry, may obtain a *venire facias ad respondendum*, which is in the nature of a summons to appear within fifteen days between the teste and return (*c*). This (or a distringas) (*d*) is the usual process on an indictment against a parish for not repairing a highway; and is served on any two of its inhabitants who live within the county (*e*). If the defendant does not appear, and the sheriff returns that he has summoned him, a distringas may be issued, and an alias from time to time, by which he loses issues on each default; but if the sheriff returned that he is not found, then upon non-appearance a capias issues, and the prosecutor may go on to outlawry, as in felony.

Bench warrant.

But the prosecutor has also a right in the last-mentioned cases, as well of misdemeanour as felony, during the session at which the bill is found, or the articles exhibited, to have a *bench warrant* against the offender to apprehend him, and bring him immediately into court to answer, or, if the court is not then sitting, before the signing or some other justice of the county, &c., to find sureties for personal appearance at the then present, or at the next session. This warrant is obtained from the clerk of the peace, and must be signed by two justices at

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(*a*) 30 & 31 Vict. c. 35, s. 10.
(*b*) 11 & 12 Vict. c. 42, sched. (F).
(*c*) 1 Ch. Cr. L. 1st ed. 350; 4 *id.* 212.
(*d*) 4 Ch. Cr. L. 1st edit. 213.
(*e*) *R.* v. *Clifton*, 5 T. R. 503, 505; 1 Chit. Cr. L. 351; *post*, Chap. IX. "Of Non-repair of Highways."

Bench Warrant.

least, and, as is said by Hawkins (*f*), while the court is sitting. If the sessions are over, the clerk of the peace will, on application of the prosecutor, grant a *certificate* of the indictment having been found, on which any judge of the Queen's Bench, or justice of peace of the proper county acting out of session, will grant a warrant for apprehending the defendant, and oblige him to enter into recognizance to appear at the next sessions to answer the indictment, or, for want of sureties, will commit him (*g*). But the better course now is to get a certificate and proceed under 11 & 12 Vict. c. 42, s. 3, *ante*, p. 176.

Where the party indicted is under recognizance to appear at the sessions at which the indictment is found, no process can be had against him *during* that session; because, being looked on at law as one day, whatever may be its duration, the defendant has the whole of it in which to make his appearance (*h*). But if he has not appeared, the prosecutor may bespeak a bench warrant during the session, which will, it is said, be issued at the close thereof (*i*). As to the backing of warrants for execution in other counties than that in which they were granted, see 24 Geo. 2, c. 55, and 11 & 12 Vict. c. 42, s. 11.

Form of Bench Warrant.

Form of bench warrant.

Middlesex, } To all constables, headboroughs and other her Majesty's
to wit. } officers and ministers within the county of Middlesex, and to every one whom it may concern.

These are to will and require and in her Majesty's name to charge and command you upon sight hereof to bring before us, her Majesty's justices of the peace for the county aforesaid, at the sessions of the peace (*or* general quarter sessions of the peace) now holden at the Sessions House on Clerkenwell Green, in and for the said county, the body of A. B., who stands indicted before us at this same session for a trespass and assault (*nature of the offence*), if the court be then and there sitting, or if not, before us or some other of her Majesty's justices of the peace of the same county, to find sufficient sureties for his personal appearance at this present sessions, to answer this said indictment, and all such other matters as on her Majesty's behalf shall be objected against him; and if he cannot be taken during this present session, that then, as soon after as he shall be taken, you bring or cause him to be brought before us or some other of her Majesty's justices of the peace of the said county, to find sufficient sureties; that is to say, two sureties in £—— each for his personal appearance at the next sessions of the peace to be holden for the said county, to answer as aforesaid, and further to be dealt with according to law. Hereof you are not to fail at your peril.

Dated in open session, at the Sessions House, Clerkenwell Green, aforesaid, this ——— day of ———, in the year of our Lord ———.

C. D. and E. F.

Having thus considered the duties of the grand jury, their jurisdiction, the form of their indictments, and the process compelling the appearance of the accused, we now proceed to con-

(*f*) 2 Hawk. c. 27, s. 8.
(*g*) See 1 Ch. Cr. L. 339, 340.
(*h*) 2 Salk. 607; 1 Ch. Cr. L. 342, 1st edit.
(*i*) *Ibid.*; 2 Hawk. c. 27, s. 8.

Of Process to compel Appearance.

sider the proceedings consequent on the appearance of the accused to take his trial; but, in the first place, it will be proper to notice an arrangement which is sometimes permitted, and then obviates the necessity of a trial at all.

Section 3.

OF COMPROMISE (OR SPEAKING WITH THE PROSECUTOR) WITH THE SANCTION OF THE COURT.

It will be proper in the first instance to notice an arrangement which, in cases of common assault, is not unfrequently made under the sanction of the court, in that stage of the prosecution which follows the finding of the bill, so as to render further inquiry needless. This is accomplished by the judicial recognition of an agreement between the prosecutor and the defendant, for the satisfaction of the former in respect of the injury he has personally suffered (*m*); upon which, in cases where the court see no objection, the defendant pleads guilty; and on the assent of the prosecutor being evidenced either by his own declaration in court, or by affidavit, or the proof of a release from him by the subscribing witness, the court authorizes the arrangement by imposing on the defendant the fine of a shilling, or some other small sum, for the injury done to the public peace (*n*), and taking his recognizance in 40*l.* to keep the peace for one twelvemonth, or other fixed period.

Prosecutions of this kind are sometimes terminated in this way by the recommendation of the court in different stages of the proceedings; and a like effect may be, indeed, produced after conviction; for it has been the common practice in Middlesex, even after judgment and fine set, to allow the defendant to make a private agreement with the prosecutor, by an intimation from the court, that *the defendant may speak with him;* by which is understood, that a remission of the fine to the king may take place, on a portion of the sum assessed being paid to the prosecutor, as a recompense for his individual wrong.

Sir *William Blackstone*, after reprobating this practice of permitting the defendant to *speak with the prosecutor*, as it is termed, unless exercised by the judges in the superior courts of record, says, even a voluntary forgiveness by the party injured ought not in true policy to intercept the stroke of justice; but this opinion that the justices are improper persons to be entrusted with this power of allowing a compromise has been successfully combatted (*o*); and it is, moreover, now settled

(*m*) 1 East, 159; 4 Burr. 2539.

(*n*) See the distinction taken between dropping a prosecution for a public misdemeanour, and one for private injury to the prosecutor, per *Le Blanc*, J., *Edgcombe* v. *Rodd and others*, 5 East, 303.

(*o*) See 1 Chitt. Cr. L. 665.

that assaults may form the proper subject of a compromise if confined to personal injuries, but not if they are of a public nature, or if accompanied by riots, or by the obstruction of a public officer in the execution of his duty (*p*). *Compromises.*

Section 4.

of arraignment.

The practice of different courts of quarter sessions varies as to the order of trying indictments: they are, however, usually tried in the order in which they stand on the file of the clerk of the peace. He should file them in the order in which he receives them from the grand jury, after calling them over in their presence. *Order of trial of indictments.*

Felonies should be tried before misdemeanours, and those cases of misdemeanour in which the defendants are in custody before other misdemeanours. Of bills brought in at the same time by the grand jury, those in which any counsel is engaged for the prosecution, are, by indulgence of the court, often heard before the others; if no special reason exists to the contrary.

In cases of felony a convenient number of the prisoners are placed at the bar, viz., in the dock, for *arraignment;* which is the legal term for calling on a prisoner to answer to a charge of felony. The arraignment in felony consists of three parts; the calling the prisoner to the bar by his name, and requiring him to hold up his hand; the reading over the indictment to him; and the asking him whether he is guilty or not guilty (*q*). *Arraignment.*

In felonies the rule is almost peremptory that the accused shall go into the dock (*r*), but not so in misdemeanours (*s*).

At the time of his arraignment the prisoner should be treated with all the humanity and gentleness which is consistent with the nature of the thing, for instance, he should not be handcuffed unnecessarily (*t*).

In the first place the officer addresses the prisoner thus:—"*A. B., hold up your hand,*" which is intended to identify him in court, viz., to the justices and the jury, as the party indicted, or to ascertain, if two or more are indicted, which is A. and which B. (*u*). A compliance with this requisition is not, however, indispensable (*x*); and it has been said that it is usual to omit it when a peer is to be tried (*y*). If, therefore, the prisoner

(*p*) *Kerr* v. *Leeman*, 6 Q. B. 308; 9 Q. B. 371; *Goodall* v. *Lowndes*, 6 Q. B. 464.
(*q*) 2 Hale, 219. See Dalton, 459, c. 185.
(*r*) *Reg.* v. *Zulueta*, 1 C. & K. 215; *Reg.* v. *Douglas*, C. & M. 193, *post*, p. 220.
(*s*) *Reg.* v. *Lovett*, 9 C. & P. 462.
(*t*) 2 Hawk. c. 28, s. 1.
(*u*) *Ibid.* c. 38, s. 2; Dalt. c. 185, p. 459.
(*x*) *R.* v. *Radcliffe*, 1 W. Bla. 3.
(*y*) 2 Hale, 219.

Calling upon the prisoner.

decline to hold up his hand, but make no objection that he is not the party intended (*z*), the trial may proceed.

Reading the indictment.

The second proceeding, the reading of the indictment, is more material, because, as in cases of felony, the prisoner is not in general (*a*) allowed a copy, it is the only means by which, before he pleads, he can ascertain the precise charge to which he is to answer. This was required to be done in English, even at the time when the proceedings themselves were written in Latin (*b*). It should always be done slowly and distinctly, or even twice, putting the charge into the second person, as thus:—"*You A. B. stand indicted by the name of A. B. late of the parish of Madley, in the county of Hereford, labourer*, for that you, on, &c.," reading the whole indictment in the same manner. If the prisoner desire it, he is entitled, it would seem, to have it read very slowly and distinctly over (*c*), so as to enable a copy to be taken, at least in short-hand, as the officer proceeds, or to frame a plea of *autrefois acquit* (*d*).

Mode of arraignment after a previous conviction.

The proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows (that is to say); the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury

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(*z*) If a collateral issue of identity be raised it is always tried instanter by a jury impannelled on the spot by the sheriff. No peremptory challenges are allowed; *R.* v. *Radcliffe*, 1 Bla. R. 4; Foster, 40.

(*a*) *Reg.* v. *Mitchell*, 3 Cox, C. C. 1; Burn's J., vol. iii., 30th ed., p. 39, tit. "*Indictment.*" The rule of practice at the Old Bailey against granting such a copy is alluded to in 15 East, 343; and Kelynge, 3; *Leggatt* v. *Tollervey*, 14 East, 302, are cited. The *right* of a party indicted for felony to a copy of his indictment, as a record in which he is interested, after the bill is ignored, or on acquittal, is ably asserted by the reporters in the note to *Browne* v. *Cumming*, 10 B. & C. 70. Since which the cases have been reviewed by Sir G. Lewin in the note to his Crown Reports, 205, *et seq.* In *Brangan's case*, 1 Lea. 27, *Willes*, C. J., refused an application for the copy of an indictment for robbery, because it was not necessary to grant it, for that after demand made from the officer of a copy of the record of acquittal, he might be punished for not making it out. However, this is not the practice. See Carthew, 421; Ld. Raym. 253. But it has been lately held that the justices of a county, &c. are bound to make up correctly and according to the fact the record of any conviction, acquittal or proceedings relating to an indictment preferred at the quarter sessions, even though the proceedings are invalid for want of due adjournment; and the reason alleged is, that the prisoner is entitled to such record when made up, to make such use of as he can, *e. g.*, in support of a plea of *autrefois convict; R.* v. *Middlesex* (*Justices*) *in re Bowman*, 5 B. & Ad. 1113; 3 N. & M. 1110; 6 C. & P. 90. See *R.* v. *Bowman*, 6 C. & P. 337; and see *post*, "Charging Jury with Prisoner."

(*b*) 37 Edw. 3, c. 15; 2 Hawk. c. 28, s. 3; 4 Bla. Com. 323; 2 Hale, 219.

(*c*) *Vandercomb's case*, 2 Lea. 711, 712; *R.* v. *Parry and others*, 7 C. & P. 836; *Reg.* v. *Dowl*, 3 Cox, C. C. 509.

(*d*) Burn's J., tit. "*Sessions.*"

shall be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment; and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions; and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry (*e*). On indictment charging a previous conviction.

The rules above contained are, with the necessary variations, to apply to any indictment for committing a crime, as defined by the 34 & 35 Vict. c. 112, s. 9 (*f*). After a previous conviction for a crime, whether the crime charged in such indictment, or the crime to which such previous conviction relates, be or be not punishable under 24 & 25 Vict. c. 96 (34 & 35 Vict. c. 112, s. 19), and in addition to the coinage offences alluded to in that act, a similar proceeding is required under the Coinage Act (24 & 25 Vict. c. 99, s. 37).

The practice above prescribed is also applied where the previous conviction forms part of the offence itself, and proof of it is necessary to give the court jurisdiction over the principal offence, as, for example, in such cases as damaging trees, after two previous summary convictions for that offence under 24 & 25 Vict. c. 97, s. 22, and uttering base coin after a previous conviction for uttering under 24 & 25 Vict. c. 99, s. 12 (*g*).

Where a prisoner is insane at the time of arraignment (*h*), though in full possession of his senses when he committed the offence, it has been a rule from the earliest times, that he shall not be arraigned for it; the true reason being, not that a man who has so become insane may not be a fit object of example, but because he is incapable of pleading to the indictment with the advice and caution which he ought (*i*). So if he become insane after plea, and before judgment, he cannot be tried, for he is unable to make his defence and the jury may be discharged of him (*k*); if after conviction, and before judgment, he loses his senses, judgment shall not be pronounced; and if Insanity of prisoner.

(*e*) 24 & 25 Vict. c. 96, s. 116.

(*f*) See *ante*, p. 169.

(*g*) *Reg.* v. *Martin*, 39 L. J., M. C. 31; L. R., 1 C. C. R. 214.

(*h*) Insanity at time of committing the crime is treated of, *post*, as a defence to a charge.

(*i*) 1 Hale, 34, 35, 370; 3 Inst. 4; Hawk. b. 1, c. 1, s. 4; 4 Harg. St. Tr. 205, 206. Before 1800, this rule only embraced *capital* offences; 2 Hale, 33, &c., &c.; but by sect. 2 of 39 & 40 Geo. 3, c. 94, the benefit of it is applied to *all* offences soever; *R.* v. *Little*, R. & R. 430.

(*k*) 1 Hale, P. C. c. 4, 35.

after judgment and before conviction, execution shall be stayed; for he cannot say anything in bar of execution, or assign error in the judgment (*k*). But a grand jury have no power to ignore a bill on account of the insanity of the party charged at the time of preferring the bill, however clearly shown; for if they believe that the acts proved, if done by a person of sound mind, would have amounted to the offence charged, their duty is to find the bill, in order to empower the court to order the prisoner's detention, if he is found insane by a petty jury, according to 39 & 40 Geo. 3, c. 94, s. 2, before his arraignment for the offence (*l*). In order to ascertain whether a party indicted is, at the time of his arraignment, or at any time during his trial, insane, or whether he merely counterfeits, the court, as well in misdemeanour (*m*) as felony, may *ex officio* impannel and swear a jury to inquire (*n*); and if they find that he is, he was formerly remanded till the next session (*o*), or till his incapacity was removed (*p*); but now the finding is recorded, and the party must be kept in strict custody till the pleasure of the crown is known (*q*). If the insane party, by any oversight, or by act of the gaoler, pleads to the indictment, so that the jury is charged to try it, they may be discharged of him (*r*). Even if his insanity supervenes, or is discovered after judgment and before sentence, a jury should be impannelled as above (*s*); though it may be questioned if a mere finding that he is *then* insane will authorize his confinement under the act just mentioned.

Impannelling jury to inquire of insanity.

Again, if a person charged with any offence is brought up to be discharged *for want of prosecution*, and appears to be insane, the court orders a jury to be impannelled to try the party's sanity, and if he is found insane, they order him to be kept in strict custody in such place and manner as to such court shall seem fit, till the sovereign's pleasure shall be known (*t*). The proofs necessary to establish insanity are those of medical and other persons acquainted with the case. As to standing mute of malice, see *post*, p. 198.

If, on the apprehension of the party indicted, or since, money, &c., has been taken from his person, there have been cases in which, on its appearing clearly to the court from the depositions or on affidavit, that the money, &c., so taken, was in no way material to support the charge against him or connected

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(*k*) 1 Hale, P. C. 35.
(*l*) *R.* v. *Hodges*, 8 C. & P. 195.
(*m*) *R.* v. *Little*, R. & Ry. 430.
(*n*) 39 & 40 Geo. 3, c. 94, s. 2; 1 Hale, 370; and *Reg.* v. *Goode*, 7 A. & E. 536.
(*o*) 1 Hale, 370.
(*p*) *Ibid.* 34.
(*q*) 39 & 40 Geo. 3, c. 94, s. 2.
(*r*) 1 Hale, 35.
(*s*) *Ibid.* 370.
(*t*) 39 & 40 Geo. 3, c. 94, s. 2.

with it, judges have granted motions for its being returned to him, in order that he might not be deprived of the means of defence afforded by it. But the discretion of a court will never be thus exercised where, from any testimony or depositions before it, there is reason to believe that the money or other article of which the prisoner has been so deprived, is in *any* way connected with the offence charged, as if it belonged to the prosecutor or some third person; or if a probability appears that it was stolen, or the produce of stolen property (*u*); or if it forms part of the evidence to be adduced in support of the indictment (*v*).

Order to return money found on accused on his apprehension.

Section 5.

OF MOTIONS TO QUASH THE INDICTMENT.

When the indictment is found, the defendant may move to quash it, or he may demur to it, or, upon arraignment, he may plead specially in abatement or in bar, or generally, guilty or not guilty.

Motions to quash.

If it appears to a court of quarter session, either on its own view, or the suggestion of the prisoner's counsel, or of an *amicus curiæ*, that an indictment is on the face of it or can be made to appear by affidavit to be so obviously insufficient, that a judgment on it against the defendant would be bad in arrest of judgment or on writ of error (*w*), that court may in its discretion quash it (*x*), without putting the prisoner to demur, or plead to it (*y*); but is in no case bound *ex debito justitiæ* to do so, or on any such ground to stay the trial, and will often not do so if the objection may be taken by de-

(*u*) See 30 & 31 Vict. c. 35, s. 9.

(*v*) See *R.* v. *O'Donnell*, 7 C. & P. 138; *R.* v. *Jones*, 6 C. & P. 343; both cases before *Patteson*, J.; *R.* v. *Barnett*, 3 C. & P. 610. An instance of taking away the watch, &c. of a party charged with rape was severely censured, and its immediate return ordered; *R.* v. *Kinsey*, 7 C. & P. 447, *Gurney*, B., and *Patteson*, J.

(*w*) But see *Reg.* v. *Norton*, 8 C. & P. 196; *R.* v. *Taylor*, 9 Dowl. P. C. 604; *Reg.* v. *Burnby*, 5 Q. B. 348; 13 L. J., M. C. 39; see Comberb. Rep. 13; *e. g.*, if a want of jurisdiction is apparent on the indictment, as perjury at common law, in which the sessions never had jurisdiction (*R.* v. *Wesley*, cited by Lord *Mansfield*, 1 Burr. 389, where an indictment for perjury found at sessions was removed and quashed in K. B.); *R.* v. *Bainton*, Stra. 1088.

So where an indictment for not repairing a highway did not state affirmatively that the road was within the district charged as liable to repair, *Tindal*, C. J., is reported to have quashed it (even *after* plea) to save the time of the trial and of the motion in arrest of judgment; *R.* v. *Upton-on-Severn*, 6 C. & P. 134.

(*x*) *Reg.* v. *Wilson*, 6 Q. B. 620, 14 L. J., M. C. 3; *Dunn et al.*, Ry. & M. P. C. 146.

(*y*) 2 Burr. 1127, and cases collected 1 Chit. Cr. L. 1st ed. 299.

Quashing the indictment is discretionary with the court.

murrer (*z*); and on motion to quash an indictment against a corporation the court refused to quash, and directed the defendants to demur, giving them leave to plead over, though in a misdemeanour (*a*).

An indictment which alleged the unlawful obtaining of goods by "divers false pretences," would be bad on demurrer or on motion to quash the indictment, but after verdict of guilty is cured, as it will then be intended that proper legal evidence of false pretences of existing facts was before the jury, and that the court had jurisdiction to try (*b*).

The proper time to move on behalf of a *defendant* to quash an indictment is before demurrer, or at least before plea (*c*); but now every objection to any indictment for any formal defect, apparent on the face of any indictment, must be taken by the defendant, if taken by motion to quash such indictment, before the jury shall be sworn, and thereupon the court may amend the indictment (*d*), and the trial may proceed; but the *court* may quash it after plea and before verdict, if the objection is then first discovered by them (*e*).

A *prosecutor* may apply to quash his own indictment for its insufficiency at (*f*) any time before actual trial commenced (*g*); and it seems that *he* may so move on a like ground after verdict for the crown if judgment has not been pronounced (*h*); but he cannot do so after demurrer and judgment thereon (*i*). The usual terms of granting this motion are, disclosure of the prosecutor's name and payment of any extra costs, *e. g.*, of *certiorari*, incurred by the defendant (*k*), and an amended bill at least *preferred* against the defendant (*l*) so as to be substituted for the first, and stand in the same situation (*m*), or the defen-

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(*z*) 2 Hawk. b. 2, ch. 25, s. 146.

(*a*) *Reg.* v. *Birmingham and Gloucester Ry. Co.*, 3 Q. B. 228.

(*b*) *Reg.* v. *Goldsmith*, 42 L. J., M. C. 94; L. R., 2 C. C. R. 74; *Latham* v. *Reg.*, 5 B. & S. 635; 33 L. J., M. C. 171.

(*c*) *R.* v. *Frith*, 1 Lea. 10; Foster, 231; *R.* v. *Rookwood*, Holt's R. 684; see note, *R.* v. *Semple*, 1 Lea. 420.

(*d*) 14 & 15 Vict. c. 100, s. 25, *post*, p. 190.

(*e*) *Reg.* v. *Goldsmith*, L. R., 2 C. C. R. 74; 42 L. J., M. C. 94; *R.* v. *Upton-on-Severn*, 6 C. & P. 134; *Reg.* v. *Norton*, 8 C. & P. 196.

(*f*) *Reg.* v. *Stowell*, 1 D. P. C. (N. S.) 320, per *Patteson*, J.; see 1 Ch. Cr. L. 1st ed. 299.

(*g*) *R.* v. *Webb*, 3 Burr. 1468.

(*h*) In a case at the Old Bailey, where the prisoner was *discharged* from an indictment for repugnancy in point of form, and not on the merits, the judges remanded the prisoner to the end of the session, to give time for preferring another bill against him; *R.* v. *Gilchrist*, 2 Lea. 657.

(*i*) *Reg.* v. *W. Smith*, 2 Moo. & R. 109, *Coleridge*, J.

(*k*) *R.* v. *Glenn*, 3 B. & A. 373; *R.* v. *Webb*, Burr. 1469; Stra. 946, n.; 1 Chit. Cr. Law, 1st ed. 299; Archb. Cr. Pl. & Ev. 17th ed. 92.

(*l*) *R.* v. *Wynn*, 2 East, 226.

(*m*) See 1 Chit. Cr. L. 1st ed. 299, 303, citing *R.* v. *Wynn*, *supra*; 3 Burr. 1469; *R.* v. *Webb*, 1 Bla. R. 460; *R.* v. *Glenn*, 3 B. & A. 373.

dant must be put on his trial (*n*). An indictment will be quashed not only for defects obvious on the face of it (*o*), but also if it is made duly to appear to the court, by affidavit, that it has been preferred, and found without the preliminary requirements of an act of parliament being complied with, as if presented contrary to the requirements of the Vexatious Indictments Act (*p*). Indictments found without jurisdiction.

Part of an indictment may be quashed and the rest be proceeded upon ; thus, if since the Vexatious Indictments Acts an indictment has been preferred consisting of several counts, some of which are not properly inserted by reason of those statutes, such counts only might be quashed and not the whole indictment (*q*). The proper way of raising the question whether an indictment has been properly quashed is by writ of error (*r*).

Section 6.

of demurrers.

After reading the indictment the clerk of the peace addresses the prisoner thus : "How say you, A. B., are you guilty or not guilty of the felony whereof you stand charged." The defendant may, however, instead of pleading either guilty or not guilty, decline to answer the indictment on the ground that it is bad in point of law, and he does this by a demurrer. Demurrers to an indictment are of two kinds, general demurrers, and demurrers in abatement. The former state, that generally on the face of the indictment no offence sufficiently appears, and the latter point out specific defects in point of form. Demurrers in criminal proceedings have never been much used, because the defendant might, formerly, in most cases after taking the chance of a complete acquittal on a plea of not guilty have had, by motion in arrest of judgment, the same advantage as he could have had upon a demurrer, until the 7 Geo. 4, c. 64, ss. 20, 21 (*s*), interfered to prevent motions in arrest of judgment for a number of formal defects. But demurrers might have been again resorted to but for 14 & 15 Vict. c. 100, s. 24, which enacted that no indictment should be held insufficient for any such defects ; and by sect. 25, all objections for formal defects on the indictment in abatement were required to be made before

General demurrers.

Demurrer in abatement.

(*n*) *R.* v. *Frith*, 1 Lea. C. C. 10; also 2 East, 226; 6 Mod. 262.
(*o*) *R.* v. *Wetherill*, Cald. 432; *Reg.* v. *Burnby*, 5 Q. B. 348, 13 L. J., M. C. 29.
(*p*) *Reg.* v. *Heane*, 4 B. & S. 947; 33 L. J., M. C. 115; *Knowlden* v. *Reg.*, 5 B. & S. 532; 33 L. J., M. C. 219, *ante*, p. 108.
(*q*) *Reg.* v. *Fuidge*, L. & C. 390; 33 L. J., M. C. 170.
(*r*) *Reg.* v. *Wilson*, 6 Q. B. 620, 14 L. J., M. C. 3.
(*s*) *Ante*, p. 144.

As to formal defects on the face of the indictment.

the jury are sworn, when the indictment may be forthwith amended. Objections on the ground of duplicity, uncertainty or repugnance would fall within this class, and must be made within such time (*q*).

With respect to matters of substance, the old practice of deferring the objection till after verdict will still probably prevail, because, where the objection goes to show that the facts stated on the record do not amount to a felony or misdemeanour, if the prisoner demurs, and judgment is given against him, that judgment is final against him on that indictment, and the Court of Crown Cases Reserved will not review such judgment (*r*), and the party is left to his writ of error as his only remedy against that judgment, while objections in arrest of judgment, after conviction upon verdict, are cognizable by that court upon a case reserved (*s*). It must, however, be borne in mind that the indictment may by 7 Geo. 4, c. 64, s. 21, be cured by the verdict of a defect which might have been fatal on demurrer or on motion to quash (*t*); and the same resort to a writ of error can still be had on the judgment of the court after verdict, for any manifest error on the record if the court will not reserve a case as on a judgment on demurrer (*u*).

An indictment charging the defendant with obtaining money by false pretences must set out the false pretences, in order that the court may see whether they are within the statute or not, and the defendant may know what he has to defend; and if it do not is demurrable, or the failure to do so may be made a ground for arresting the judgment, or reversing it on writ of error (*x*). A demurrer has the effect of putting the legality of the whole of the proceedings in issue, and compels the court to examine the whole record and give judgment thereupon (*y*); and the court must give judgment against the party whose pleading is the earliest to be defective (*z*).

Thus, if the indictment be bad, as if the subject of an indictment for larceny is not a proper subject for larceny, there will be judgment for the defendant, although he may have pleaded a bad plea in bar; or if it appear that the court have no jurisdiction over the offence charged in the indictment (*a*).

(*q*) *Reg.* v. *Guthrie*, L. R., 1 C. C. R. 241; 39 L. J., M. C. 95; *Nash* v. *The Queen*, 4 B. & S. 935; 33 L. J., M. C. 94; *R.* v. *Warshaner*, 1 Moo. 466.

(*r*) *Reg.* v. *Faderman*, 1 Den. C. C. 568.

(*s*) *Ibid.*

(*t*) *Reg.* v. *Goldsmith*, L. R., 2 C. C. R. 74; 42 L. J., M. C. 94.

(*u*) 1 Chit. Cr. L. 747.

(*x*) *R.* v. *Mason*, 2 T. R. 581; *Reg.* v. *Holloway*, 2 Den. C. C. 296, per Lord *Campbell*. But see *Hayman* v. *The Queen*, L. R., 8 Q. B. 102; *Reg.* v. *Goldsmith*, *ubi sup.*

(*y*) *R.* v. *Fearnley*, 1 Lea. 425; Hob. 56; 1 Saund. 284, n. 5; 1 Chit. Cr. L. 440.

(*z*) *Pigot's case*, 5 Co. 29; 1 Saund. 284, n. 5.

(*a*) *Reg.* v. *Faderman*, 1 Den. C. C. 570; *R.* v. *Fearnley*, 1 T. R. 316.

By the 25th section of 14 & 15 Vict. c. 100, every objection to any indictment for any *formal* defect, apparent on the face thereof, must be taken by demurrer or motion to quash the indictment before the jury are sworn, and not afterwards. This, however, would rather apply to demurrers in abatement. Formal defects in indictment.

In form the demurrer should be on parchment and signed by counsel (*b*), though joinder in demurrer may be *ore tenus* (*c*).

The form of judgment for the defendant is, that he be dismissed and discharged from the premises.

On a general demurrer, in case of judgment for the crown, the judgment is final, and the prisoner is not allowed to plead over, because by a general demurrer the prisoner confesses all the material facts charged (*d*).

Form of general Demurrer to an Indictment or Information.

Form of demurrer.

And the said ——— in his own proper person comes into court here, and having heard the said indictment [*or* information] read, says, that the said indictment [*or* &c.], and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he the said ——— is not bound by the law of the land to answer the same, and this he is ready to verify: Wherefore for want of a sufficient indictment [*or* &c.] in this behalf the said ——— prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment [*or* &c.] specified.

Form of Joinder in Demurrer.

Form of joinder in demurrer.

And ———, who prosecutes for our own said lady the queen in this behalf, says, that the said indictment [*or* &c.], and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law to compel the said ——— to answer the same, and the said ——— who prosecutes as aforesaid is ready to verify and prove the same as the court here shall direct and award: Wherefore, inasmuch as the said ——— has not answered to the said indictment, nor hitherto in any manner denied the same, the said ——— for our said lady the Queen prays judgment, and that the said C. D. may be convicted of the premises in the said indictment specified.

Section 7.

Special pleas—(a) in abatement; (b) in bar.

After the indictment has been read, and when the prisoner is called upon to plead to it, is the time to plead in abatement (*e*) any misnomer or other defect apparent on the face of the indictment, or in matters of fact not so apparent, but when shown on plea making the indictment defective; but there are instances of the withdrawal of the plea of not guilty being allowed as a matter of favour after being recorded, and a plea to the juris-

(*b*) *R.* v. *Walker*, 2 Moo. & R. 446.
(*c*) *Ibid.*; *R.* v. *Sheen*, 2 C. & P. 634.
(*d*) *R.* v. *Fearnley*, 1 T. R. 316; 1 Chit. Cr. L. 440; *Reg.* v. *Faderman*, 3 C. & K. 359.
(*e*) 2 Hale, 175; Fost. 16; 1 Lea. 476.

Of pleas in abatement.

diction admitted (*e*). Pleas in abatement are, however, now rendered partially useless by 7 Geo. 4, c. 64, s. 19, by which act, for preventing abuses from dilatory pleas, it is enacted, that "no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded." And these pleas are rendered nugatory in respect of formal defects apparent on the face of the indictment by the 14 & 15 Vict. c. 100, s. 25, by

Amendment of indictment.

which statute "every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards; and every court before which such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had

Defective indictment cured.

appeared." And by 14 & 15 Vict. c. 100, s. 24, "no indictment shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears upon the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute' instead of 'against the form of the statutes,' or *vice versâ;* nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequently to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for the want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil in any case where the value in price or the amount of damage, injury or spoil is not of the essence of the offence."

There would seem, however, to be one case at least in which a plea in abatement is the proper, and indeed the only way to take advantage of an objection to a want of certainty and definiteness which is not apparent on the face of the indictment, but appears on matters of fact *dehors* the indictment; thus, if the description in a highway in an indictment for its non-repair

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(*e*) *Kinloch's case*, Fost. 16; *Reg.* v. *Purchase*, C. & M. 617.

Pleas in Abatement.

be equally applicable to several highways, the defendant might plead in abatement that there were several such highways, all answering to and known by the description used in the indictment, and then proceed to give a more definite and particular description of them (*f*).

Of pleas to the jurisdiction.

Pleas to the jurisdiction are scarcely ever necessary in inferior courts of a limited local jurisdiction, within whose jurisdiction nothing shall be intended to be which is not alleged or proved to be so (*g*). Therefore, if an indictment is found and tried at quarter sessions for an offence over which the sessions has no cognizance, though the defendant may plead to the jurisdiction without answering the charge at all (*h*), yet, inasmuch as it would appear to be the subject of a demurrer, either upon the face of the indictment or upon the caption of the record (*i*), or may be taken advantage of on the plea of general issue, it is thought unnecessary to say more about them here.

Special pleas in bar. Autrefois acquit.

Of special pleas in bar, the plea of *autrefois acquit* shall be first considered. As to the form of the plea, by 14 & 15 Vict. c. 100, s. 28, in any plea of *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully acquitted of the said offence charged in the indictment.

This plea is based on the principle that a man ought not to be placed in jeopardy twice in respect of the same offence (*k*). Therefore, it must appear that the prisoner could have been lawfully convicted upon any evidence that might have been adduced on the trial of the first indictment for the offence charged in the second, and that the two offences charged were identical (*l*); and a criterion is, whether the evidence necessary to support the second indictment would have been sufficient to have procured a conviction on the first (*m*).

Judgment in favour of a prisoner on a demurrer to an indictment is not pleadable in bar to a subsequent indictment (*n*), for the indictment on the first trial must have been such that judgment was or might have been lawfully passed upon the prisoner (*o*). So, a person cannot plead his acquittal on a prior indictment who, by reason of some defect or insufficiency in the record, either in the indictment, place of trial, process or the like, is not lawfully liable to suffer judgment for the offence charged on that proceeding (*p*).

(*f*) *R.* v. *Hammersmith*, 1 Stark. N. P. 357; Burn's Justice, 30th ed. vol. 1, p. 2.
(*g*) *Peacock* v. *Bell*, 1 Wms. Saund. 96; *R.* v. *Johnson*, 6 East, 583.
(*h*) 2 Hale, 236.
(*i*) *R.* v. *Fearnley*, 1 T. R. 316.
(*k*) 1 Chitt. Cr. L. 452; 4 Co. 40; 3 Inst. 213.
(*l*) *Reg.* v. *Bird*, 2 Den. C. C. 94; 20 L. J., M. C. 70; *R.* v. *Sheen*, 2 C. & P. 634; *R.* v. *Clark*, 1 Brod. & B. 473.
(*m*) *Reg.* v. *Bird*, *ubi sup.* See *R.* v. *Embden*, 9 East, 437.
(*n*) *R.* v. *Richmond*, 1 C. & K. 240.
(*o*) *Vaux's case*, 2 Co., pt. 4, 45 a, p. 400.
(*p*) *Reg.* v. *Drury*, 3 C. & K. 193; *Vaux's case*, *ubi sup.*

Plea of autrefois acquit.

So the acquittal must be by judgment upon a verdict of the jury after trial, and therefore the ignoring of a bill by the grand jury, or the failure to present a bill after a committal, and a consequent discharge of the prisoner by proclamation, does not support this plea (*q*).

An abortive trial without verdict cannot be pleaded as an acquittal: thus, if after the jury are sworn and the prisoner given in charge to them, the judge, in order to prevent a failure of justice by the refusal of a witness to give his evidence, or by reason of the non-agreement of the jury to a verdict, or by reason of the death or such illness of a juryman as to necessitate the discharge of the jury before verdict, does so discharge them without coming to a verdict (*r*).

The effect of the 14 & 15 Vict. c. 100, s. 28, is now to render the identity of the offences charged a matter of evidence and a question for the jury, but the powers of amendment given by statute for the support of indictments do not put the prisoner in jeopardy upon an insufficient indictment, as, for instance, where the property of goods stolen is laid in the wrong person, though such powers of amendment might be exercised, yet, if in fact they have not been, and if a prisoner be acquitted on such an indictment for larceny, because it was not amended, he cannot plead *autrefois acquit* to a subsequent indictment against him for stealing the same goods, laying the property in the right person (*s*).

Where local description essential to the offence.

Where local description is essential to the offence, a variance between the two indictments will render the plea of *autrefois acquit* ineffectual (*t*).

An acquittal upon an indictment for burglary and larceny of goods operates as an acquittal for larceny of the same goods, but an acquittal on an indictment charging burglary with intent to commit larceny, and not charging actual larceny, does not operate as an acquittal for the larceny of the same goods, nor, *e converso*, would an indictment for burglary and larceny operate as an acquittal for burglary with intent to commit a larceny (*u*); but if a burglary and larceny of certain goods is charged in the indictment, an acquittal on that charge would operate as an acquittal of an attempt to steal the same goods by force of 14 & 15 Vict. c. 100, s. 9, but not of an attempt to steal other goods (*v*).

An acquittal upon an indictment for embezzlement or fraudulent application or disposition of property within 24 & 25 Vict. c. 96, operates as an acquittal for simple larceny or larceny as

(*q*) 2 Hale, 243, 246; 2 Hawk. c. 35, s. 6.
(*r*) *Reg.* v. *Winsor*, L. R., 1 Q. B. 289, 390; 35 L. J., M. C. 121; *Reg.* v. *Charlesworth*, 1 B. & S. 460; 31 L. J., M. C. 25; *Conway* v. *Lynch*, 7 Ir. Law R. 149, per *Crampton*, J.
(*s*) *Reg.* v. *Green*, D. & B. 113; 26 L. J., M. C. 17; 2 Hawk. c. 35, s. 5.
(*t*) 2 Hale, 245.
(*u*) *Vandercomb's case*, 2 Lea. 72.
(*v*) *Reg.* v. *McPherson*, D. & B. 197; 26 L. J., M. C. 134.

a clerk or servant, or as a person employed in the public service, or in the police. So an acquittal upon an indictment for larceny operates as an acquittal of embezzlement, fraudulent application, or disposition of the same property (*y*). *Plea of autrefois acquit.*

At common law an acquittal upon an indictment for felony is no bar to an indictment for a misdemeanour upon the same facts, and *e converso* (*z*); but by force of statute an acquittal upon an indictment for the misdemeanour of obtaining money by false pretences, is to operate as an acquittal for larceny upon the same facts (*a*); and by the force of another statute an acquittal by the verdict of a jury on the trial of a misdemeanour, which appeared on the facts given in evidence to amount to a felony, shall operate as an acquittal for a felony subsequently charged upon the same facts (*b*).

An acquittal as accessory is a bar to an indictment as principal for the same offence by virtue of 24 & 25 Vict. c. 94, s. 7.

The original indictment on which the first trial was had is evidence on this plea during the continuance of the same sessions, without a record having been drawn up (*c*). After a trial for rape, and an acquittal thereon, another indictment for rape on the same person was found at the same assizes, and upon this plea being pleaded to such second indictment, the prisoners' counsel began, and put in evidence the commitment and first indictment, with the minutes of the former acquittal as written over the prisoners' names, without drawing up a record; and after a verdict of the jury that the offences were the same, it was held that the evidence was properly admitted, and was alone sufficient to justify the verdict (*d*). Evidence to support the plea.

This plea ought, properly, to be on parchment, signed by counsel (*e*); but the plea will not be rejected by the court because it is informal, but it will assign counsel to prepare it in a proper form for the defendant (*f*). In *Reg.* v. *Walker* (*g*), the plea was tendered *ore tenus*, but *Parke*, B., ordered it to be put on parchment; a demurrer to it was subsequently tendered by the crown *ore tenus*, but the judge ordered that also to be put on parchment. Joinder of demurrer was, however, allowed *ore tenus*, on the authority of *R.* v. *Sheen* (*h*). An amendment of the plea has been also allowed after it had been Should be on parchment—should be signed.

(*y*) 24 & 25 Vict. c. 96, s. 72.
(*z*) See 2 Hawk. c. 35, s. 5. And see *Reg.* v. *Bird*, 20 L. J., M. C. 70; 2 Den. C. C. 94.
(*a*) 24 & 25 Vict. c. 96, s. 88.
(*b*) 14 & 15 Vict. c. 100, s. 12.
(*c*) *R.* v. *Horne Tooke*, 25 St. Tr., acted on in *R.* v. *Parry*, 7 C. & P. 839; 2 Hale, 242, 255.
(*d*) *R.* v. *Parry and others*, 7 C. & P. 836.
(*e*) *R.* v. *Sheen*, 2 C. & P. 634.
(*f*) *R.* v. *Chamberlain*, 6 C. & P. 93.
(*g*) 2 Moo. & R. 446.
(*h*) 2 C. & P. 634.

Plea of autrefois acquit.

put in on parchment, and time given to the crown to decide upon whether the prosecution would demur or traverse (*i*).

The plea, if to a felony, should conclude with pleading over to the felony (*k*), but this is not absolutely necessary (*l*).

Plea of certificate of dismissal upon complaint before justices for assault.

A certificate of the dismissal of a complaint by justices for a common assault, or for an assault upon a male child of fourteen years or under, or upon any female of an aggravated nature, operates as a release from an indictment, &c. for the same cause (*m*). Such a certificate is pleadable as a bar to an indictment charging a malicious and unlawful wounding, for an assault occasioning actual bodily harm upon the same facts (*n*); or to an indictment for felonious stabbing with intent (*o*), or for an assault and carnally knowing and abusing a girl between the age of ten and twelve years (*p*), or for rape (*q*); but such certificate would not be pleadable in bar of an indictment for manslaughter or murder upon the death of the person assaulted, inasmuch as it is not a proceeding for the same cause as a complaint before the justices for the assaults which caused the death made by the party subsequently deceased in his lifetime (*r*).

A certificate of dismissal must always be specially pleaded in the same manner as a plea of *autrefois acquit* (*s*), and the certificate of dismissal should be set out in the plea (*t*), if it is intended to be set up as an answer in bar, ***though if not pleaded it may be given in evidence.***

Form of Plea of Autrefois acquit.

Form of plea.

And the said ——— in his own proper person comes into court here, and having heard the said indictment read, says, that our said lady the Queen ought not further to prosecute the said indictment against the said C. D., because he says that heretofore, to wit, on the ——— day of ———, at the general quarter sessions of the peace holden at ——— in and for the county of ———, he the said C. D. was lawfully acquitted of the said offence charged in the said indictment. And this he the said C. D. is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified. And as to the felony and larceny of which he the said C. D. now stands indicted, he the said C. D. says that he is not guilty thereof, and of this the said C. D. puts himself upon the country, &c.

(*i*) 2 C. & P. 634.

(*k*) *R.* v. *Drury*, 3 C. & K. 190, 200.

(*l*) *R.* v. *Sheen, ubi sup.*; 2 Hawk. c. 23, s. 128; *R.* v. *Welch*, Car. Cr. L. 56, Q. B. 1828; Burn's Just. vol. i. p. 353, 30th ed.

(*m*) 24 & 25 Vict. c. 100, ss. 42, 43, 44, 45.

(*n*) *Reg.* v. *Elrington*, 31 L. J., M. C. 14; *Reg.* v. *Taylor*, L. R., 1 C. C. R. 194; 38 L. J., M. C. 106; *Reg.* v. *Oliver*, Bell, C. C. 287; 30 L. J., M. C. 12; *Reg.* v. *Headon*, 31 L. J., M. C. 70.

(*o*) *Reg.* v. *Walker*, 2 Moo. & R. 446. *Blackburn*, J., in *Reg.* v. *Elrington*, 31 L. J., M. C. 14.

(*p*) *Reg.* v. *Guthrie*, L. R., 1 C. C. R. 241; 39 L. J., M. C. 95.

(*q*) *Re Thompson*, 6 H. & N. 193; 30 L. J., M. C. 19; *Wilkinson* v. *Dutton*, 32 L. J., M. C. 152; 3 B. &. S. 821.

(*r*) *Reg.* v. *Morris*, 36 L. J., M. C. 84; L. R., 1 C. C. R.

(*s*) *Harding* v. *King*, 6 C. & P. 427; *Reg.* v. *Walker*, 2 Moo. & R. 446.

(*t*) *Skuse* v. *Davis*, 10 A. & E. 635.

Replication to Plea.

Form of replication to plea autrefois acquit.

And hereupon A. B. [the clerk of the peace], who prosecutes for our said lady the Queen in this behalf, says, that by reason of anything in the said plea of the said C. D. above pleaded in bar as alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said C. D.; because he says that the said C. D. was not lawfully acquitted of the said charges in the said indictment in manner and form as by the said C. D. in the said plea is alleged: and this he the said A. B. prays may be inquired of by the country. And the said C. D. doth the like. Therefore let a jury come, &c.

Form of Plea of Certificate of Dismissal of Complaint.

Form of plea of certificate of dismissal of complaint.

C. D. against Reg. } And the said C. D. comes into court here, and having heard the said indictment read, says, that our lady the Queen ought not further to prosecute the said indictment, because he says that heretofore, to wit, on ——— at ———, in the county of ———, he the said C. D. was upon a certain complaint made by the said A. B. in the indictment mentioned, for that [*reciting complaint in past tense*] before ——— and ———, being two justices of peace acting in and for the said county, he the said A. B. then and there being the party aggrieved in that behalf, brought before the said ——— and ———, then and there so being two of such justices of the peace in and for the said county, charged by the said complainant, for that he the said C. D. did on, &c., at &c., in the said county, unlawfully assault and beat the said A. B. contrary to, &c., and the said two justices proceeded to hear and heard what the said A. B. had to allege in that behalf, and the evidence adduced by him in support of the said charge, and also heard what the said C. D. then and there alleged in his defence, and the said justices then and there adjudged that the said offence was not proved [*or* that the said C. D. was lawfully justified in committing the said assault and battery, *or* that the said assault and battery were so trifling as not to merit punishment, *as the case may be*], and thereupon the said justices accordingly on the ground aforesaid dismissed the said complaint, and forthwith made out their certificate under their hands stating the fact of such dismissal upon the grounds aforesaid, and delivered the same certificate to the defendant, which said judgment and dismissal still remain in full force and effect, and the defendant says that the said assault, &c., in respect whereof the said A. B. had so complained as aforesaid before the said justices against him the defendant, and in respect of which the said justices had so adjudicated and granted the said certificate, was and is the same identical assault, &c. mentioned and charged against him the said C. D. in the said indictment, and the said indictment and the said complaint are proceedings in respect of one and the same cause, and not other or different. And this the said C. D. is ready to verify. Wherefore he prays judgment that by the court here he may be dismissed and discharged from the premises in the said indictment specified. And as to the felony aforesaid in the said indictment mentioned the said C. D. says that he is not guilty thereof, and therefore he puts himself upon the country.

Plea of autrefois convict.

We have next to consider pleas of *autrefois convict.*

A man who has been convicted of an indictable offence may plead such conviction in bar of a subsequent indictment for the same offence of which he was convicted (*u*).

Since the 14 & 15 Vict. c. 100, s. 28, in any plea of *autrefois convict* it shall be sufficient for any defendant to state that he has been lawfully convicted of the said offence charged in

(*u*) 2 Hale, P. C. 251; *Vaux's case*, 2 Co. pt. 4, 45 a, 400; 2 Hawk. c. 36, ss. 10, 14.

Plea of autrefois convict.

the indictment. Prior to the year in which that act passed it had been necessary to set out the record of the conviction. Now neither need the record be set out in the indictment nor even given in evidence, as a certified copy of the record of the indictment, trial, conviction and judgment, omitting the formal parts thereof, is now sufficient (*x*).

The judgment for the defendant is that he be dismissed or discharged from the premises.

Judgment for the crown, on the issue being found against the defendant, in cases of felony, is that he answer over (*y*); but in cases of misdemeanour it is final for the crown. But the reason for this distinction in all cases except murder, viz., *in favorem vitæ*, has now disappeared.

Plea of previous summary conviction of same assault.

There is also a plea of the same nature which sets up as a bar to an indictment for an assault, or an offence including an assault, a previous summary conviction before justices for the same assault on a complaint by the person assaulted, under the 24 & 25 Vict. c. 100, s. 42, *et seq.* The cases cited, *ante*, p. 194, to show wherein an adjudication of dismissal is or is not a bar, equally apply to show when a conviction is or is not a bar.

If upon the complaint for the assault before the justices, instead of a conviction with fine or imprisonment or a dismissal, the justices merely order the defendant to enter into recognizances to keep the peace and pay the costs, no conviction being drawn up, such circumstances cannot be pleaded in bar of the subsequent indictment (*z*), but may be taken into consideration by the court before passing sentence.

Form of Plea.

Form of plea of autrefois convict.

And the said C. D. in his own proper person comes into court here, and having heard the said indictment read, says, that our said lady the Queen ought not further to prosecute the said indictment against the said C. D., because he says that heretofore, to wit, on the ——— day of ———, A.D. ——, at the general quarter sessions of the peace holden at ——— in and for the county of ———, he the said C. D. was lawfully convicted of the said offence charged in the said indictment, which said conviction still remains of full effect and unrevoked. And this he the said C. D. is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.

Form of Plea of Summary Conviction for an Assault before Justices.

C. D. against Reg. } And the said C. D. in his own proper person comes into court here, and having heard the said indictment read, says, that our said lady the Queen ought not further to prosecute the said indictment against him the said C. D. in respect of the offence in the said indictment mentioned, because he says that heretofore, to wit, on the ——— day of ———, in the year of our Lord ——, at the parish of ———, in the county of ———, he the said C. D. was upon the complaint

(*x*) 14 & 15 Vict. c. 99, s. 13.
(*y*) *R.* v. *Taylor*, 3 B. & C. 514.
(*z*) *Hartley* v. *Hindmarsh*, L. R., 1 C. P. 553; 35 L. J., M. C. 255.

of the said A. B., then and there being the party aggrieved in that behalf [*reciting the complaint in the past tense*], convicted before the said E. F., Esq., and C. H., Esq., so being such two of her Majesty's justices of peace in and for the said county, for that the said C. D. did on, &c., at, &c., unlawfully assault and beat the said A. B. in the peace of our said lady the Queen then and there being contrary to the statute in that case made and provided; and the said justices did then and there adjudge the said C. D. for this said offence to forfeit and pay the sum of 5*l.* of lawful money of Great Britain to be paid and applied according to law, and also to pay to the said A. B. the sum of 5*l.* for his costs, and in default of immediate payment of the said several sums by the said C. D. to be imprisoned in the house of correction for the said county for the space of two calendar months, unless the said several sums should be sooner paid, as by the record of the said conviction more fully and at large appears, which said judgment and conviction still remains in full force and effect, and not in the least reversed or made void. And the said C. D. further says, that the assault and battery of the said A. B., of which he the said C. D. was convicted as aforesaid, and the wounding of the said A. B., in the said indictment mentioned, are one and the same assault and battery, and not other and different. And he the said C. D. further says, that he the said C. D. has duly paid the whole amount of the said several sums so adjudged by the said justices to be paid under the said conviction as aforesaid, in manner and form as by law required. And this he the said C. D. is ready to verify. Wherefore he prays judgment if our said lady the Queen ought further to prosecute the said indictment against him the said C. D. in respect of the said offence in the said indictment mentioned, and that he the said C. D. may be dismissed and discharged from the same. And as to the felony aforesaid, in the said indictment mentioned, the said C. D. says that he is not guilty thereof, and therefore he puts himself upon the country, &c.

Form of plea of previous summary conviction for same assault.

Replication to Plea of previous Conviction.

And hereupon A. B. (clerk of the peace), who prosecutes for our said lady the Queen, in this behalf says, that by reason of anything in the said plea of the said C. D. above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said C. D., because he says that there is not any record of the said supposed conviction in manner and form as the said C. D. hath above in his said plea alleged; and this he the said A. B. prays may be inquired of by the country, &c., and the said C. D. doth the like. Therefore let a jury come, &c.

Form of replication to plea.

Section 8.

PLEA OF GUILTY OR NOT GUILTY, AND REFUSING TO PLEAD.

If after the reading of the indictment, and upon the prisoner being called upon to plead, as stated *ante*, p. 187, the prisoner pleads "Guilty," the court may immediately record the plea, and either proceed immediately to give judgment, or examine witnesses as to the circumstances of the offence, for the guidance of their own discretion in determining on the sentence. But it is usual for the officer to explain to the prisoner the consequences of his plea, and to ask him again whether he persists in it; and there has been a prevalent practice among judges of assize, of doing far more than this—of entreating the prisoner to withdraw his plea, admonishing him of his right to a trial, and manifesting much reluctance to receive his open confession

Plea of guilty.

Plea of guilty. of guilt. How far this practice shall be adopted at sessions must be left to the good sense of the chairman, who may, however, deem it quite sufficient to have ascertained that the prisoner fully understood the meaning and effect of his plea, and that he had made up his mind so to plead. After sentence has passed, the prisoner cannot retract his plea of guilty.

Prisoner standing mute of malice.

By 7 & 8 Geo. 4, c. 28, s. 2, it is enacted, "that if any person arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanour, shall stand mute of malice, or shall not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of '*not guilty*' on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same."

Where prisoner is dumb.

The course of proceeding where a prisoner, on being arraigned, says he is deaf, and does not appear to hear the indictment when read to him (*a*), or stands mute (*b*), is in the latter case when the prisoner is dumb, for instance, to endeavour, by means of an interpreter and by his signs, to make the prisoner understand and plead through the interpreter, but if the court is not successful in this, then to impannel a jury (*e. g.*, that impannelled for trial of prisoners) to try whether he stands mute by the visitation of God, or through wilfulness and obstinacy (*c*). His counsel may address the jury and call witnesses, for the affirmative of the issue is on him (*d*).

Entering plea of not guilty by the courts.

If a prisoner is found mute by the visitation of God, a plea of not guilty may be entered; and the case should be heard with careful vigilance on the part of the court, to give the prisoner the benefit of everything which may appear in his favour (*e*). Great diligence and circumspection should, of course, be exercised in so critical a case. And where the visitation has not supervened on the instant, but the party is *surdus et mutus à nativitate*, any assistance to be obtained from signs or tokens which he has been made to understand, and has acted on by returning communication to them, should be sought for and obtained; even, as it seems, at the expense of remanding the prisoner and respiting the recognizances to the next session (*f*). Where a party refused to plead, on the ground that he had before pleaded to another indictment for the same offence, but which was not

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(*a*) *R.* v. *Halton*, 1 R. & M. N. P. 78; see *R.* v. *Pritchard*, 7 C. & P. 303; *R.* v. *Dyson*, *id.* 305, n.

(*b*) *R.* v. *Mercier*, 1 Lea. 183.

(*c*) *Ibid.*; *R.* v. *Steel*, 1 Lea. 453.

(*d*) *R.* v. *Roberts*, Carr. Cr. L. 57.

(*e*) *R.* v. *Steel*, 1 Lea. 451, 453; *R.* v. *Halton*, 1 R. & M. N. P. 78. The oath to the jury to try a mute is, "You shall well and truly try the prisoner at the bar, whether he stands mute by the act of God or out of malice, and a true verdict thereupon give according to the evidence. So help you God." Cro. Car. Comp. 542.

(*f*) See *R.* v. *Steel*, and *R.* v. *Jones*, 1 Lea. 452, note.

valid for want of duly swearing the witnesses who went before the grand jury, a plea of not guilty was entered under 7 & 8 Geo. 4, c. 28, s. 1 (*g*). *Entering Plea of not guilty.*

When a prisoner pleads "not guilty," he is by such plea, without any further form, deemed to have put himself on the country for trial, and the court in the usual manner orders a jury for his trial accordingly (*h*). The clerk of the peace, however, still records the plea, by writing the word—"*po se*," for "*ponit se super patriam*," on the parchment record of the proceedings of the session (*i*). Plea of not guilty.

Should any violence or fear of rescue or escape have occasioned the prisoner to be handcuffed, the court has, after plea, that power to order his handcuffs to be struck off, which before plea it had not (*k*).

After a plea has been once pleaded, the permission to withdraw the plea is a matter in the discretion of the chairman or recorder at the trial, and has been granted in some cases and refused in others, by a judge to a prisoner who had pleaded not guilty, when the application to withdraw the plea was made with a view to demurring to a portion of the indictment (*l*); but a prisoner, after having pleaded not guilty to a forgery, has been allowed to withdraw his plea, and plead guilty; and again, upon being called as a witness against an accomplice, and swearing that his plea of guilty was pleaded by mistake, to withdraw his second plea and again plead not guilty, and be tried upon it (*m*). In *Kinloch's case* (*n*) the prisoners, after having pleaded not guilty to the indictment, and after the jury were sworn and they were given in charge, but before any evidence for the crown was given, were permitted by the court, in the apprehension that an objection which they had to the jurisdiction of the court could not be taken advantage of upon the general issue, to withdraw their plea and plead specially to the jurisdiction; and, to enable this to be done, a juror by consent was withdrawn, and the jury discharged from giving their verdict on the plea then pleaded; and afterwards, on judgment being given against the defendants on the special plea, they were again arraigned, and the same jury were again sworn and charged and gave their verdict, which was upheld. The exercise of the above discretion by the court cannot be reviewed on a case reserved (*o*). As to withdrawal of a plea.

The defendant must plead in person, for at *quarter sessions* he Defendant must plead in person.

(*g*) *R.* v. *Bitton*, 6 C. & P. 92.
(*h*) 7 & 8 Geo. 4, c. 28, s. 1.
(*i*) *Reg.* v. *Newman*, 2 Den. C. C. 392.
(*k*) *R.* v. *Layer*, 16 How. St. Tr. 94, 99, 129; *R.* v. *Waite*, 2 East, P. C. 670; 1 Lea. 28, 36.
(*l*) *Reg.* v. *Brown*, 1 Den. C. C. 291, 293, n.; 17 L. J., M. C. 145; *R.* v. *Binckes*, 2 Smith, 620.
(*m*) *Reg.* v. *Clouter*, 8 Cox, C. C. 237.
(*n*) Fost. 16.
(*o*) *Reg.* v. *Brown*, 1 Den. C. C. 291; 17 L. J., M. C. 145.

When trial may be in the absence of the accused.

cannot appear by attorney (*o*), though a trial for misdemeanour may, after plea, proceed to conviction and sentence in the absence of the defendant (*p*). If he is present, it is not *essential* that he should be tried *at the bar, i. e.*, in the dock, but it is otherwise in felony (*q*).

Section 9.

of postponing trial.

Postponing bill.

The presenting a bill for even a capital offence may be postponed on affidavit of the attorney for the prosecution, that a material and necessary witness is ill, though he has been examined before a magistrate, and his deposition contains no matter to show his evidence to be essential, for material evidence may have been discovered since; nor need the affidavit state that evidence. If the grounds of postponement are intricacy of the evidence, and the short time afforded for disentangling the different portions necessary to support the several indictments which it makes requisite, the motion must be made before preferring any bill, or at least before arraignment (*r*).

Grounds of postponement.

Prosecutor not appearing.

If after indictment found, and not guilty pleaded, the prosecutor do not appear, the prosecutor is (by the crier) called to come and give evidence, and on his default to appear, the chairman addresses the jury to this effect,—"Gentlemen, A. B. stands indicted for making an assault upon Y. Z. [*or as the misdemeanour may be*]; no one appears to prove that he is guilty, and therefore you must acquit him;" and thereupon the jury being asked (*by the clerk of the peace*) "whether the defendant is guilty or not guilty," say, "*Not guilty.*"

If the prosecutor does not appear, the court may, upon motion on behalf of the defendant being in custody, order the defendant's recognizances to be discharged, and himself discharged by proclamation at the end of the sessions (*s*), or, if an *acquittal* is desired, to respite the recognizances, and to put off the trial to the next session; making an order, at the same time, that notice be left at the last place of the prosecutor's abode, or at the office of the clerk of the peace, with certain conditions of publication or notification, as to the said court shall seem necessary, shall be deemed well served. These terms, imposed by the court, whatever they may be, having

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(*o*) *Reg.* v. *Birmingham and Gloucester Railway Company*, 3 Q. B. 223, per *curiam*; 9 C. & P. 469.

(*p*) 2 Chit. Cr. L. 413, 2nd edit.; he may be fined in his absence, but to mitigate a fine he must appear in person; 2 Hawk. c. 48, s. 22. So on moving for a new trial; *R.* v. *Hollingberry and others*, 4 B. & C. 329.

(*q*) See *ante*, p. 181, and *post*, p. 220.

(*r*) *Reg.* v. *Fuller*, 9 C. & P. 35, per *Patteson*, J.

(*s*) See *Reg.* v. *Hibburd*, C. & K. 461.

been complied with, the defendant, in order to an *acquittal* at the next sessions, should be prepared with affidavits of the order, and of the acts done in conformity with it, to be produced at the ensuing session; when, if the prosecutor again fail to appear, the jury will be sworn, and an acquittal directed. *In case of Non-appearance of Prosecutor.*

The court has the power to postpone a trial *suo motu*, but a trial may also be put off on motion made by either party, *after* plea pleaded (*t*), and notice given to the opposite party in time to enable him to oppose it. Postponement may be by court itself or at the instance of either bail.

Before the 60 Geo. 3 & 1 Geo. 4, c. 4, the defendant in misdemeanours had the right to postpone the trial till the next sessions by traversing the indictment, but by that act that right was essentially narrowed; and now by the 14 & 15 Vict. c. 100, s. 26, so much of the former act as related to traverses was repealed, and by sect. 27 it is enacted, that "no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court upon the application of the person so indicted or otherwise shall be of opinion that he ought to be allowed a further time either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent sessions without entering into any fresh recognizance for that purpose. Traverses abolished. Right of accused to postponement abolished, but, on application of accused, court may order postponement.

By the 60 Geo. 3 & 1 Geo. 4, c. 4, s. 6, the right of the defendant in an indictment found in a city or town corporate to remove it to the next adjoining county for trial, under 38 Geo. 3, c. 52, is preserved, and by sect. 7 the court, at any *session of the peace*, session of oyer and terminer, or session of gaol delivery, respectively, upon sufficient cause shown for that purpose, might allow further time for pleading to any such indictment, or for trial of the same; so that now all persons who are in custody, or are out on bail upon the same charge, are, on the finding of the indictment, subject to postponement for cause, bound to plead and try *instanter*, like parties charged with felony. And where an indictment has been found at a former sessions, and the party has been afterwards taken, or bailed, he is bound at such session to plead and try, unless a writ of *certiorari* first remove the proceedings. The 60 Geo. 3 & 1 Geo. 4, however, did not apply to prosecutions for omitting to repair bridges or highways (*u*), which were left subject to traverse as before the statute; but the recent statute, 14 & 15 Vict. c. 100, which abolished traverses, generally makes no such exception. As to prosecutions for non-repair of bridges or highways.

(*t*) *Reg.* v. *Bolam*, 2 M. & Rob. 192; *R.* v. *Doyle*, 1 Esp. N. P. C. 125.
(*u*) Section 10.

Grounds of Postponement.

The grounds for putting off a trial of felony or misdemeanour are various; as the circulation of handbills tending to influence the minds of the jurors (*u*); the illness of the defendant's attorney in a case where the preparation for trial was handed over to the attorney (*x*); the ignorance of a material witness as to the nature and obligation of an oath (*y*); the panel of jurors having been taken from a neighbourhood so excited against the prisoner by various publications, as to prevent the likelihood of a fair trial (*z*); the prosecutrix having been bribed and kept out of the way to prevent her giving evidence (*a*), &c.

But the most usual ground is the absence of a material witness for the prosecution, or defence; whether occasioned by illness (*b*), being kept out of the way by the other side (*c*), or other circumstances (*d*). It should, however, be borne in mind, with reference to the postponement of a trial on the ground of the absence through illness of a material witness, that if such witness has been examined before a committing magistrate, that if the cause of absence is sufficient to satisfy the 11 & 12 Vict. c. 42, the deposition of the witness may be read in evidence (*e*). Inasmuch as the granting this delay at the instance of the accused, though expedient to justice, is an indulgence, and not a

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(*u*) *R.* v. *Jolliffe*, 4 T. R. 285; 1 Burr. 570.

(*x*) *Hayley* v. *Grant*, Say. R. 63; Bac. Abr. *Trial* (H).

(*y*) In this case, the court will order the witness to be instructed on these points before the next session. *Rooke*, J., took this course in the case of a child, and all the judges approved it; see *Murphy's case*, in 1795, in note to *R.* v. *White*, 1 Lea. 430, note; and 2 Bac. Abr. (by Gwillim), *tit. Evidence*, 577, note; but without laying down any general rule, *Pollock*, C. B., declined to take this course; *Reg.* v. *Nicholas*, 2 C. & K. 246.

(*z*) *Reg.* v. *Bolam*, 2 M. & Rob. 192.

(*a*) *R.* v. *Gutteridge*, 9 C. & P. 228. In that case an indictment having been found for rape without the evidence of the prosecutrix, *Patteson*, J., committed the prisoners till the next assizes (citing *Reg.* v. *Chapman*, 8 C. & P. 558), and estreated the prosecutrix's recognizance after calling her on it; *Reg.* v. *Andrews*, 2 D. & L. 10; 13 L. J. M. C. 113.

(*b*) It is in the discretion of a judge to postpone the trial, though the depositions of the witness have been taken and are admissible in evidence, under 11 & 12 Vict. c. 42, s. 17, or 30 & 31 Vict. c. 35, and though the application be on the part of the prosecution, the recognizances of prosecutor and witnesses being enlarged; *Reg.* v. *Tait*, 2 F. & F. 553. See *post*, p. 205.

(*c*) *R.* v. *Gutteridge*, *supra*, and *post*, p. 281; also *Green* v. *Gatewick*, Bull. N. P. 243.

(*d*) *Reg.* v. *Owen*, 9 C. & P. 83. After the grand jury was discharged, the prisoners were acquitted of the rape of Christina Collins. One Orgill, being on his trial for bigamy before the other judge at the time the trial for rape was proceeding, was convicted and sentenced to imprisonment; he then disclosed to the gaoler matters which Owen had told him in their cell respecting the death of C. C. *Williams*, J., remanded Owen and the other prisoners till the next assizes.

(*e*) As to when such depositions are admissible, see *post*, p. 263. *Semble*, a trial for felony may be postponed on prisoner's application on sufficient affidavit, even after a jury has been charged with the indictment, and before any evidence given; *Reg.* v. *Fitzgerald*, 1 C. & K. 201.

right, laches or undue forbearance by him in endeavouring to serve a subpœna, or to procure the attendance of the absent witness, will be fatal to his application (*f*). The motion can only be made on an affidavit sworn at least two days before the intended trial; unless the facts affecting the witness were not known till afterwards, when it may be sworn in court (*g*). The judge will decide from the depositions whether the witness is material or not; but if the witness was not examined before the magistrates or his deposition is not returned, affidavit must be made of what he is expected to prove (*h*). Affidavit of grounds.

The affidavit must, in general, be made by the party on whose behalf the postponement is sought; but his absence, age, sickness, or other sufficient cause, will let in his attorney, or even a third person, to swear it. The illness of the absent witness, or of a child of which she is the nursing mother, is best established by the affidavit of the medical attendant, such being deemed sufficient to prevent the estreat of his recognizance. His name and place of abode, his continued absence, or actual incapacity to attend at any time during the session, and the use of every reasonable effort to compel such attendance, must be distinctly specified, and the materiality of his evidence in the case shown. Nor will these facts suffice to postpone the trial, unless the affidavit is *positive* in its verification of them. Thus, it must state that the absent party is a material witness, without whose evidence the applicant cannot safely proceed to trial, and that he has endeavoured, without effect, to serve him with a subpœna, specifying the exertions used. It should then state, in plain terms, that there is reasonable ground for believing that the delay sought for will tend to the furtherance of justice, and that the testimony of the witness may be obtained at the time to which the trial is proposed to be deferred. On account of the illness or absence of a witness.

The postponement of trial is seldom granted to a period later than to the next session (*i*). In one case of a misdemeanour respecting coin, standing for trial at an assize, the defendant was out on bail, and the judge, doubting whether the offence charged was indictable, put off the trial to the next assize by *consent*, in order to take the opinion of the judges in the interval (*j*); but since the 11 & 12 Vict. c. 78, and the establishment of the Court of Crown Cases Reserved, such a course in this particular instance is never likely to be taken again.

The trial will never be put off on account of the absence of witnesses to character (*k*). The prisoner will never be obliged

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(*f*) If laches appears, the court will sometimes, in misdemeanours, impose terms on the accused, *e. g.*, to consent to examine a witness for the crown on interrogatories, he being about to leave the country; *R.* v. *Morphew*, 2 M. & S. 602.

(*g*) See 1 Ch. Cr. L. 1st ed. 494; *Reg.* v. *Fitzgerald*, 1 C. & K. 201.

(*h*) *Reg.* v. *Savage and Penn*, 1 C. & Kir. 75.

(*i*) Bac. Abr. *tit. Trial* (H).

(*j*) *R.* v. *Heath*, R. & Ry. 184.

(*k*) Per *Lawrence*, J., in *R.* v. *Jones*, 8 East, 34.

Grounds of Postponement.

to pay the costs of the prosecution where the trial of a felony is postponed on account of the illness of a witness for the prisoner (*m*); but if, after the trial of a misdemeanour is called on, the defendant procures the trial to be postponed, the prosecutor will be entitled to costs of the day. But where several indictments have been found against a prisoner or prisoners, and he or they have been tried and acquitted on some of them, the court will not postpone the trial of the others on the ground that the prosecutor had not had time to prepare the case properly for the instruction of counsel (*n*). In one case, where the trial of a felony was postponed for the absence of a prosecutor who was a material witness, the prisoner was discharged on his own recognizance to appear at a future period, but without receiving costs (*o*); but after a bill has been found in serious cases, if the prisoner is in custody, the court may refuse to bail, though the postponement be at the instance of the prosecution (*p*).

More notice has been taken of this particular subject than it may appear entitled to receive; but this has been thought proper, because there is generally no part of the proceedings before courts of quarter session less critically attended to by the courts, or more carelessly executed by the professional attendants.

The following affidavits and notice will suggest like forms, varied according to the circumstances of each particular case.

THE QUEEN ON THE PROSECUTION OF A. B. *v.* P. Q.

Joint Affidavit of a Defendant and his Attorney, made in order to postpone a Trial.

Form of affidavit to postpone.

P. Q., the defendant above named, and X. Y. of ———, in the county of ———, attorney for the said P. Q., severally make oath and say. And first this deponent, the said P. Q., for himself saith, that one D. D. of ———, in the county of ———, seedsman, and one of the co-partners in the house of C. C., D. D. and Co. at ——— aforesaid, in the county of ——— aforesaid, he the said P. Q. is advised, and believes, is a material and necessary witness for him, this deponent, the said P. Q., and that he cannot safely proceed to the trial of the above indictment without his the said D. D.'s testimony. And this deponent, the said P. Q., further saith, that as soon as possible after he received notice of the aforesaid bill of indictment against him [*or* as soon after the order of committal to take his trial was made, *as the case may be*], he applied by letter to the said D. D., informing him that he the said P. Q. would require the attendance of him the said D. D. at the trial thereof, and requiring to be informed whether he the said D. D. was then in England, it being known to him, the said P. Q., that the said D. D. is frequently resident at Amsterdam, on account of the dealings and business of the said house of C. C., D. D. and Co. And this deponent further saith, that, in answer to his said letter, he was informed by the said C. C. that the said D. D. was at that time at Amsterdam afore-

(*m*) *R.* v. *Hunter*, 3 C. & P. 591.
(*n*) *Reg.* v. *Fuller*, 9 C. & P. 35.
(*o*) *R.* v. *Crowe*, 4 C. & P. 251; but see *post*, p. 281.
(*p*) *Reg.* v. *Gutteridge*, 9 C. & P. 228; *Reg.* v. *Andrews*, 2 D. & L. 10; *Reg.* v. *Owen*, 9 C. & P. 83, 86; and *post*, p. 281.

said, and was not likely to return from thence before the end of the month of ——— then next ensuing, which information the said deponent believes to be true. And the said deponent further saith, that he made another application by letter on the ——— day of ——— instant, addressed to the said C. C., inquiring whether the said D. D. was yet returned from Amsterdam, to which he, this deponent, received an answer so late as ——— last, from the said C. C. informing him, this deponent, that the said D. D. was not yet returned, and that he was not expected to return till the end of the month of ——— next, as before stated, which information this deponent does verily believe to be true. And this deponent, the said P. Q., further saith, that he fully expects to be able to procure the presence of the said D. D. at the next general quarter session of the peace, to be holden for this county of ——— at ———, and the said D. D. will be then and there able and willing to attend the trial of the above-mentioned indictment. And this deponent, the said X. Y., for himself saith, that he is the attorney appointed by the said P. Q. to defend him on the trial of the said bill of indictment, on the prosecution of A. B., and that the said D. D. will be a material and necessary witness at the hearing of the same, and that without his testimony the said P. Q. cannot safely go to trial. And this deponent for himself further saith, that on the ——— day of ——— last past, he addressed a letter by the direction of the said P. Q. to the said D. D. at Amsterdam, requesting him to return, if possible, in order to be present at the trial of the before-mentioned indictment at the present session of the peace, and that he received an answer to the said letter from the said D. D. on the ——— day of ——— last, in which the said D. D. assured him, this deponent, that he could not possibly return to England till after the ——— day of ——— then next ensuing, but that he hoped to be able, and would be willing, to attend at the next general quarter session of the peace, to be holden at ——— for the county of ——— aforesaid. And this deponent, the said X. Y., further saith, that he has no doubt but the said D. D. will be ready and willing to attend at the next session of the peace as aforesaid.

Form of Affidavit to postpone.

Sworn, &c.

Affidavit of Medical Attendant.

County of ——, *to wit.* } O. P. of ——— in the said county, surgeon, maketh oath and saith, that M. N. of ———, carpenter, about ten days since fractured his skull in a dangerous manner, and is still confined to his bed on account of the same, and is utterly incapable of being removed from his said bed without imminent danger of his life.

Sworn, &c.

THE QUEEN ON THE PROSECUTION OF A. B. *v.* P. Q.

Notice of Application to postpone the Trial.

Mr. A. B. take notice, that I shall, on the ——— day of ——— instant, at the sitting of the court of quarter session at ——— for the county of ———, or as soon after as counsel can be heard, move the said court that the trial of the said indictment may stand over till the next general quarter session of the peace for the said county, on account of the absence of ——— a material witness for the defendant in the same, who is absent in foreign parts, and whom I have not been able to serve with a subpœna.

Notice of application to postpone.

X. Y.

Attorney to the defendant in the said prosecution.

To Mr. A. B., Prosecutor, &c.
(*or to his attorney.*)

The postponement of a trial (see *ante*, p. 201) may emanate from the court, independently of the desire of the parties prosecuting or defending. Thus, when the power, now abolished, of traversing indictments for misdemeanour existed, if

Postponement in order that all the defendants may be tried together

Postponement in order that all the Defendants may be tried together.

several were in custody for a conspiracy or other joint misdemeanour, and bills had been found, and one or more of them preferred to take their trial immediately, and the others to traverse with their pledges according to the regular form, the court would put off the trial till the period when, by the customary expiration of the traverse, all the parties could be tried together. This seemed to be the established practice, and the reason given for it is, that were it otherwise, as there is generally a difference in the guilt of the different offenders, or in the evidence which is to attach guilt to them, those who have the best chance of being acquitted would always offer themselves for immediate trial, in order that they might afterwards become witnesses for their confederates on the trial of *their* traverses (*r*). On the point of *expediency* there may be force in this reasoning; but at the same time it appears to be a great hardship to keep a person in prison without trial, who is willing to be tried, because another, who is more fortunate, has been able to procure bail.

Proceedings upon postponement.

By analogy to the old practice upon traversing where a party seeks a postponement, he should appear in court with sureties, in case he should be required to find bail. He can then give to the clerk of the peace, or, in some counties, to his deputy out

Giving bail on postponement.

of court, the names and additions of two responsible persons who are ready to be bound for him in recognizance that he shall appear and try at the ensuing sessions; and the prosecutor may, if he thinks fit, then examine the proposed sureties as to their sufficiency in point of estate. If they are unopposed or accepted, the recognizance of the defendant and his sureties is read over by the clerk of the peace to them in the following form:

Form of Recognizance to try.

A. B. you acknowledge to owe to our sovereign lady the Queen the sum of ———, and you C. D. and E. F. severally acknowledge to owe, &c., the respective sums of ——— and ——— to be respectively levied of your goods and chattels, lands and tenements to her Majesty's use, by way of recognizance, upon condition that you A. B. shall appear at the next session of the peace to be holden for this county, to try this indictment to which you have now pleaded not guilty, and not depart without leave of the court.

To this the accused and the pledges answer that "they are content," and depart the court.

Section 10.

CALLING THE PETIT JURY—CHALLENGING AND SWEARING JURY—GIVING PRISONER IN CHARGE TO JURY.

Calling jury.

Twelve jurors (unless they are already in the box after trying others) are then called into it from the panel by the clerk of the peace in this manner:—"*You good men who are*

(*r*) And see *Gittin's case*, Plowd. 98.

returned and empannelled to try the issue joined between our Sovereign Lady the Queen and the prisoner [or *prisoners*] *at the bar, answer to your names and save your fines;*" and the clerk of the peace then calls the names of the jury. *Calling the Jury.*

There are sayings to be found in the books that the proper course is to call the names of the jurors as they stand in the panel, but there is no authority for asserting that this course may not be departed from when convenience requires (*s*). And when they are impannelled in alphabetical order, it seems absurd to require that on each trial the clerk of the peace or assize must begin with the A's (*t*). Order of calling names of jurymen.

When twelve appear in answer to their names thus called, the prisoners at the bar, who have just been arraigned and pleaded, are informed by the officer of their right of challenge in these terms: "*These good men, whose names you shall hear called, and who do appear, are the jury who are to pass between our Sovereign Lady the Queen and you upon your trial,* [or *upon your respective trials*]; *if, therefore, you would challenge them or any or either of them, your time is as they come to the book* [*viz.*, the Four Evangelists, or, in case of Jews, the Old Testament], *to be sworn, and before they are sworn* (*u*), *and you shall be heard*" (*x*). Informing prisoner of right to challenge.

Where there is no expectation of any considerable exercise of the right of challenge, several prisoners are often thus addressed together, who are to be tried on several charges; but either may desire to exercise the right of challenge separately, or, in legal phrase, to "sever in his challenges;" in which case the other prisoners will be desired to stand back, and he will remain to make his challenges alone. So, where several are arraigned on one indictment for the same offence, every prisoner may challenge peremptorily his number; and if one *venire facias* is awarded for all, he who is challenged by one shall be withdrawn against all. Severing in challenges.

No challenge either to the array or to the polls can be taken till a full jury appears (*y*); and if a tales be prayed, the appearance of twelve must be obtained before any challenge can be made. As soon as that is done, and before the swearing of *any* juror begins, it is the proper time for the crown or defendant to *tender* in writing any challenge to the *array*, *i. e.*, to the whole jury; or where no such challenge is made, or if made, fails, to challenge the *polls*, *i. e.*, one or more individual Array or polls.

(*s*) *Reg.* v. *Mansell*, Dears. & B. 375, 408; 27 L. J., M. C. 4.
(*t*) *Ibid.*
(*u*) Bull. N. P. 307; *Reg.* v. *Mellor*, D. & B. 473.
(*x*) Prisoners have in general no right to a copy of the panel of jurors, except at nisi prius, or by special enactment; 1 Ch. Cr. L. 516, 1st edit.; see 2 Hawk. P. C. c. 41, ss. 21, 22, 23.
(*y*) *R.* v. *Edmonds*, 4 B. & A. 471; *Vicars* v. *Langham*, Hob. 235.

Challenging Jurors.

jurors (*z*) orally (*a*); but the challenge will be too late if not made before the swearing the juror has *begun, i. e.*, before he has taken the book of the Evangelists in his hand by direction of the officer of the court: though if he has so taken it without that authority, the right of challenge remains till the oath be begun to be taken (*b*).

Time for challenging.

Challenges are of two kinds, *viz.*, either to the *array*, or to the *polls;* and may be made either on the part of the Queen (that is, the prosecutor), or of the prisoner (*c*).

A challenge to the *array* is an exception to the whole panel, in which the jury are *arrayed*, or set in order, by the sheriff in his return; and must be made before any challenge to the polls (*d*), and, as we have seen, before *any* of the jury are sworn.

Causes of challenge to the array.

There are two descriptions of cause of challenge; *principal causes* of challenge, and causes of challenge to *favour*. A *principal cause* of challenge is grounded on such a recognized ground for imputing *partiality*, that, if it be found true, it unquestionably sets aside the array, or the juror. The following are *principal causes* of challenge to the *array; viz.*, that the sheriff, or other officer concerned in summoning the jury, is the prosecutor of the indictment or the defendant, or is of kindred to the prosecutor or defendant, or of affinity, if it continue; that the officer has returned any one of the jurors on the nomination of either party; that the prosecutor or defendant has an action against the sheriff, though it is said that if the sheriff be the plaintiff, this is only cause of challenge to the favour; that the sheriff or his bailiff who returned the jury is under the duress of either party; or that the sheriff, or his officer concerned in summoning the jury, is either counsel, attorney, officer, or servant to either party (*d*). In these cases, if the fact (of partiality) be established, the array will at once be set aside by the court without intervention of triers. The want of a knight's being returned on the jury, or the want of hundredors, are no longer grounds of challenge to the array (*e*).

To the array for favour.

A challenge to the array *for favour* arises from matter fit to be left to the conscience and discretion of the triers, under the particular circumstances of each individual case. Thus it is said, that if one of the jurors returned be a tenant to the sheriff, or if there be a family connection between one of the jurors and the sheriff, or if the sheriff omit to summon a person named in the panel, this may be ground of challenge of the array *to the favour*—that is, matter to be left to the triers to decide whether

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(*z*) The juror must "stand indifferent as he stands unsworn;" Co. Lit. 157, b.

(*a*) Trials per *Pais*, 172.

(*b*) Per *Tindal*, C. J., *Parke*, B., and *Williams*, J., in *Reg.* v. *Frost*, 9 C. & P. 137; see Bull. N. P. 307, and judgment of *Holroyd*, J., in *R.* v. *Brandreth*, 32 St. Tr. 770.

(*c*) 4 Bla. Com. 352.

(*d*) *Ibid.*

(*e*) 6 Geo. 4, c. 50, ss. 13, 28.

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it indicates such partiality as should avoid the array (*f*). In short, all circumstances which do not come within the authorities as absolute grounds of challenge to the array, and which yet lead to a reasonable suspicion of partiality in the officer, may be presented to the court as ground of challenge to the favour. The array of a *special* jury may be challenged (*g*).

But a challenge to the array has become very improbable; as, without a gross breach of the law, it is hardly possible that there should be any exercise of partiality in selecting the jury.

Mode of challenging the array.

The party challenging the array must put the challenge in writing (*h*), and tender it as soon as a full jury appears, before any juror is sworn (*i*), and be prepared to prove the cause strictly (*k*). The specific ground of challenge must be stated, *e. g.*, that the sheriff was a member of a society by which the prosecution was instituted (*l*), or was an inhabitant of the hundred in which the houses whose firing was in question were situate (*m*), or that the array was made at the instance or nomination of the plaintiff, or that the sheriff was cousin of one party, &c., and a mere allegation that he has not chosen the panel indifferently and impartially, as he ought to have done according to the law of the realm, was held bad, for not showing in *what respect* the panel was chosen partially, so as to enable the crown to traverse (*n*). If the panel is quashed on a challenge of the array for unindifferency of a sheriff, the course in the Queen's Bench is for the prosecutor to apply to the court to postpone the trial in order to direct a new process to the coroners (*o*).

Challenges to the polls.

Challenges to the *polls* are challenges of individual jurymen; and are either peremptory, or for cause; by the prisoner, or the crown.

Peremptory challenges.

Peremptory challenges to the polls in felony are (as the name imports) challenges at the mere will of the party challenging, without any reason given (*p*). The prisoner, in cases of treason and felony (*q*), has, from very early times, pos-

(*f*) *R.* v. *Edmonds*, 4 B. & A. 471, 489.
(*g*) *R.* v. *Johnson*, Strange, 1000; Cro. Cir. Comp. 105 b, 8th ed.; *R.* v. *Edmonds*, 4 B. & A. 471.
(*h*) Trials per *Pais*, 172. See form of challenge to the array, Cro. Cir. Comp. 122; Burn's J., *tit. Jurors*, vol. 3, p. 106, 30th ed.
(*i*) *Ante*, p. 208. Trials per *Pais*, 272.
(*k*) *R.* v. *Savage*, 1 Moo. C. C. 51; *Brimskill* v. *Giles*, 9 Bing. 13; see as to Triers, *post*, p. 214.
(*l*) *R.* v. *Dolby*, 1 C. & K. 238, where a form of oath to the triers to try the challenge is given.
(*m*) *R.* v. *Savage*, 1 Moo. C. C. 5.
(*n*) *Reg.* v. *Hughes*, 1 C. & K. 235.—The demurrer to such a challenge and joinder are always *ore tenus*. Demurrer was in that case allowed, and the trial proceeded to conviction.
(*o*) *R.* v. *Dolby*, 2 B. & C. 104; 1 C. & K. 238.
(*p*) Co. Litt. 156.
(*q*) *Gray* v. *The Queen*, 11 Cl. & F. (H. of L.) 427; 1 C. & K. 505, n.

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sessed the right of peremptory verbal challenge by himself personally, and not by counsel (*s*): the numbers he might so challenge have been varied at times by several statutes; but that number is now fixed at *thirty-five* in cases of treason and *twenty* in all cases of felony (*t*). If a party indicted for treason, felony, or piracy, persists in challenging peremptorily a greater number than the law allows, his challenge is absolutely void, and his trial must proceed as though no such challenge had been (*u*). After a prisoner has peremptorily challenged *twenty*, he cannot withdraw a challenge and challenge another (*x*).

No peremptory challenges in misdemeanours.

In cases of misdemeanours, and in collateral issues, there is no right of peremptory challenging (*y*); but it is usual for the officer, on application to him, to abstain from calling any reasonable number of names objected to, either by the prosecutor or the defendant, taking care that enough be left to form a jury; and this practice has often been sanctioned by the court.

A proper course is for the attornies on both sides to hand in to the clerk of the peace lists of the names of those common jurors on the panel whom they wish not to be called; and a misdemeanour is like a civil action *quoad hoc*. Accordingly, if the jury panel is exhausted by this course, all the names must be put in the balloting box again, and the parties may then challenge for cause (*z*).

It seems agreed that by the common law the crown has the right of peremptory challenge of as many as it thinks fit, but this has been controlled by the statute 31 Edw. 1, st. 4, called "*ordinatio de inquisitionibus*" (*a*). The 6 Geo. 4, c. 50, s. 29, now stands in the place of the last-mentioned statute and enacts, "That in all inquests wherein the king is a party, howsoever it be, notwithstanding it be alleged by them that sue for the king that the jurors of those inquests, or some of them, be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court; and it shall be proceeded to the taking of the same inquisition, as it shall be found, if the challenges be true or not, after the discretion of the court."

Peremptory

It has been held, that there was no intention by this statute of

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(*s*) 2 Hawk. c. 43, s. 4; Trials per *Pais*, 272.
(*t*) 22 Hen. 8, c. 14; 32 Hen. 8, c. 3; 33 Hen. 8, c. 23; 1 & 2 P. & M. c. 10; 6 Geo. 4, c. 50, s. 29.
(*u*) 7 & 8 Geo. 4, c. 28, s. 3.
(*x*) *R.* v. *Parry and others*, 7 C. & P. 836.
(*y*) *Reading's case*, 7 Howell's St. Tr. 265; *Oates's case*, 10 *id.* 1079; 4 Bla. Com. 353, Christian's note; Foster, 42.
(*z*) See *Marsh* v. *Coppock*, 9 C. & P. 480.
(*a*) 2 Hawk. c. 43, s. 2.

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challenges for the crown.

taking away all power of peremptory challenge from the crown, but the object of the statute is attained if the crown be prevented from exercising its power of peremptory challenge, so as to make the trial go off while there are twelve of those returned upon the panel who cannot be proved to be liable to valid objection. Therefore the course has invariably been, from the passing of the statute to the present time, to permit the crown to challenge without cause till the panel has been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the crown and to put the crown to assign cause, so that if twelve of those upon the panel remain, as to whom no just cause of objection can be assigned, the trial may proceed (*b*). The panel is not called over and exhausted so as to put the crown to show cause of challenge by the mere calling over of the names, for some of the jurors may have omitted to answer to their names when called from accidental or enforced absence, but may have come into court before the calling over of the panel is completed, or before any fresh step has been taken, but it cannot be said to be exhausted till, according to the usual practice of the court and what may reasonably be done, the fact is ascertained that there are no more of the jurors on the panel whose attendance may be procured, and that, without requiring the crown to assign cause of challenge, the trial could not proceed. Thus, where by reason of the challenges of the prisoner, and the peremptory challenges of the crown, the panel has been called over without getting a full jury—twelve of the panel being on another jury which had retired to consider their verdict in another case—and upon calling again one of the names peremptorily challenged for the crown the jury which had retired returned into court with their verdict, it was held, that the crown had a right to have those twelve jurors called before being required to show cause to any of the jurors peremptorily challenged, and that until that was done the panel was not exhausted (*c*). A full jury was obtained in that case out of the jury which had returned into court and the trial proceeded, and the prisoner was held rightly convicted.

If all the jurors in the panel are in court when the panel has been called over, and if when it has been once gone through in that way there is not a full jury made, the usual course would be immediately to call the names over again and put the crown to assign cause of challenge; but if all the names were not answered to, the panel should be called over again, omitting to call those who have been peremptorily challenged by the prisoner, with a view to see whether there may not be some of the jurors in the panel who may have come into court, and who

(*b*) *R.* v. *O'Coigly and others*, 26 How. St. Tr. 1231; *Mansell* v. *Reg.*, D. & B. 375; 27 L. J., M. C. 4.

(*c*) *Mansell* v. *Reg.*, D. & B. 375; 27 L. J., M. C. 4.

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may make up a full jury without putting the crown to assign cause of challenge (*d*).

Causes of challenge to the polls.

A challenge to the *polls*, *i. e.*, of individual jurors, is like a challenge to the array, a principal challenge, or a challenge to the favour.

Principal challenges.

The grounds of principal challenge, *i. e.*, for matter which once ascertained absolutely disqualifies, are reduced to four heads: *propter honoris respectum; propter defectum; propter affectum;* and *propter delictum.*

Propter honoris respectum.

1. A challenge *propter honoris respectum* is a challenge in respect of the rank and dignity of the juror; as, if a lord of parliament be impannelled, he may be challenged by either party, or may of his own accord decline serving.

Propter defectum.

2. A challenge *propter defectum* is for some personal incapacity; as, if a juryman be an alien (*e*), not having been domiciled in England or Wales for ten years or upwards (*f*), lunatic, or minor; or if he have not sufficient estate. As to this last ground of challenge, the act which alters the qualification of jurors, enacts (*g*), that "If any man shall be returned as a juror for the trial of any issue in any of the courts thereinbefore mentioned (among which is the court of quarter sessions), who shall not be *qualified according to that act*, the want of such qualification shall be good cause of challenge, and he shall be discharged upon such challenge if the court shall be satisfied of the fact; and that if any man returned as a juror for the trial of any such issue shall be qualified in other respects according to this act, the want of freehold shall not, on such trial, in any case, civil or criminal, be accepted as good cause of challenge, either by the crown or the party, nor as cause for discharging the man so returned upon *his own* application: provided that nothing herein contained shall extend in anywise to any special juror." A grand juryman who found the bill may, it seems, be challenged if on the petty jury (*h*); but if he is sworn, and then offers to leave the box, to which the prosecutor consents, but defendant does not, and the juror remains, and the verdict is guilty, there is no mistrial (*i*).

Propter affectum.

3. The challenge *propter affectum* is on some palpable ground of bias; as if the juror be of the blood or kindred to either party; or under his power or direct influence, as tenant or servant, or of council with him (*k*); or if he has declared beforehand that he will pass for the one party out of affection for the party, but it is not a ground of challenge that he has said he will so do from the knowledge he has of the matter and

(*d*) *Mansell* v. *Reg.*, D. & B. 375; 27 L. J., M. C. 4.
(*e*) Co. Litt. 156 b; 6 Geo. 4, c. 50, s. 3.
(*f*) 33 & 34 Vict. c. 77, s. 8.
(*g*) 6 Geo. 4, c. 50, s. 27; *R.* v. *Sutton*, 8 B. & C. 417.
(*h*) See *R.* v. *Edmonds*, 4 B. & A. 476; *Cook's case*, 13 How. St. Tr. 339.
(*i*) *Reg.* v. *Sullivan*, 8 A. & E. 831; 1 P. & D. 96.
(*k*) Co. Litt. 157 a.

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of the truth (*l*), or inhabits a town where the riot which forms the subject of the indictment occurred, and actively engaged in the affair which led to it (*m*).

Propter affectum.

And an exception against a juror, that he has found an indictment against the party for the same cause, has been adjudged good (*n*); and also upon another indictment when the same matter is in question, or happens to be material, though not directly in issue. But it is no good cause of challenge that the juror has found *others* guilty on the same indictment, for the charge is several against each (*o*).

Before forfeitures were abolished it was also a good cause of challenge on the part of a prisoner, that the juror had a claim to the forfeiture which would have ensued from the party's attainder or conviction (*p*). And Lord *Coke* says, "If either party labour the juror and give him anything to give his verdict, this is a principal challenge; but if either party barely labour the juror to appear and to do his conscience, this is no challenge at all, but lawful for him to do it" (*q*).

An action brought by the juror against either of the parties, or by either of the parties against him, which implies malice or displeasure, is cause of principal challenge; other actions which do not imply malice or displeasure, are but to the favour (*r*).

Propter delictum.

4. The challenge *propter delictum* is for some crime or misdemeanour that affects the juror's character, and renders him infamous; as, a conviction of treason, felony, or perjury, or if he be outlawed. And it has been holden that such exceptions are not removed by a pardon. But it seems that none of the above-cited challenges are principal ones, but only to the favour, unless the record of the outlawry, judgment, or conviction be produced, if it be a record of another court; or the session be shown, if it be a record of the same court (*s*).

Although a juror has not given apparent marks of partiality, yet there may be sufficient reason to *suspect* he may be more favourable to one side than the other, and this is reason for a challenge to the favour. The causes of favour are infinite, and in these inducements to *suspicion* of favour, the question is, "whether the juryman be indifferent as he stands unsworn;" for a juryman ought to be perfectly impartial to either side (*t*).

We have seen (p. 209) that, if the challenge is to the *array*, it must be tendered in writing, and if to the poll, *i. e.*, to an

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(*l*) Hawk. b. 2, c. 43, s. 28; *R.* v. *Edmonds*, 4 B. & A. 471, 491.
(*m*) *Cook's case*, 13 St. Tr. 339; *R.* v. *Edmonds*, 4 B. & A. 493, n.
(*n*) *R.* v. *Swain*, 2 M. & Rob. 112.
(*o*) Hawk. b. 2, c. 43, s. 29; *R.* v. *Edmonds*, 4 B. & A. 471, 491.
(*p*) *Ibid.*
(*q*) Co. Litt. 157 b.
(*r*) *Ibid.*
(*s*) *Ibid.*
(*t*) *Ibid.*

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individual juror, must be orally made before the juryman objected to takes the book into his hand by the direction of the officer of the court (*u*).

After a challenge to the array, the party may challenge the polls, but not *vice versâ;* and he who has more than one cause of challenge against a juror, must take them all at once; though, if he challenge a juror, and the cause be found insufficient, he may nevertheless afterwards challenge him peremptorily, for perhaps the very challenge may create a prejudice in the mind of the juror so challenged (*x*).

A principal cause of challenge being grounded on a manifest presumption of partiality, if it be found true, it unquestionably sets aside the *array*, without any other trial than its being made out to the satisfaction of the court, before which the panel is returned.

Challenge to the favour in discretion of triers.

But a challenge to the favour, when the partiality is not apparent, must be left to the discretion of the triers (*y*).

Mode of trial of challenges.

If the *array* be challenged, it lies in the discretion of the court to determine *how* it shall be tried; sometimes it is done by two attornies, sometimes by two coroners, and sometimes by two of the jury; with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge be on account of partiality, then by any other two assigned thereunto by the court (*z*).

When a challenge is made to the *array* for favour, the prosecutor may either confess it, or demur, or plead to it; if he plead, the judges assign triers to try the array, who seldom exceed two, who being chosen and sworn, the clerk of the peace declares to them the challenge, and concludes to them thus,—"*and so your charge is to inquire whether it be an impartial array, or a favourable one;*" and the presiding judge will give them a direction as to what constitutes impartiality if necessary (*a*); and if they affirm the array, the clerk enters underneath the challenge, "*affirmatur;*" but if the triers find it favourable, then thus, "*calumnia vera,*" or words to that effect (*b*).

As to challenges to the *polls:* If a juror be challenged before any juror is sworn, two triers are appointed and sworn by the court, thus,—

Oath of trier.

"You shall well and truly try whether A. B. (the person challenged) stand indifferent between the parties to this issue. So help you God" (*c*).

(*u*) *Reg.* v. *Frost*, 9 C. & P. 137, per *Tindal*, C. J.; *ante*, p. 208. See *Reg.* v. *Mellor*, Dears. & B. 468.
(*x*) Co. Litt. 158 a.
(*y*) *Ibid.*
(*z*) 2 Hale, 275.
(*a*) *R.* v. *Edmonds*, 4 B. & A. 471, 491.
(*b*) *R* v. *Edmonds*, 4 B. & A. 471, 474; Trial per *Pais*, 165.
(*c*) Salk. 152.

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And if after the direction of the court upon the question of impartiality the juror be found indifferent, and sworn or affirmed (*d*), he and the two triers shall try the next juror challenged; and if he be tried and found indifferent, then the two first triers shall be discharged, and the two jurors tried and found indifferent shall try the rest. But if the prosecutor challenge ten, and the prisoner one, and the twelfth be sworn, or affirmed, then he that remains shall have added to him one chosen by the prosecutor, and another by the prisoner, and they three shall try the challenge (*e*); and if six be sworn and the rest challenged, the court may assign any two of the six sworn to try the challenges (*f*).

The truth of the matter alleged as cause of challenge must be made out by witnesses, to the satisfaction of the triers; also the juror challenged may, on a *voire dire* (*veritatem dicere*, to speak the truth), be asked on his oath such questions as do not tend to his disgrace, *e.g.*, as to his qualification (*g*), or whether he has taken an active part with reference to a matter which led to a riot, the subject of the indictment about to be tried (*g*). But a juror may not be asked whether he has been whipped for larceny or convicted of felony, and such questions as tend to discover matters of infamy or shame (*h*). Nor may a juror be asked whether he has expressed an opinion or determination hostile to the party challenging, and such matters must be proved by other evidence (*i*).

Exhaustion of panel.

If on the trial of an indictment under a commission of *gaol delivery* the panel is exhausted by non-appearance, or by challenges of the jurors, but no *tales* are prayed under the attorney-general's warrant, the justices may award a new panel, not reckoning in it the jurors before sworn (*k*), by *ore tenus* ordering the sheriff to return a panel *instanter* without further precept (*l*). And in all cases of felony, justices of peace in sessions may, after plea pleaded, issue a *special* precept in the nature of a *venire facias juratores*, commanding the sheriff to return twenty-four, forty-eight, or more jurors immediately, and on his returning a sufficient number of jurors thereon, may proceed to try the party on the same day or at the same session (*m*). And the like, as it seems, in misdemeanours,

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(*d*) 30 & 31 Vict. c. 35, s. 8.

(*e*) Co. Litt. 158 a.

(*f*) 2 Hale, 275.

(*g*) *R.* v. *Swain*, 2 Moo. & R. 112.

(*h*) 6 Geo. 4, c. 50, s. 50; Trial per *Pais*, 158; Salk. 153; Co. Litt. 158 b; *Reg.* v. *Frost*, 9 C. & P. 129, 136.

(*i*) *R.* v. *Edmonds*, 4 B. & A. 471; 1 Salk. 153. At O'Coigly's trial, 3 Harg. St. Tr.; 26 How. St. Tr. 1226, a juror was set aside for having said "Damned rascals!" on looking at the prisoners, clenching his fist the while.

(*k*) 1 Ch. Cr. L. 1st ed. 517.

(*l*) 1 Ch. Cr. L. 506—508. Per *Treby*, C. J., in 4 Harg. St. Tr. 744.

(*m*) Hawk. b. 2, c. 41, s. 1. It has, however, been said that this may be done by *general* precept, *ibid.* In *Reg.* v. *Cropper*, 2 Moo. C. C. 18, a

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where the party is in prison, or consents to waive the formality of a special precept to the sheriff not returnable till the end of fifteen days (*n*).

However, in most cases the following course, settled on grave consideration, is more advisable. If on trial of a felony the jurors in the panel are so exhausted, that is to say,—it is ascertained that according to the usual practice of the court, and what may reasonably be expected, there are no more jurors in the panel whose attendance may be procured,—either by the challenges of the prisoners only, or by the alternate peremptory challenges of the prisoners and the crown, so that a full jury cannot be had, the proper course is to call over the whole panel in the same order as before (only omitting those who have been peremptorily challenged by the *prisoner*). Then as each juror appears, the counsel for the prosecution must state a *cause* of challenge, and if they decline to do so, or it is held insufficient, and the prisoner does not challenge for *cause*, and successfully, the juror must be sworn (*o*).

Allowance or disallowance of challenge.

It would seem to be the better opinion that the improper allowance or disallowance of a challenge by the judge is a matter of error on the record, though it was treated as such with some hesitation in *Mansell* v. *Reg.* (*p*), and *R.* v. *Ed-*

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new panel of seventy-two jurors was ordered; and a conviction by a petty jury obtained from them after many more challenges was held valid; 1 Hale, 28, 261; though older authorities state, that the justices cannot *compel* the immediate return of jurors to *venires* issued during the *then* session, so as to try even a felon at that session, Dalt. c. 185; Staundford, Pl. Cor. lib. 3, c. 5; Fitzh. Ab. *tit. Corone*, pl. 44; and rest the confessed power of the judges of gaol delivery, on the ground of the general precept issued by them (as justices of oyer and terminer, 4 Inst. 168) to the sheriff long before their entering the county, to return jurors at the sitting of the court then announced. See 4 Hargr. St. Tr. 744; 2 Hawk. c. 41, s. 1; 1 Chit. Cr. L. 508, 509. But *Hale* says, "this is not the reason, for so it is done by justices of oyer and terminer *and of the peace*, and yet they make *special* precepts of *venire*," 1 Hale, 261; and adds that, "as there goes out a summons of gaol delivery, so there issues a general summons of the sessions of the peace," *Id.* 28. The forms of the precept to the sheriff, and of the sheriff's warrant to his bailiffs to summon the jurors (*ante*, pp. 20, 21), support this reasoning.

(*n*) 2 Hawk. c. 41, s. 4; Keilw. 159; 1 Ch. Cr. L. 513; and cases in 3 Burn's J., *tit. Jurors*, VII.

(*o*) *Mansell* v. *Reg.*, D. & B. 375; 27 L. J., M. C. 4; *ante*, p. 211; *Reg.* v. *Geach*, 9 C. & P. 499, acted on in *R.* v. *Turvey and others*, Worcester Lent Assize, 1845, where *Pollock*, C. B., after consulting *Platt*, B., held the course of praying a *tales* inadmissible; Dick. Q. S., 5th ed. 507; *R.* v. *Perry and others*, 7 C. & P. 836. Where a prisoner had had no opportunity of challenging a particular jury, *e.g.*, where on an indictment tried on the nisi prius side, John Williams being on the common jury panel was called as a talesman, but at his request, and without collusion with either party, his son was sworn and served, being neither of full age, qualified by estate, or on any panel, it was held a mistrial, and after verdict of guilty a new trial was ordered. *R.* v. *Tremearne*, 5 B. & C. 254; (*Misdemeanour*) as explained *R.* v. *Sutton*, 8 *id.* 417; see 6 Geo. 4, c. 50, s. 16; 11 Hen. 4, c. 9; 12 Co. 98.

(*p*) D. & B. 375.

monds (*q*). The challenge and its grounds should be put upon the record and demurred or pleaded to, and judgment passed thereon (*r*). A writ of error should then be brought, and if the judgment were reversed on the ground that the challenge was improperly disallowed, a *venire de novo* would be awarded (*s*); for the disallowance of a challenge is ground not for a new trial but for a *venire de novo* (*t*). But so far as it is a matter of law any question on it may be reserved for the opinion of the Court of Crown Cases Reserved, who may award a *venire de novo* (*u*). *Challenge of Jurors.*

A judge, on the trial of a criminal case, has authority, though there be no challenge either by the crown or by the prisoner, to excuse a juryman on the panel when he is called, or to order him to withdraw if he be palpably unfit by physical or mental infirmity to do his duty in the jury box, as if he were completely deaf or blind, or afflicted with a bodily disease which rendered it impossible for him to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relative that he could not duly attend to the evidence (*v*). Authority of judge to excuse juryman, though not challenged.

The sheriff cannot be commanded to appoint a tales, *viz.*, "so many sufficient persons present," as may complete the number of a jury, reduced below its proper number by neglect to appear, challenge, death, or otherwise, without warrant from the attorney-general (*x*). This mode of filling up a jury is therefore seldom resorted to at sessions, but either the prosecutor or the party indicted may obtain the necessary warrant. Tales.

The challenges being now supposed to have been waived or determined, and the jury full, the clerk of the peace calls the jury to be sworn, every man severally; and this is done, in case of felony, in the following manner:— Swearing jury in felony.

"You shall well and truly try, and true deliverance make, between our sovereign Lady the Queen and the prisoners at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God."

The crier then counts the jurors, as the clerk of the peace reads their names, and asks them "if they are all sworn."

(*q*) 4 B. & A. 471.

(*r*) *Gray* v. *The Queen*, 11 Cl. & Fin. 427; *Mansell* v. *Reg*, *ubi sup.*; *R.* v. *Edmonds*, 4 B. & A. 471, 474; *Reg.* v. *Mellor*, D. & B. 478, 512, per *Crompton*, J.; *Reg.* v. *Levinger*, L. R., 3 P. C. 282; 39 L. J., P. C. C. 49.

(*s*) *R.* v. *Edmonds*, 4 B. & A. 471, 473.

(*t*) *Ibid.*; and see cases there cited.

(*u*) 11 & 12 Vict. c. 78.

(*v*) *Mansell* v. *Reg.*, D. & B. 405; 27 L. J., M. C. 4.

(*x*) 1 Ch. Cr. L. 1st ed. 508, 518; Foster, 25, 64; 4 Bla. C. 354, 355, *contra*. *Semble*, on mere commissions of *gaol delivery*, no tales could be awarded, 4 Inst. 168. *Cook's case*, 4 St. Tr. 728; *id.* 744; though at nisi prius it might by 35 Hen. 8, c. 6, now repealed by 6 Geo. 4, c. 50, s. 62.

Swearing the Jury.

In cases of misdemeanours, the jurors are sworn four at a time, in the following terms :—

In misdemeanour.

"You shall well and truly try the issue joined between our Sovereign Lady the Queen and the defendant, and a true verdict give according to the evidence. So help you God."

Affirming the jury.

The immemorial law and custom of England entitled the subject to a trial by twelve men *sworn* to deal uprightly with his case. But by 30 & 31 Vict. c. 35, s. 8, if any person summoned or required to serve as a juror in any civil or criminal proceeding shall refuse, or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge (or other presiding officer or person qualified) to administer an oath to a juror, upon being satisfied of the sincerity of such objection to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration, in the words following :—

"I, A. B., do solemnly and sincerely and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly and sincerely and truly affirm and declare," &c.

Which solemn affirmation and declaration shall be of the same force and effect, and if untrue shall entail all the same consequences as if such person had taken an oath in the usual form; and whenever in any legal proceedings it is necessary or usual to state or allege that jurors have been sworn, it shall not be necessary to specify that any particular juror had made affirmation or declaration instead of oath, but it shall be sufficient to state or allege that the jurors have been "sworn or affirmed." The latter part of this section takes the place of 6 & 7 Vict. c. 85, s. 2.

If a juror wrongly sworn.

A mere misnomer in the christian name of a juror in the panel which leads to his being sworn, for instance, as Robert Curry instead of Joseph Curry, is not a ground of mistrial if discovered afterwards (*y*). In that case Robert Curry who served was summoned as a juryman, and though there was a Joseph Curry on the sheriff's panel, he was not then resident in the county. But where a juror answers to and is sworn in the christian and surname of another juror on the panel the court was equally divided, six judges being against six on the question whether it was mistrial or not, whilst the conviction in that trial for murder was confirmed by a majority (*z*). In such a case it is as if eleven jurymen had tried the prisoner, and therefore he never was in jeopardy, and he might be tried again (*a*). If the mistake be discovered before verdict, the judge might perhaps discharge the juror objected to and call another juryman, and then take the evidence over again, or he might give the prisoner the liberty of challenging the juror who actually served (*b*).

(*y*) *The case of a Juryman*, 12 East, 231, n.
(*z*) *Reg.* v. *Mellor*, D. & B. 468; 27 L. J., M. C. 121.
(*a*) *Ibid.*
(*b*) Per *Wightman*, J., *Reg.* v. *Mellor*, *ibid.*

Swearing the Jury.

But it was said in that case, that if a juryman answers to the name of another juryman and is sworn in such wrong name, or if a stranger answers to the name of a juryman and this comes to the knowledge of the judge during the trial, it is the duty of the judge to discharge that jury and to have another impannelled (*c*). But the court was divided into six judges against six judges upon the question, whether a verdict taken upon a trial under such circumstances where the fact of the mistake did not come to the knowledge of the judge was vitiated thereby (*d*).

Giving prisoner in charge.

On the trial of a felony a further preliminary form takes place of reading the indictment again, which is unnecessary in misdemeanours, where the defendant is entitled to a copy (*e*). It is termed *charging the jury*. This consists in the clerk of the peace again desiring the prisoner to hold up his hand, and addressing the jury :—

"Gentlemen of the jury, look upon the prisoner and hearken to his charge; he stands indicted by the name of A. B., for that he, on, &c. [*reading the indictment to the end*]. Upon this indictment he hath been arraigned; upon his arraignment he hath pleaded not guilty; your charge, therefore, is to inquire whether he be guilty or not guilty, and hearken to the evidence."

Charging after previous conviction.

It is enacted by 24 & 25 Vict. c. 96 (The Larceny Act), s. 116, that in any indictment for any felony punishable under that act and committed after a previous conviction or convictions for any felony, misdemeanour, or offence or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was, at a certain time and place, or at certain times and places, convicted of felony, or of an indictable misdemeanour, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous felony.

And the proceedings upon any indictment for committing any offence after a previous conviction or convictions, shall be as follows (that is to say), the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then and not before be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted or stand mute of malice, or will not answer directly to such ques-

(*c*) Per *Cockburn*, C. J., in *Reg.* v. *Mellor*, *ibid.*
(*d*) *Ibid.*
(*e*) 1 Ch. Cr. L. 555. See *ante*.

Giving the Prisoner in charge to the Jury.

tion, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry.

Provided, that if upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of "guilty" shall be returned; and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. As to the mode of charging previous convictions in coinage and other cases, see *ante*, p. 183.

A prisoner charged.

A prisoner charged with felony must be at the bar, viz., in the dock, during his trial, and cannot sit at the table with his counsel, except on the ground of ill-health, &c., to be allowed by the court (*f*).

Quashing indictment or discharging jury after jury are sworn.

Though after the jury are sworn, formal objections apparent on the face of the record cannot be taken, and substantial objections so apparent can, as a matter of right only, be urged in *arrest* of judgment, yet if the indictment (at least in misdemeanour) be so clearly bad, that no judgment can pass upon it, the court may and will either quash it at the instance of the defendant, or in the exercise of its discretion leave him to his writ of error (*g*) (see *ante*, p. 185), or discharge the jury from trying it, even though the defendant desires that the trial may proceed, as it is palpable that it would be useless to take the opinion of the jury on the facts.. Though counsel may suggest, they cannot be allowed to argue such an objection after the jury is sworn, till after conviction, when they may move in arrest of judgment (*h*). Where, at nisi prius, the jury were not all sworn before the indictment was discovered to be defective, the case was struck out of the list, and the judge refused to take notice of the record.

(*f*) *Reg.* v. *Zulueta*, C. & Kir. 215; *Reg.* v. *Douglas*, C. & M. 193; *Reg.* v. *St. George*, 9 C. & P. 485. See *ante*, p. 181.

(*g*) *Reg.* v. *Keane*, 4 B. & S. 947; 33 L. J., M. C. 115.

(*h*) *R.* v. *Abraham*, 1 M. & Rob. 7, per Lord *Tenterden*.

CHAPTER VI.

OF THE TRIAL.

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SECTION 1.

OPENING SPEECH OF COUNSEL.

Opening of case by counsel.

THE jury being charged with the prisoner, in cases of felony, the trial commences.

Where counsel are instructed, the proceedings commence by his opening statement.

In cases of misdemeanour of the more important character, such as nuisances, if there are two counsel for the prosecution, the junior commences by stating the indictment, and the leading counsel then opens the case for the prosecution. In cases of felony, the indictment having been read, this is unnecessary. In a prosecution against several persons for misdemeanour, the counsel conducting the case against them has a right, before opening his case, to the acquittal of any defendant whom he proposes to examine as a witness (*a*).

The leading counsel opens the case for the prosecution, according to his instructions, unless it be so plain in its nature as not to require any statement, which will often occur (*b*); but if a case be ever so plain, he must open it if there is a counsel for the prisoner (*c*). A prosecutor conducting his case in person, and who is to be examined as a witness in support of

(*a*) *R.* v. *Rowland*, R. & M. 401.
(*b*) *R.* v. *Jackson and Fisher*, 7 C. & P. 773, per *Parke*, B.
(*c*) Per *Parke*, B., since 6 & 7 Will. 4, c. 114, in *R.* v. *Gascoine and others*, 7 C. & P. 773.

Opening Speech of Counsel.

it, has no right to address the jury as counsel (*d*). When a counsel addresses the jury in a case of felony, he ought to confine himself to a simple statement of the facts which he expects to prove; and in cases where the prisoner has no counsel, he should particularly refrain from stating any part of the facts, the proof of which from his own brief may appear doubtful, except with proper qualification; for he will either produce on the minds of the jurors an impression, which the mere failure of the evidence may not remove, in instances where the prisoner is unable to comment on it with effect; or may awaken a feeling against the case for the prosecution, which in other respects it may not deserve. The court, too, if watchful, cannot fail, in the summing up, to notice the discrepancy between the statement and proof. This is still more important with respect to opening any expression of the prisoner. See *infra*.

But in all cases, as well of felony as misdemeanour, where a prisoner has counsel, not only may the facts on which the prosecution rests be stated, but they may be reasoned on, so as to anticipate any line of defence which may probably be adopted (*e*). For as counsel for parties charged with felony may now address the jury in their defence, as might always have been done in misdemeanour, the position of parties charged with either degree of offence is thus assimilated, in cases where they have counsel; and it is no longer desirable for the prosecutor's counsel to abstain from observing generally on the case he opens, in such a manner as to connect its parts in any way he may think advisable to demonstrate the probability of guilt, and the difficulty of an opposite conclusion. Thus he may anticipate an attack being made upon one of the witnesses for the prosecution, and state that there is no foundation for any imputation upon her (*f*). In this exercise of his duty, he will refrain from invective, or appealing to the prejudices or passions of a jury; it being neither in good taste or right feeling to struggle for a conviction as is done for a verdict in a civil cause. On the other hand, should he be called on for a reply, his situation may be very different; as occasions will sometimes occur, where the fraud and perjury of a defence will require to be searchingly and unsparingly exposed.

But now, by the 28 Vict. c. 18, s. 2, the counsel for the prosecution, in cases where the prisoner is defended by counsel who does not call witnesses, has an opportunity given him of summing up the evidence for the prosecution, and therefore has the opportunity of explaining any variances or discrepancies between his opening and the proof which he had not formerly. As to this section, see *post*, p. 295.

As to opening prisoner's statements.

Before we dismiss the subject of the opening by the prose-

(*d*) *R.* v. *Brice*, 2 B. & A. 606; 1 Chit. 352. See *R.* v. *Lancashire (Justices)*, *id.* 602.
(*e*) *Reg.* v. *Courvoisier*, 9 C. & P. 362.
(*f*) *Ibid.*

Opening Speech of Counsel.

cutor's counsel, we must advert more particularly to the proper manner of stating *oral declarations* of the prisoner, whether amounting to *confessions*, strictly so termed, viz., made before a magistrate, or to evidence of less cogency. As to the latter, it is common to find that a very material part of a prosecutor's case consists of *expressions used by a prisoner*, of more or less application to the matter in issue. When this is the case, it must be recollected that conversation is, of all other evidence, that which is most liable to be misunderstood, imperfectly remembered, and misstated; while its whole sense and bearing may be changed by omitting or transposing a word. Hence it was often the practice of counsel to abstain from exercising their strict right to open for the prosecution the circumstantial detail of the words used on the ground that, though it might turn out that the prisoner had not used them at all, or at least not in the sense imputed, a prejudice might be created in the minds of the jury, which any variance in the evidence, short of absolute contradiction, might fail to destroy. As it was laid down, by a first-rate authority on such subjects, Mr. Baron *Garrow*, that the correct practice was to state no more than the *general effect* of the expressions used (*g*). Besides which, if the prosecutor's counsel undertakes to state in detail, from his instructions, the precise tenor of the words insisted on as material, any perceptible variance in the testimony, though unimportant in itself, may be wrested to produce the effect of overturning the rest of his case, though founded on reasonable grounds distinct from the prisoner's admission. But where the prosecutor's counsel, in his opening address, alluded to certain declarations of the prisoner as about to be proved, and relied on them as material against him, but left them to be detailed by the witnesses, so that their *general effect* remained so wholly unknown to the prisoner and his counsel as to prevent them from shaping their defence properly, Mr. Baron *Parke* is reported to have interposed, saying that the fair and proper course towards the prisoner, is to state in the opening all that is intended to be proved (*h*), viz., not only facts but declarations; as any discrepancy between the opening address and the testimony of the witnesses might operate favourably for him in the minds of the jury (*i*). On the whole, then, with respect to expressions of the prisoner, which are material to the prosecutor's case by way of admission, it appears proper to state them in such a general way as will draw the attention of

(*g*) *R.* v. *Deering and Atkinson*, 5 C. & P. 165.

(*h*) *R.* v. *Hartel*, 7 C. & P. 773; *R.* v. *Orrell*, 1 M. & Rob. 468; also stated less fully in 7 C. & P. 774, n.

(*i*) *R.* v. *Hartel*, by *Parke*, B.; and again, by the same learned judge, in *R.* v. *Davis*, 7 C. & P. 786. It does not appear from this latter case, as reported, whether the prisoner's expressions, as there stated by the prosecutor's counsel under the judge's ruling after objection taken to them, were stated in so many words, from the counsel's instructions, or only the *general bearing and effect* of them.

Opening Speech of Counsel.

the prisoner or his counsel to the time and place when, and the parties to whom, they are alleged to have been used, as well as to their general purport, without affecting to detail them minutely (*k*). If such particularity is attempted in the opening, it should be accompanied by such observations as will be calculated to prevent any unsubstantial variance in any particular proof, from weighing against the general scope and bearing of the rest. Though since the power of summing up the case in prosecutions given by the 28 Vict. c. 18, any such variance can be explained at that time.

As to opening confession.

But in opening to a jury the *confession* of a prisoner before a magistrate as part of the evidence by which a prosecution will be supported in the whole, or in part, the duty of a counsel is clearly laid down to be, not to state more than its general effect; the reason assigned in all the cases being, that the confession may turn out to have been made under circumstances rendering it inadmissible in evidence (*l*). As this ruling appears grounded on the prejudice which might be created in the minds of the jury by opening a detailed statement of a confession, and which might not be removed, notwithstanding that in the result the confession turned out inadmissible in evidence, it is not easily reconciled with Mr. Baron *Parke's* doctrine, that such declarations of a prisoner as do not amount to confession of the *corpus delicti*, shall be opened in order that they may be benefited by any subsequent discrepancy in proof. In both cases it seems the right course to open the general effect of a prisoner's declarations and confessions. If additional evidence is discovered after the opening for the prosecution has concluded, it must, of course, be heard, but cannot be made the subject of a second address for the prosecution (*m*).

Examining witnesses from the depositions where no counsel appear.

Where no counsel is engaged for the prosecution, there is of course no opening; the prosecutor himself never being allowed personally to address the jury (*n*). For the cause is not his, but that of the crown, though conducted at his instance; and on that account alone formerly it was that he could be examined at all, and, now when so examined, must be sworn on the book like another witness (*o*). In these latter cases, however, the court will have had an opportunity of learning the nature of the case, and of the evidence to be adduced from the depositions which will have been delivered to the officer of the court before the day of the sessions, though *Maule*, J., has expressed his disapprobation of the practice of the court acting as counsel for the prosecution by making a case against a prisoner after a perusal of the depositions, and handed the depositions, where no

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(*k*) See *R.* v. *Swatkins*, 4 C. & P. 548.
(*l*) *R.* v. *Swatkins and others*, 4 C. & P. 548; *R.* v. *Davis*, 7 C. & P. 786; *R.* v. *Orrell*, 7 C. & P. 775.
(*m*) *Reg.* v. *Courvoisier*, 9 C. & P. 362.
(*n*) *Ante*, pp. 221, 222.
(*o*) *Ibid.*

counsel was instructed, to a counsel; for, as he said, the fiction of law was that the court was of counsel for the prisoner and not for the prosecution (*p*); and a counsel so instructed ought to act as counsel for the prosecution in all respects and not confine himself to examining witnesses (*q*).

Examination of Witnesses where no Counsel appear.

Section 2.

Examining Witnesses from the Depositions where no Counsel—Calling Witnesses named on the back of the Indictment.

The depositions consist of the "information on oath" of the witnesses, taken down in writing before the committing magistrate, which on this account, as well as that of the right of the prisoner to inspect them at his trial, are required by the 11 & 12 Vict. c. 42, s. 20, to be delivered by the justice or justices who have taken the same "or he or they shall cause the same to be delivered to the proper officer of the court in which the trial is to be had, before or at the opening of the said court, on the first day of the sitting thereof, or at such other time as the judge, recorder or justice, who is to preside in such court at the said trial shall order and appoint."

Of the depositions.

Examining from the depositions.

A right is given to the prisoner to have copies of the depositions given him by sect. 27 of the 11 & 12 Vict. c. 42, which provides "that at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions, or other first sitting of the court at which any person so committed to prison, or admitted to bail as aforesaid, is to be tried, such person may require and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three half pence for each folio of ninety words."

Right of defendant to copies of depositions before trial.

This section gives the right to copies of the depositions only when the party has been bailed or committed to prison for some offence for which he is to be tried, and with a view of enabling him to prepare for trial; it does not, therefore, apply to the case of a person committed to prison for default of sureties to keep the peace, and who has been discharged by the sessions (*r*).

(*p*) *Reg.* v. *Page*, 2 Cox, 221.
(*q*) *Reg.* v. *Littleton*, 9 C. & P. 671.
(*r*) *Ex parte Humphrys*, 19 L. J., M. C. 189.

Right of defendant to inspect depositions at the trial.

By 6 & 7 Will. 4, c. 114, s. 4, "All persons under trial shall be entitled at the time of their trial to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

If these depositions are not returned, as they ought to be, the court can merely call on the witnesses upon the back of the indictment to be sworn, and give their own narrative.

Calling witnesses named on the back of the indictment.

In cases of *felony*, where the prosecutor does not think fit to examine a witness whose name is indorsed on the bill, the court will usually, at the prisoner's request, require such witness to be placed in the box as a witness for the prosecution, in order to his cross-examination, but this is not of course, even in felony, and any examination to which he may be subjected for the prosecution, after being so cross-examined, must be treated as a mere re-examination, limited to the points on which he has been cross-examined.

In trials for *misdemeanours* which assimilate more to civil proceedings, this practice of putting witnesses in the box, who, though on the back of the indictment, are not called for the prosecution, does not prevail.

In neither class of offences is there any objection to the examining witnesses at the trial, who have not been before the committing magistrate or the grand jury; but it is usual for the counsel for the prosecution to show to the prisoner's counsel a copy of the proof of the fresh witness before the trial comes on, and the omission so to do affords matter of comment.

If a juror is wanted to give evidence, he must be sworn and examined as a witness (*s*).

Section 3.

OF THE PARTS OF THE CHARGE WHICH MUST BE SUPPORTED BY PROOF.

Amount of proof required.

In order to convict the prisoner or defendant, the prosecutor must, subject to the statutory enactments now in force on the subject, always prove *so much* of the indictment as will amount to a complete allegation of an offence of the *same quality and degree* for which he is indicted, though it need not be proved to the *full extent* charged (*t*). Thus, on an indictment for felony, if a misdemeanour only be proved, the prisoner must

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(*s*) Per Cur. Style's R. 233; *Bennett* v. *Hertford Hundred*, 12 Vin. Ab. 47.

(*t*) *R.* v. *Hollingberry*, 4 B. & C. 330; 6 Dowl. & Ry. 344; *R.* v. *Hunt*, 2 Campb. 585.

be acquitted (*u*), unless the case comes within some statute, *e. g.* 24 & 25 Vict. c. 96, s. 41, or 14 & 15 Vict. c. 100, s. 9.

Amount of Proof required.

By statute, however, a greater laxity is introduced. Thus, by 24 & 25 Vict. c. 96, s. 41, "If upon the trial of any person upon any indictment for *robbery* it shall appear to the jury, upon the evidence, that the defendant did not commit the crime of robbery, but that he did commit *an assault with intent to rob*, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried, as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery, for which he was so tried."

Upon indictment for robbery.

And when the evidence offered to prove the actual commission of the offence charged falls short of the proof required, and amounts only to proof of an attempt to commit it, in order to prevent persons so charged from escaping conviction, it is enacted by 14 & 15 Vict. c. 100, s. 9, that if, upon the trial of any person charged with any felony or misdemeanour, it shall appear to the jury upon the evidence, that the defendant did not *complete* the offence charged, but that he was guilty only of an attempt to commit *the same*, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanour charged in the said indictment; and no person so tried, as herein lastly mentioned, shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanour for which he was so tried. To permit a conviction upon this section the evidence must show an attempt to commit the offence charged; and it is important with reference to this section not to confound an *intention* to commit with an *attempt* to commit the offence. Thus, a man may break and enter a house with the intention of stealing certain goods which he supposes to be there, but if the goods have been previously carried away, or the house is empty, he could not be said to have attempted to steal the goods though he had the intention of doing so; thus, upon an indictment for breaking and entering a house and stealing therein certain specified goods of the prosecutor, and the evidence was that the

When complete offence charged, conviction may be of attempt to commit the same.

(*u*) *R.* v. *Westbeer*, Stra. 1133; 1 Leach, 12; and *vice versâ*, *ante*, p. 140.

Amount of Proof required.

goods specified were not in the house at the time, though other goods of the prosecutor were, it was held that the prisoner could not be convicted of the attempt to commit the offence charged (*z*). The words "complete the offence" imply that the offence charged was begun, and therefore the attempt must be to do that which, if it had been successful, would have amounted to the felony charged, but if the attempt never could have been successful, the felony could not be said to be attempted. So to put the hand into the pocket of another with the intention of stealing anything in it, if it appear that the pocket was empty, is not an attempt to steal anything (*a*).

And by 14 & 15 Vict. c. 100, s. 12, if upon trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not be entitled to be acquitted of such misdemeanour (*b*).

So, by 24 & 25 Vict. c. 96, s. 88, if a person indicted for obtaining goods by false pretences, be proved to have obtained them in such manner as to amount to larceny, he is not to be acquitted (*b*).

Larceny and embezzlement, and *vice versâ*.

And by 24 & 25 Vict. c. 96, s. 72, where embezzlement is charged and larceny proved, the jury may find not guilty of the embezzlement and guilty of the larceny, and *vice versâ* (*b*).

So, upon indictment for robbery, the jury may find the prisoner guilty of an intent to rob (*c*).

If upon the indictment for the felony of administering noxious drugs, so as thereby to occasion grievous bodily harm, the jury may find a verdict of guilty of the misdemeanour of administering such drugs with intent to injure, aggrieve, or annoy (*d*). So, at common law, upon an indictment for a felony of a grave nature the defendant might always be found guilty of a felony of lesser atrocity, included within the felony *charged*, *e. g.*, on an indictment for murder, he might be convicted of manslaughter (*e*); on an indictment for burglary, of stealing in a dwelling-house (*f*); or on an indictment for breaking into a house and stealing therein, of simple larceny. Where a common law felony or misdemeanour is by statute subjected to more severe punishment if committed under particular circumstances, a person indicted under the statute may be convicted of the common law offence, if the prosecutor fail in proving the circumstances which would make it punishable by the statute (*g*).

When greater offence includes the less.

(*z*) *Reg.* v. *Macpherson*, Dears. & B. 197; 26 L. J., M. C. 134.

(*a*) *Reg.* v. *Collins*, L. & C. 471; 33 L. J., M. C. 88. See further, as to attempts, *post*, Chap. IX.

(*b*) See these sections, *ante*, pp. 140, 141.

(*c*) 24 & 25 Vict. c. 96, s. 41, *ante*, p. 227.

(*d*) 24 & 25 Vict. c. 100, s. 25, *ante*, p. 142.

(*e*) Co. Litt. 282 a.

(*f*) *R.* v. *Butterworth and others*, Russ. & Ry. 520; *Reg.* v. *Jones*, C. & Mar. 218; and see 1 Stark. Ev. 2nd edit. 372, 379.

(*g*) 2 Hale, 191, 192.

Amount of Proof required.

Thus, if an indictment for a larceny is framed on a statute which does not embrace the offence charged, the prisoner may be convicted of simple larceny at common law (*h*). A charge in the plural, as of extorting twenty shillings (*i*), or of conspiring to prevent workmen from continuing to work (*k*), is supported by proof of extortion of one shilling, and of conspiring to prevent one workman from working. If two intents are charged for one act, as assaulting a girl with intent to abuse *and* carnally know her, it will be enough to prove either (*l*), for the averment is divisible. So it is enough to prove a larceny of one of several articles charged to have been stolen by the defendant (*m*). So the defendant may be convicted of a common assault on an indictment for assaulting a constable in the discharge of his duty; or upon an indictment for an assault occasioning actual bodily harm (*n*); or on an indictment for unlawful and malicious wounding (*o*); or upon an indictment for cutting and wounding with intent to disable, &c. (*p*); or upon an indictment for assaulting and carnally knowing a girl between ten and twelve years old (*q*), or rape (*r*).

When it will suffice to prove one of two things charged.

When the indictment charges that the defendant did two things, either of which is an offence of the same degree, it will be sufficient to prove that he did either. Thus, on an indictment alleging that the prisoner "forged, *and* caused to be forged," it is enough to show either (*s*). And if a party be charged with composing, printing, *and* publishing a libel, he may be found guilty either of printing *or* publishing merely. "For," as observed by Lord *Ellenborough*, "this distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified" (*t*).

As to cases of charging several jointly with a single offence and conviction of separate parts of that offence, see *ante*, p. 135.

(*h*) *R.* v. *Beaney*, R. & Ry. 416. An indictment for stealing a "colt," framed on 1 Edw. 6, c. 12, s. 10; 2 Edw. 6, c. 33.

(*i*) *R.* v. *Burdett*, 1 Ld. Raym. 149; *R.* v. *Carson*, R. & Ry. 303.

(*k*) *R.* v. *Bykerdike*, 1 M. & Rob. 179.

(*l*) *R.* v. *Dawson*, 3 Stark. 62. See *R.* v. *Evans*, *id.* 35; *R.* v. *Jones*, 2 B. & Ad. 615, 616; and *R.* v. *Middlehurst*, 1 Burr. 400.

(*m*) 2 Hale, 302; *R.* v. *Ellins*, R. & Ry. 188.

(*n*) *Reg.* v. *Oliver*, Bell, C. C. 287; 30 L. J., M. C. 12; *Reg.* v. *Yeadon*, L. & C. 81; 31 L. J., M. C. 70.

(*o*) *Reg.* v. *Taylor*, L. R., 1 C. C. R. 194; 38 L. J., M. C. 106.

(*p*) *Reg.* v. *Walker*, 2 Moo. & R. 446.

(*q*) *Reg.* v. *Guthrie*, L. R., 1 C. C. R. 241; 39 L. J., M. C. 95.

(*r*) *Re Thompson*, 6 H. & N. 193; 30 L. J., M. C. 19. See *ante*, p. 140.

(*s*) *R.* v. *Middlehurst*, 1 Burr. 400.

(*t*) *R.* v. *Hunt*, 2 Campb. 196.

Material Averments must be proved.

We have already seen (*ante*, p. 143), that there are averments in the indictment, which, if through the technical accuracy of the law they are inserted, need not be proved. For instance, the day or hour of committing the offence is never material. Where, indeed, *time* is of the essence of the offence, it must appear to have been done at such an hour as will constitute the crime; but it need not be proved even then at the precise hour laid in the indictment. Thus, on a prosecution of a person for being "found armed at night, with intent to kill game," it must be shown that the defendant was found between the hours which the statute defines to be "night" for its purposes; but the proof need not further correspond even here with the allegation (*r*). As to *place*, it is always necessary to show that the offence was committed within the county, city, borough, or other part of the county to which the jurisdiction of the court extended, where the venue is laid; or that such part of the transaction occurred there as may give the court jurisdiction to try it; except where the common law locality of offences has been superseded by statutable provision (*s*). And where the offence is, in its nature, *local*, that is, where local description of place is of the essence of the charge, as in injuries to real property, burglary, stealing in a dwelling-house, forcible entry, or the like (*t*), the parish or vill laid in the indictment must be correctly proved. But in other cases, although a *vill* must be stated, the offence may be proved in any other vill within the county, provided there be in the county such a *vill* as is laid; for it has been said that, though the prosecutor need not prove affirmatively that there is, if it be proved that there is not, the prisoner must be acquitted (*u*). However, this was held otherwise in an indictment for setting fire to a stack of beans, to which local description was given, by laying a parish, &c. and stating the stack to be *there situate*, the judges holding that charge to be transitory only, with nothing of locality in it (*x*).

Immaterial averments.

With respect to the charge itself in the record on which the prosecutor relies, the material *description* must always be accurately proved; though unnecessary averments introducing or accompanying it may be rejected as surplusage. Thus, the name of the owner of goods stolen; of the party alleged to have been killed (*y*); of the owner of a dwelling-house

(*r*) *Ante*, p. 152.

(*s*) See *ante*, p. 153.

(*t*) *Ante*, p. 153; *R.* v. *Woodward*, 1 Moo. C. C. 323. The first and second counts in that case are not open to the objection made in Archb. Pl. & Ev. 508, 17th ed. *viz.*, that the indictment gave no local description to the property burned.

(*u*) See 3 Campb. 77; *R.* v. *Bullock and another*, 1 Moo. C. C. R. 325; *R.* v. *Dowling*, Ry. & M. N. P. C. 433; but see *ante*, p. 211.

(*x*) *R.* v. *Woodward*, 1 Moo. C. C. R. 323.

(*y*) *R.* v. *Brinklett*, 5 C. & P. 416.

broken (*z*), must always be proved as laid, otherwise the prisoner would be convicted of one offence on a record charging another (*a*); but variances between the allegations and the proof may be amended under the provisions of the 12 & 13 Vict. c. 45, s. 10, and 14 & 15 Vict. c. 100, s. 1.

Material Averments must be proved.

The strictness of the common law in this respect is now relieved by a power to amend the record during the course of a trial which is given by statute in certain cases, thus:—

Variances between indictment and proof in case of writings.

When any variances appear between any matter in writing, or in print produced in evidence, and the recital or setting forth thereof in the indictment whereon the trial is pending, they may be forthwith amended, for by 12 & 13 Vict. c. 45, s. 10, "Every court of general or quarter sessions of the peace on the trial of any offence within its jurisdiction, whenever any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment shall have the same power in all respects to cause the indictment to be amended which is given to courts of oyer and terminer and general gaol delivery with regard to offences tried before such last-mentioned courts by virtue of 11 & 12 Vict. c. 46, and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise as if no such variance or variances had appeared," and by the 11 & 12 Vict. c. 46, s. 4, "any court of oyer and terminer or general gaol delivery, if such court shall see fit so to do, may cause the indictment for any offence whatever whereon the trial was pending in such a case to be forthwith amended in such particular or particulars by some officer of the court."

Variances in various matters.

Still greater powers of amendment are given by the 14 & 15 Vict. c. 100, s. 1. "Whenever, on the trial of any indictment (which includes plea, sect. 30) for any felony or misdemeanour there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the *name* of any county, riding, division, city, borough, town corporate, parish, township or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate therein stated, or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the com-

(*z*) *Secus*, if the indictment charges "robbery *in a dwelling-house*," and robbery is proved; for the offence is complete without proving anything about the dwelling-house; *Pye's case*, East's P. C. 785; *Johnston's case*, *id.* 786.

(*a*) *Ante*, pp. 154 *et seq.*

Powers of Amendment of Indictment or Plea.

mission of such offence, or in the christian name or surname, or both christian name and surname, or other description whatsoever of any person or persons whatsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the *ownership* of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended according to the proof by some officer of the court or other person both in that part of the indictment where such variance occurs, and in every other part of the indictment where it may become necessary to amend on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable, and after any such amendment the trial shall proceed whenever the same shall be proceeded with in the same manner in all respects and with the same consequences both with respect to the liability of witnesses to be indicted for perjury and otherwise as if no such variance had occurred, and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the postea and returned together with the record, and thereupon such papers, rolls and other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be indorsed on the indictment or shall be engrossed on parchment and filed, together with the indictment, among the records of the court. Provided that in all such cases where the trial shall be so postponed it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses and of the defendant and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as they were originally bound by their recognizances to appear and prosecute and give evidence at the time and place to which such trial shall have been so postponed.

Amendment of indictment, &c., according to the proof.

Postponement of trial.

Challenges of jury after postponement of trial on amendment.

Provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn."

By sect. 3, if it shall become necessary at any time, for any purpose whatsoever, to draw up a formal record in any case where any amendment shall have been made under the provisions of this act, such record shall be drawn up in the form in which the indictment was after such amendment made, without

taking any notice of the fact of such amendment having been made.

Powers of Amendment of Indictment or Plea.

An indictment which charged the obstruction of a footway may be amended when one of the termini of the way has been misdescribed (*b*). So also an indictment for larceny, where the ownership of stolen property is wrongly described (*c*); and where, on an indictment for perjury, alleging that the offence was committed on the trial of a prisoner for burning a barn, the certificate of conviction related to a charge of setting fire to a stack, the indictment was amended (*d*).

What descriptions of amendments are within the statute.

It is not too late to apply for an amendment though the counsel for the prisoner may have addressed the jury (*e*), but the amendment must be made before the case is left to the jury, who must give their verdict according to the allegations in the indictment at that time, and the proof thereupon (*f*).

Time for amending.

An inaccuracy in the description of a thing, *e. g.*, an act of parliament, may be so slight and insignificant as to not leave in doubt for a moment what thing was referred to, and in such a case it can hardly be said to amount to a variance necessary to be amended, but nevertheless, if observed, it may properly be amended (*g*).

In general, the proof of the entire issue, on the plea of "*not guilty*," lies in the first instance on the prosecutor, who must establish every thing essential to the charge (*h*). Thus, on an indictment against a parish for not repairing a highway, he must, on the plea of not guilty, show that the way is a public way; that the part stated to be out of repair lies within the parish; and that it is, in fact, out of repair. In general, however, a mere negative averment, though necessary to be alleged by a prosecutor in consequence of the rule of pleading on a statute, need not be proved by him, where the affirmative must be in the knowledge of the defendant; thus, in an information for sporting without a qualification before the late act 1 & 2 Will. 4, c. 32, abolished qualification, it was not necessary to show the absence of it, though it must have been negatived in the conviction (*i*); and on an information for selling ale by retail without due licence, it lies on the defendant, when shown to have sold ale, to prove his licence. *Knowledge* and *intent*, when material, must be made out by the pro-

The prosecutor must prove the affirmative of the entire issue.

(*b*) *Reg.* v. *Sturge*, 3 E. & B. 734; 23 L. J., M. C. 172.
(*c*) *R.* v. *Vincent*, 2 Den. C. C. 464; 21 L. J., M. C. 109; *Reg.* v. *Fullerton*, 6 Cox, C. C. 194; *Reg.* v. *Pritchard*, 1 L. & C. 34; 30 L. J., M. C. 169; *Reg.* v. *Webster*, 1 L. & C. 77; 31 L. J., M. C. 17.
(*d*) *Reg.* v. *Neville*, 6 Cox, C. C. 69, per *Williams*, J.
(*e*) *Reg.* v. *Fullerton*, 6 Cox, C. C. 194, per *Lefroy*, C. J., and *Monahan*, C. J.
(*f*) *Reg.* v. *Larkin*, 1 Dears. 365; 23 L. J., M. C. 125; *Reg.* v. *Frost*, 1 Dears. 474; 24 L. J., M. C. 116.
(*g*) *Reg.* v. *Westley*, Bell, C. C. 193; 29 L. J., M. C. 35.
(*h*) *R.* v. *Westbury*, 8 Mod. 357.
(*i*) *R.* v. *Turner*, 5 M. & S. 206.

Prosecutor not required to prove negative Averments, when.

secutor: he cannot, of course, make them out by direct evidence, unless when they have been confessed; but both may be gathered from the conduct of the party as shown in proof (*m*); and when the tendency of his actions is direct and manifest, he must always be presumed to have designed the result when he acted. Counsel for a defendant accused of misdemeanour may, at a trial, dispense with formal proof by the prosecution, but attornies cannot agree to do so previously (*n*).

Proof of knowledge and intent.

Section 4.

Of the degree (or quantity) of proof required to substantiate a charge.

Quantity of proof.

The *quantity of proof* necessary to support a charge must, of course, depend in general on the circumstances of each case, for which no rules can be given. A single witness swearing to the actual crime, or to such facts as necessarily lead to the inference that it has been committed, if unshaken and uncontradicted, is quite sufficient to substantiate the charge. And the prisoner's confession before a magistrate, if made in consequence of a charge against him, and in a direct and positive manner, voluntarily and without promise or threat operating on his mind at the time of making it, is sufficient, standing alone, to be presented to the jury, and for them to convict upon, if they believe it to be true (*o*); even though there is no proof *aliunde* that the crime charged was committed (*p*). Further, as to confession, see *post*, p. 236.

Confession.

Degree of proof.

Accomplice.

Again, in point of law, as an accomplice is a competent witness, a jury believing his story might convict on his testimony alone, and such conviction would be valid (*q*). But it is usual for judges, in the exercise of a sound discretion, to direct the acquittal of a prisoner, unless the accomplice be corroborated by evidence admitting of no suspicion, not as to the whole case, for then the testimony would be needless, but as to such parts as satisfactorily show that he has not fabricated the story. And he should be confirmed in some facts affecting the individuals whom he accuses; *e. g.*, by showing the prisoner and

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(*m*) *Reg.* v. *Francis*, 43 L. J., M. C. 97; where previous distinct acts of using false pretences to obtain money were given in evidence to prove the guilty knowledge of the prisoner on the charge on which he was indicted.

(*n*) *R.* v. *Thornhill*, 8 C. & P. 575.

(*o*) See further, p. 236; *R.* v. *Wheeling*, 1 Leach, 311, n.; *R.* v. *Eldridge*, R. & Ry. 440. See cases collected, Burn's Justice of the Peace, *tit. Confession*, Vol. 1.

(*p*) *R.* v. *Falkner and Bond*, R. & Ry. 482.

(*q*) *R.* v. *Attwood*, 2 Leach, 521; cited in *R.* v. *Jones*, 2 Campb. 132.

Of Accomplices.

the accomplice together under circumstances which were not likely to have occurred unless there had been concert between them (*r*); because otherwise his whole narrative may be true in its circumstances, and abundantly confirmed, and yet false as to the alleged actors, for he may speak truly as to all the facts, which he would know from having been present, and yet may substitute one of the prisoners for himself in his narrative (*s*). But this is a mere matter for the discretion of the court; and there have been instances where, on consideration, it has been deemed proper to convict and to execute prisoners on the evidence of an accomplice who was confirmed as to some of the party, but not as to others (*t*). On the other hand, where an accomplice swearing positively to several prisoners was confirmed as to some, and not confirmed as to others, *Vaughan*, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed (*u*). But where, on an indictment against a principal for stealing, and accessories for receiving, the case against the principal was proved by the testimony of an accomplice, who was not confirmed as to the larceny of the principal, but proved the receiving, and was confirmed as to that, all the prisoners were held entitled to acquittal (*x*). But now that receivers of stolen property can be indicted for a substantive felony, whether the principal felon shall or shall not have been previously convicted (*y*), such a case is not likely to recur.

Section 5.

OF THE KIND OF PROOF BY WHICH A CHARGE MAY BE SUPPORTED.

The kind of proof by which charges may be sustained includes all relevant facts, evidenced by competent witnesses, which tend to produce a moral certainty of the imputed guilt. It may be *positive*, as by the direct testimony of a witness who saw the fact; it may be *circumstantial*, when a number of

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(*r*) *R.* v. *Farler*, 8 C. & P. 106; where in a case of night poaching, on 9 Geo. 4, c. 69, s. 9, the only confirmation of the accomplice's testimony was that he and the prisoner were drinking together at a public house, commonly frequented by the prisoner, and left the house together when shut up for the night.

(*s*) *Reg.* v. *Stubbs*, 25 L. J., M. C. 16.

(*t*) *R.* v. *Dawber*, 3 Stark. N. P. C. 34; *R.* v. *Jones*, 2 Campb. 133; *R.* v. *Birkett*, R. & Ry. 252.

(*u*) *R.* v. *Field and others*, Berks Spring Assizes, 1828; Dick. Q. S. 5th ed. 520.

(*x*) *R.* v. *Wells and others*, Mood. & M. 327, cor. *Littledale*, J. See *R.* v. *Birkett*, 8 C. & P. 732.

(*y*) See 24 & 25 Vict. c. 96, s. 91.

Of the Kinds of Proof.

Presumptive. Confessional.

facts are presented as inconsistent with any other hypothesis than that of the prisoner's guilt; it may be *presumptive*, when the possession of a stolen article casts on the prisoner the burden of showing how he obtained it; or it may be *confessional*, when the party himself has admitted the guilt which is in issue. The three first descriptions of proof are merely matters for the decision of the jury; but the last is subject to legal restrictions which we shall briefly notice. It is said that confessions are the weakest and most suspicious of all testimony, ever liable to be obtained by artifices, false hopes, promises of favour or menaces, seldom remembered accurately or reported with due precision, and incapable in their nature of being disproved by other negative evidence (*u*). The ground for rejecting evidence of confessions is the dangerous nature of the evidence and not any presumption that it is false or untrustworthy (*x*).

Confession by statements made before justices.

A confession made by a prisoner, in the course of his examination before a magistrate on a charge of felony or misdemeanour, is of the highest authority when freely made, even in answer to questions (*y*).

The mode of taking the statements of prisoners, made before the justices, is pointed out by the 11 & 12 Vict. c. 42, s. 18, which enacts, that after the examinations of all the witnesses for the prosecution "the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect:—'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial.' And whatever the prisoner shall then say in answer shall be taken down in writing and read over to him, and shall be signed by the said justice or justices and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not, in fact, sign the same: provided always, that the said justice or justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to

First caution of justice.

Second caution by justice.

(*u*) 4 Bla. Com. 357.
(*x*) *Reg.* v. *Baldry*, 2 Den. C. C. 7; 21 L. J., M. C. 130.
(*y*) *R.* v. *Ellis*, R. & M. N. P. C. 432; *R.* v. *Wilson*, Holt, 597; *R.* v. *Thornton*, *id.* 27.

induce him to make any admission or confession of his guilt; but that whatever he shall then say may be given in evidence against him upon his trial notwithstanding such promise or threat: provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time, which by law would be admissible as evidence against such person."

Statements made before Justices.

The 28th section of the act enacts, that "the several forms in the schedule to this act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law;" and it has been held, that a statement taken before a magistrate in the form prescribed by the schedule, and signed by the prisoner and the magistrate, is admissible evidence at common law; and where there has been no previous threat or inducement it is admissible under the statute, without proof of the second caution having been given; but it is prudent for justices to give the second caution as well as the first in all cases (*z*); but the section only applies to the concluding examination before the justices after all the witnesses for the prosecution have been examined, and does not apply to a voluntary statement made by a prisoner at any time during the course of the examination. And before the case for the prosecution is concluded such statements may be proved by anyone who heard them, who may refresh his memory by a written paper taken at the time (*a*).

If a confession by a prisoner, purporting to be signed by a magistrate, has been duly returned to the judge, and has on the face of it the statement that the first caution has been given, it is admissible itself in evidence by the statute without any further proof (*b*).

If the authentication be incomplete, as, if the prisoner, having made his statement, the magistrate neglects to sign it (*c*); or if by inadvertence it is not tendered for signature, and even if it be clearly shown that it was never reduced into writing at all, what the prisoner said at his examination may be received on the evidence of the above facts from parties present, though subject in the last case to all the deductions in point of authenticity and weight which the circumstances occasioning its imperfection may imply (*d*). The witness should refresh his memory by any such writing as may exist (*e*).

But before oral evidence of a confession made on examination

(*z*) *Reg.* v. *Sansome*, 1 Den. C. C. 545; *Reg.* v. *Bond*, 19 L. J., M. C. 138; 1 Den. C. C. 517.

(*a*) *Reg.* v. *Stripp*, 19 L. J., M. C. 143; Dears. C. C. 648, 25 L. J., M. C. 143; *Reg.* v. *Bond*, *ubi sup;* *R.* v. *Wilkinson*, 8 C. & P. 662; *R.* v. *Bell*, 5 C. & P. 162.

(*b*) *Reg.* v. *Sansome*, 1 Den. 545.

(*c*) *R.* v. *Lambe*, 2 Lea. 552, 555.

(*d*) *Ibid.*; *Reg.* v. *Wilkinson*, 8 C. & P. 662; *R.* v. *Reed*, M. & M. 403; but see *Reg.* v. *Walter*, 7 C. & P. 267.

(*e*) *R.* v. *Bell*, 5 C. & P. 162; *R.* v. *Jones*, Carr. Crim. L. 13.

Proof of statements made by prisoner on the examination before the justices.

before a magistrate can be received at all, it must be affirmatively shown that the statement was not reduced into writing; because, if it was, such writing is the highest evidence; and it is to be presumed, until the contrary be shown, that the magistrate performed his obvious and cogent duty under the statute (*i*). Parol evidence may in general be given of what the prisoner said, if proved to have been omitted from an examination signed by the magistrate (*k*). If an oath has been inadvertently administered to the prisoner before he confessed, no statement made by him on that occasion can be used against him (*l*).

It is for the judge to decide upon the admissibility or inadmissibility of a confession made after an alleged inducement, and if the confession were rightly admitted in the first instance and taken down by him as evidence, but proof was afterwards given that inducement, such as to exclude the confession, had been in truth made, he ought to strike the evidence out of his notes (*m*). A confession made after a statement, in the presence of the prisoner's mistress and her husband, by a medical man, that it would be better for the prisoner to speak the truth, is inadmissible (*n*). A statement made after the reading over of the evidence should be proved by the person who read it over, the magistrate or his clerk, as no one else can well prove that the evidence was correctly read over (*o*). But in a case before the above statute, where the prisoner was a markwoman, a constable swore that he was present at the time of examining the prisoner, and heard her examination read over to her by the magistrate's clerk; saw the magistrate sign it, and the prisoner put her mark to it, and his evidence was held sufficient (*p*). When a *deposition* taken before a magistrate

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(*i*) *Phillips* v. *Wimburn*, 4 C. & P. 273; *R.* v. *Jacobs*, 1 Lea. 310; *R.* v. *Fearshire*, *id.* 202. See the statute *supra*.

(*k*) *R.* v. *Harris*, 1 Moo. C. C. 338. But where, on the examination before the magistrate of several persons charged with felony, the magistrate's clerk, in taking down their statements, had left a blank where either had mentioned the name of another of them, *Patteson*, J., refused to allow them to be supported by parol evidence of the clerk as supplementary evidence; *Reg.* v. *Morse et al.*, 8 C. & P. 605.

(*l*) 1 Hale, 585. In *R.* v. *Smith*, 1 Stark. N. P. C. 242, where an examination of a prisoner taken in writing *purported* to have been taken on oath, *Le Blanc*, J., refused to admit evidence to show that the party was *not* sworn. In *Reg.* v. *Pikesley*, 9 C. & P. 124, where the magistrate returned with the depositions, that "prisoner was *sworn*, and made a statement," this statement was rejected by *Parke*, B., though a witness swore the prisoner was *not* in fact sworn. Where a prisoner was sworn by mistake, but as soon as it was discovered, the deposition was destroyed, his subsequent statement was admitted; *R.* v. *Webb*, 4 C. & P. 564; and see *R.* v. *Tubby*, 5 C. & P. 530; *R.* v. *Lewis*, 6 C. & P. 161.

(*m*) Russ. on Cri., Ed. Greaves, 4th ed. 418; *Reg.* v. *Garner*, 1 Den. C. C. 329; 14 L. J., M. C. 1.

(*n*) *Reg.* v. *Garner*, *ubi sup.*

(*o*) *R.* v. *Chappel*, 1 Moo. & R. 395.

(*p*) *R.* v. *Hope*, 1 M. & Rob. 396, n.

(as to which, see *post*, p. 264) is to be given in evidence, *e. g.*, in case of the death of the witness, or his permanent inability to attend (*q*), or his actual permanent insanity at time of trial (*r*), it is very proper, as matter of caution, that the magistrate or his clerk should be called in all cases where convenience will admit, but it is not necessary in point of law (*s*), and proof of his signature will be sufficient (*t*). Proof of depositions.

Persons present at the prisoner's examination may prove what he said on that occasion, though it has not been taken down by the magistrate's clerk in the written examination returned to the court (*u*).

A statement made under oath in the course of a lawful and voluntary examination, in the course of a judicial proceeding, is admissible (*v*). And so if the disclosure is made compulsory by statute and lawful, and the deponent is not protected from the consequences of his answers, his statements are admissible evidence against him (*v*). Thus, the examination of bankrupts made under a declaration which is in the place of an oath and before the bankruptcy court, may be admissible against him (*x*). And upon the same principle, the voluntary examination of a person under oath before a coroner may be used in evidence afterwards against the deponent; but this objection does not apply to the admissibility of declarations made subsequently (*y*), or on oath at a previous time, and for another purpose, even though under compulsory process, as a statement before commissioners of bankrupt, or an answer in chancery (*z*). Previous statements made on oath.

Confessions to gaolers, constables, clergymen, or persons holding no office, are also admissible when freely made (*a*); though of course not so decisive as confessions regularly taken before a magistrate, and deliberately signed by the prisoner. The same rule applies to all; that if there be any ground to believe they were obtained by the influence of hope, or the fear of temporal consequences excited by the party obtaining them, they cannot be heard; and it seems to lie on the prosecution to satisfy the judge that the confession was not the consequence of any inducement or threat (*b*). On this subject the law has proceeded to a scrupulous nicety, which the good sense of the judges has recently inclined to restrain, and which certainly should be Confessions to persons not magistrates.

(*q*) *Reg.* v. *Wilshaw*, 1 C. & M. 145.
(*r*) *Reg.* v. *Marshall and others*, 1 C. & M. 147.
(*s*) *Reg.* v. *Wilshaw*, per *Coleridge*, J., *ubi sup.*
(*t*) *Reg.* v. *Foster*, 7 C. & P. 148.
(*u*) *R.* v. *Harris and others*, 1 Moo. C. C. 338.
(*v*) *Reg.* v. *Scott*, Dears. & B. 47; 25 L. J., M. C. 128; *Reg.* v. *Robinson*, L. R., 2 C. C. R. 80; 36 L. J., M. C. 78.
(*x*) *Reg.* v. *Scott*, *ubi sup.*; *Reg.* v. *Skeen*, Bell, C. C. 97; 28 L. J., M. C. 91; *Reg.* v. *Robinson*, *ubi sup.*
(*y*) See note (*k*), *ante*, p. 238.
(*z*) *Smith* v. *Beadnell*, 1 Campb. 30. See as to *R.* v. *Merceron*, 2 Stark. 566, the observation of *Tindal*, C. J., 1 Moo. C. C. 203.
(*a*) *Reg.* v. *Baldry*, 2 Den. 445; 21 L. J., M. C. 130.
(*b*) *Reg.* v. *Warringham*, 2 Den. C. C. 467, per *Parke*, B.

Confessions—when not received.

carried no further. Thus, if a prosecutor or a constable say to a prisoner, "I only want my money, and if you will give me that you may go to the devil if you please" (*b*); "You had better tell the truth;" or "It will be worse for you if you do not confess;" not a word said afterwards on the same occasion can be heard (*c*). So a confession induced by the expression, "Unless you give me a more satisfactory account, I will take you before a magistrate;" or "Tell me where the things are, and I will be favourable to you," cannot be received at all (*d*). And even where the first overture came from the prisoner, as where he said to the officer who had him in charge, "If you will give me a glass of gin, I will tell you all about it," and two glasses of gin were given, and he did tell, Mr. Justice *Best* refused to hear what he told (*e*). A simple exhortation to an accused to "tell the truth," if he says anything, ought not to exclude the confession (*f*); but if he is told that it will be better for him to speak the truth, the subsequent confession may be inadmissible (*g*); but, whatever the words used, it is for the judge to consider whether they of themselves, or coupled with the manner adopted, import an exhortation only, or an inducement to confess (*h*) But it is now settled, that inducements held out at one time, will not invalidate a confession made at a subsequent time, if the expectation raised by the inducement at the former time has been effaced at the time of the subsequent statement, whether before a magistrate or to any other party, as a constable (*i*). And it has been further held, that if, at the time when the confession is made, a bystander, having no authority, or semblance of authority, to extend mercy, officiously advises the party to confess, this will not invalidate the confession, though it would be otherwise if the party giving the advice were the prosecutor, the constable, or the magistrate (*k*); but a

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(*b*) *R.* v. *Jones*, R. & Ry. 152; *R.* v. *Barrett*, 4 C. & P. 570.

(*c*) 2 East, P. C. c. 16, s. 94, p. 659.

(*d*) *R.* v. *Thompson*, 1 Lea. 325; *R.* v. *Cass*, *id.* 328, n. (*a*).

(*e*) *R.* v. *Laxton*, Chetw. Burn, *tit. Confession*.

(*f*) *Reg.* v. *Moore*, 2 Den. C. C. 522; *Reg.* v. *Parker*, L. & C. 42; 30 L. J., M. C. 144; *Reg.* v. *Sleeman*, Dears. C. C. 249; *Reg.* v. *Holmes*, 1 C. & K. 247; *Reg.* v. *Court*, 7 C. & P. 486.

(*g*) *Reg.* v. *Garner*, 1 Den. C. C. 329; 18 L. J., M. C. 1; *Reg.* v. *Baldry*, 2 Den. C. C. 430; 21 L. J., M. C. 130.

(*h*) *Reg.* v. *Garner*, *ubi sup.*

(*i*) *R.* v. *Lingate*, 1 Taylor on Ev. s. 802; *R.* v. *Rosier*, *id. ibid.*; *R.* v. *Row*, Russ. & Ry. 153.

(*k*) *R.* v. *Gibbons*, 1 C. & P. 97; *R.* v. *Tyler*, *id.* 129; *Reg.* v. *Taylor*, 8 C. & P. 733, per *Patteson*, J.—It is the opinion of the judges that evidence of any confession is receivable, unless some inducement has been held out by some person *in office or authority*. ["*Office*" applies to magistrates, gaolers, constables, &c.; "*authority*," to parties having power over prisoner, as master, &c.]

L.'s house had been on fire. Prisoner, a female servant of L., was sent for into the parlour, where W., a person *not in office or authority*, said to prisoner, in the presence of the wife of L., "You had better tell how you did it." She made an answer;—but it was rejected by *Patteson*, J.,

Confessions when received.

bystander who holds out an inducement, in the presence of a person having authority, as the prosecutor, or his wife, &c., without any expression of dissent, must be taken to act with the sanction of such persons, and a confession made thereupon is not admissible (*l*); but whether the person holding out the inducement is to be deemed to have the authority of the person in authority, though no dissent is expressed, depends upon the special circumstances of the occasion, and the evidence has been admitted in many cases (*m*). And it is no ground for excluding a confession, that it was induced by the admonitions of a clergyman as to the religious duty of confession; for such admonitions could scarcely tend to produce falsehood, the danger of which is the only reason for excluding confessions at all; and the hopes and fears which the law contemplates, are hopes of temporal advantage, and fears of punishment in this world, not considerations relating to pardon or suffering in another state of being (*n*).

Discoveries made, or acts done, in consequence of a confession unduly obtained, may always be given in evidence, with so much of the prisoner's statement as led to those discoveries or acts, without his acknowledgment of guilt (*o*). Thus, where a prisoner's statement was inadmissible in evidence, but described a lantern as being in a particular place, or stolen property to be in the sacking of his bed, which proved to be the fact, it was held that a witness might be examined whether the prisoner had said anything about the lantern, and whether in consequence thereof it was searched for and found (*p*); for declarations of an accused accompanying his acts are evidence, though inadmissible as a *confession* (*q*). A letter given to the gaoler by a prisoner to put into the post for his father, upon the promise of the gaoler that he would post it, has been received as evidence against him, though the gaoler forwarded it to the visiting justices, who handed it to the prosecutor (*r*); but the practice of obtaining evidence in such a manner is open to observation.

Confessions, oral or written, are only evidence against the

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because Mrs. L., prosecutor's wife and prisoner's mistress, was present; and, as she expressed no dissent, must be taken to have sanctioned the inducement, which inducement must be taken as if it had been held out by a person in authority over the prisoner. *S. C.*

(*l*) *Reg.* v. *Taylor*, 8 C. & P. 733; *R.* v. *Langher*, 2 C. & K. 225; *Reg.* v. *Lockhurst*, 1 Dears. C. C. 245; *Reg.* v. *Garner*, 1 Den. C. C. 329; *R.* v. *Upchurch*, 1 Moo. C. C. 465.

(*m*) *Reg.* v. *Spencer*, 7 C. & P. 876; *Reg.* v. *Hewett*, 1 C. & M. 534; *Reg.* v. *Parker*, L. & C. 42; 30 L. J., M. C. 144.

(*n*) *R.* v. *Gilham*, 1 Mood. C. C. R. 186; *R.* v. *Cleves*, 4 C. & P. 221.

(*o*) *Warickshall's case*, 1 Lea. 298; and see 2 Stark. Ev. 27, 2nd ed.; *R.* v. *Jenkins*, R. & Ry. 492.

(*p*) *Warickshall's case, ubi sup.*; *R.* v. *Leatham*, 8 Cox, 498; *R.* v. *Gould*, 9 C. & P. 364; *R.* v. *Lockhart*, 2 East, P. C. 658.

(*q*) *R.* v. *Griffin*, R. & Ry. 151; see 2 Stark. Ev. (2nd ed.) 28.

(*r*) *R.* v. *Derrington*, 2 C. & P. 418.

Confession Evidence only against party making it.

party confessing, not against others indicted with him (*h*), unless they were present when he made his statement, and by any word, or act, may be fairly considered as expressing assent to its truth (*i*). For the mere silence of a party charged with an offence, while another person making a confession in his hearing implicates him as a sharer in it, does not make that confession evidence against him (*i*); as it is not to be presumed that a prisoner, in the presence of a magistrate, would dare to interrupt the person under examination as he might have done in ordinary conversation (*i*); nor does it seem that the conviction of a principal, founded on a confession made by him in the presence of a party afterwards indicted as accessory after the fact, can be evidence against the latter, to establish *per se* that that conviction of the principal was proper on the merits, or to prove more than the fact of that conviction (*k*).

Whole statement.

The prisoner is always entitled to have the whole of any paper produced against him, and the whole of any conversation, to part of which the prosecutor examines, submitted to the jury (*k*). And though the prosecutor is at liberty to show that any part of the statement so made is false, either by direct proof, or by showing facts with which it is incompatible, yet, if there be nothing to impugn it in the case, the jury ought to give weight to the whole, and acquit, if its statement so adduced warrants such acquittal (*l*). Where a prisoner charged with larceny has given two different accounts of the way in which he became possessed of the stolen property, it is not incumbent on the prosecutor to call as witnesses persons whom, in one of the statements, he says could prove his innocence, with a view of disproving that statement (*m*).

(*h*) 1 Hale, 585; 2 Hawk. c. 46, s. 3; but a letter from a prisoner read as a confession, must be read without omissions, though it mention the names of the other prisoners; *R.* v. *Fletcher*, 4 C. & P. 250; *R.* v. *Clewes*, *id.* 221. So a witness who speaks to a conversation, in which the prisoner said something which implicates another prisoner, he must not omit the name of that other prisoner, but must give the conversation exactly as it occurred; *R.* v. *Hearne*, *id.* 215. In both cases the judge will tell the jury that the letter, or the declaration of the one prisoner, is not evidence against any one but himself. This rule prevails, even though the prisoner might have cross-examined.

(*i*) *R.* v. *Appleby*, 3 Stark. N. P. C. 33; J. Kelynge, Resol. 5, in *R.* v. *Tong*, pp. 17, 18. See *R.* v. *Hevey*, 1 Lea. 235; *Melen* v. *Andrews*, Moo. & M. 336.

(*k*) See by twelve judges in *R.* v. *Turner and others*, 1 Lew. Cr. R. 119; 1 Moo. C. C. 347, *S.C.*; *R.* v. *Thomas Reilly*, 1 Leach, 454, note.

(*k*) *The Queen's case*, 2 Brod. & Bing. 297.

(*l*) *R.* v. *Jones*, 2 C. & P. 630.

(*m*) *Reg.* v. *Dibley*, 2 C. & K. 818.

Section 6.

OF CONFINING EVIDENCE TO A SINGLE FELONY, VIZ. ELECTION BY PROSECUTOR.

Confusion has frequently arisen from want of a clear understanding of the practice of calling on the prosecutor, who has preferred various charges of felony, to elect that precise charge on which he will proceed, and offenders have sometimes altogether escaped punishment, from the mere circumstance that they have committed several offences so connected, that it was impossible entirely to sever one from the others. It is, therefore, important to ascertain precisely what the rule is, and in what manner it ought to be applied in practice. The only rule of *law*, strictly speaking, on this subject, is, that *all evidence must be relevant to the issue*, and, therefore, it is not competent to the prosecutor to blacken the general character of the prisoner by showing that he committed a crime for which he is not indicted (*n*), and which forms no part of the transaction which is the subject of inquiry.

Prosecutor put to election, when.

We have seen that, in point of law, the joinder of several felonies in one indictment is not liable to objection; and, in fact, every count purports on the face of it to contain a distinct charge (*o*); however, in trials for felonies, as soon as it distinctly appears from the prosecutor's opening, or at any other part of the trial, that the matters charged constitute technically or actually separate felonies (*p*), it has been the practice for judges, in their discretion (*q*), to confine the prosecutor's evidence to a single transaction, lest the prisoner should be surprised or embarrassed in his defence by a variety of charges. But the principle on which this practice rests is entirely forgotten, when this discretion of the court is applied to prevent the full proof of one connected transaction involving the felony charged, because in such transaction *another felony is involved*, which must also appear in proof if the whole transaction is sifted. Accordingly, the better considered and more recent decisions all show that the prosecutor may prove everything necessary to elucidate a single charge, although in so doing he must show other felonies as a medium of proof. Thus, where the prosecutor, suspecting the prisoner, had put marked money into his till, and caused him to be watched; the prosecutor was suffered to prove several visits to the till by the prisoner, several inspections of the till consequent upon those visits, and the several results of those inspections, *viz.*, that the money was each time reduced. It was objected that the prosecutor should have been

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(*n*) See *R.* v. *Edwards*, *post*.
(*o*) *Ante*, p. 136.
(*p*) *R.* v. *Dunn*, 1 Mood. C. C. 146.
(*q*) See *R.* v. *Galloway*, 1 Moo. C. C. 234. See per *Pollock*, C. B. *Reg.* v. *Moah*, Dears. C. C. 631.

Of confining the Evidence to a single Charge.

confined to proof of a single felony. But the Court of King's Bench refused to stay the judgment on that ground, saying that the judge had a discretion to allow evidence of several felonies when they formed part of one transaction (*p*). In his judgment Mr. Justice *Holroyd* mentioned a case (*q*), in which, at a trial for robbery effected by a threat of a shocking accusation, he allowed evidence of an attempt by the prisoner at another time to obtain other property of the prosecutor; and the judges, on the point being stated to them, agreed that he was warranted in receiving the proof. Evidence even of three distinct burglaries, when necessary to the history of one, has been received, and the admission of the proof had the high sanction of Lord *Ellenborough's* approval (*r*); and in a recent case on a charge of attempting to obtain money from a pawnbroker by false pretences, in order to show the guilty knowledge of the defendant, the prosecution was allowed to prove previous attempts at other towns and on other days to obtain money from other pawnbrokers by false pretences of a somewhat similar nature (*s*). So, on an indictment for murder by a woman of her husband with arsenic, evidence was given that arsenic had been found in the body of the husband after death, and that two sons of the prisoner had subsequently died, and that arsenic also had been found in their bodies after death, and that another son had been taken ill, but had recovered, and that arsenic had also been administered to him. That the symptoms in the four cases were the same; and that the prisoner lived in the same house and prepared their tea and cooked their victuals. And it was held that the evidence was admissible to enable the jury to determine whether the taking of the arsenic by the husband was accidental or not; and notwithstanding that it might have a tendency to prove or create a suspicion of a subsequent felony (*t*). So, in a case where the prisoner was charged with stealing a thousand feet of cubic gas on a particular day, and the evidence showed that on that day, and daily afterwards for two years, the prisoner had caused an abstraction of gas from the main of the prosecutors, by a pipe which conducted the gas to a mill of the prosecutor without its passing through any meter; it was held that the circumstances attending the abstraction of the gas during the whole of that time were rightly given in evidence, and that the prosecutors were not put to their election of any three or any one particular taking (*u*). But it must be observed in that case that the evidence was considered to show only one prolonged continuous taking. And again, in the case of a lessee of a coal mine, who by the

Several distinct felonies may be proved if involved in felony charged.

In false pretences.

In larceny.

(*p*) *R.* v. *Ellis*, 6 B. & C. 143. See also *Reg.* v. *Wilman*, Dears. C. C. 188; 22 L. J., M. C. 118.
(*q*) *R.* v. *Egerton*, R. & Ry. 375.
(*r*) *R.* v. *Wylie*, 1 New R. 92.
(*s*) *Reg* v. *Francis*, 43 L. J., M. C. 97.
(*t*) *Reg.* v. *Geering*, 18 L. J., M. C. 215.
(*u*) *Reg.* v. *Firth*, 38 L. J., M. C. 54. See as to larceny of gas, *Reg.* v. *White*, Dears. C. C. 203.

working of his own colliery abstracted, for some years, the coal of many adjoining proprietors; it was held by *Erle*, J., that as long as the coal was gotten from one shaft it was one continuous taking, though the working was carried on by means of different levels and cuttings and into the lands of different people; and evidence was admitted to show that the prisoner went out of his boundary in other instances and into the property of many other persons (*x*). *Of confining Evidence to a single Charge.*

It is completely settled that on an indictment for uttering forged notes or counterfeit coin, the prosecutor may give evidence of other utterings of similar notes or coin, though they are not charged on the record, as evidence of guilty knowledge (*y*). In coinage offences.

A subsequent uttering to the one charged of a coin of a different denomination is evidence to prove guilty knowledge at the time of the uttering charged (*z*). And on a charge of feloniously and knowingly, and without lawful excuse, having in his custody and possession a mould impressed with the figure of the obverse side of a half-crown; evidence that the prisoner had, thirteen days before, passed a bad half-crown, though not shown to have been made in the mould in question, was held admissible to show the guilty knowledge (*a*). In that case there was another indictment against the prisoner for the uttering, upon which he was afterwards tried and convicted (*b*).

In a case of embezzlement, where the books of a society, kept by the prisoner, were given generally in evidence by the prosecution, though it was objected on behalf of the prisoner that the evidence must be confined to the three particular entries referred to in the three charges in the indictment, the conviction was sustained (*c*). In embezzlement.

In an indictment for embezzlement, which charged that on three several occasions within six months, the prisoner entered in books payments made by him correctly, but in adding up the items made the totals greater than they really were, and took credit with his employers for the larger amount. At the trial evidence was tendered that on a series of occasions, before and after those mentioned in the indictment, precisely similar errors had been made by the prisoner and advantage taken of them by him; and it was held by *Willes*, J., that the evidence was admissible to explain motives and intentions, and to show that the errors in the cases in the indictment were not the consequence of mistake (*d*). And where a number of articles are found in

(*x*) *Reg.* v. *Bleasdale*, 2 Car. & K. 765.
(*y*) *R.* v. *Ball*, R. & Ry. 132.
(*z*) *Reg.* v. *Forster*, Dears. C. C. 456; 24 L. J., M. C. 134.
(*a*) *Reg.* v. *Weeks*, L. & C. 18; 30 L. J., M. C. 142.
(*b*) *Ibid.*
(*c*) *Reg.* v. *Proud*, L. & C. 97; 31 L. J., M. C. 71. See *Reg.* v. *Moah*, Dears. C. C. 631.
(*d*) *Reg.* v. *Richardson*, Archb. Cr. Pl. 417, 16th ed.; *Reg.* v. *Balls*, L. R., 1 C. C. R. 328; 40 L. J., M. C. 149.

Proof of distinct acts of receiving stolen goods.

the prisoner's possession, the mere probability that he stole them at different times is no ground for requiring the prosecutor to confine his evidence to one of them, if nothing shows that they might not have been stolen at once (*a*). And though, on an indictment for receiving, if it distinctly appear that articles were received at different times, the prosecutor may be required to elect on which act of receiving he will found his case, he may still give evidence of the other receivings as proof of guilty knowledge (*b*).

Now, by 34 & 35 Vict. c. 112, s. 19, "where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him. And this practice is aimed at by the 24 & 25 Vict. c. 96, s. 6, which enacts, that "if upon the trial of any indictment for larceny it shall *appear* that the property alleged to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings."

And by 24 & 25 Vict. c. 96, s. 92, "in any indictment containing a charge of feloniously stealing any property it shall be lawful to add a count or several counts for feloniously receiving the same, or any part or parts thereof, knowing the same to have been stolen; and in any indictment for feloniously receiving any property avowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same: and where any such indictment shall have been preferred and found against any person the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty either of stealing the property or of receiving the same, or any part or parts thereof knowing the same to have been stolen."

And by sect. 71, "for preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition *hereinbefore* mentioned (sects. 67—70), it

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(*a*) *R.* v. *Dunn*, Moo. C. C. 148; *Reg.* v. *Johnson*, D. & B. 340; 27 L. J., M. C. 52.

(*b*) *R.* v. *Dunn*, Moo. C. C. 148.

shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against her majesty or against the same master or employer within the space of six months from the first to the last of such acts." Where it was the duty of an agent of a coal society to collect and receive from persons who bought coals from the society, for which they were to pay by weekly instalments such weekly payments, and to send in a weekly account on the Tuesday of every week, and on such Tuesday to pay the gross amount received by him in the course of the week into a bank to the credit of the society. An indictment for embezzlement against the agent contained three counts, and charged in the first count the act of embezzling the sum of 1*l.* 1*s.*; and evidence was given on that count that during a certain week payments amounting in the whole to this amount had been made to the prisoner by ten different persons in small sums, and that the prisoner omitted to account at the end of the week, or at any time for those several sums or for any specific amount of 1*l.* 1*s.* In the other two counts sums were charged, being aggregate sums similarly composed and received weekly, but not accounted for weekly in a similar manner, and thirty-one small sums in all were thus shown not to have been accounted for at three weekly accountings: it was held that the evidence was properly received, and the indictment did not charge more than three distinct acts of embezzlement—each act of embezzlement being the omission to account weekly for the aggregate sum composed of the several sums received during the week (*c*).

Proof of distinct acts of Embezzlement.

The prosecutor may, as it seems, be called on to make this election, at any part of the trial; but if the judge refuse the prisoner's request, that he may do so, it will not invalidate the conviction. This was the opinion of all the judges in a case where the same parties were charged in one count as principals in larceny, and in another as receivers; though they were equally divided in opinion whether or not, in point of discretion, the prosecutor should have been put to his election (*d*).

Again, where a person was separately indicted for offences of a nature totally distinct, as shooting at a keeper, and night poaching, the prosecutor was not put to his election to abandon either indictment; the evidence was received at the trial of the latter without directing abandonment of or acquittal on either (*e*). So, where the subject-matter of one untried indictment was material to be proved as part of the facts of another (*f*). In one case, however, where the very *corpus delicti*, for which an outstanding indictment was found, *e. g.*, stealing a coat of a

(*c*) *Reg.* v. *Balls*, L. R., 1 C. C. R. 328; 40 L. J., M. C. 148.
(*d*) *R.* v. *Galloway*, Moo. C. C. R. 234.
(*e*) *R.* v. *Handley*, 5 C. & P. 565.
(*f*) *R.* v. *Salisbury*, 5 C. & P. 155. See *R.* v. *Smith*, 2 C. & P. 633.

Evidence of distinct Misdemeanours.

gamekeeper, was proposed as part of the proof to corroborate a prosecution pending against the same prisoner for poaching, the evidence was rejected unless the prosecutor would consent to an acquittal of the larceny (*k*).

The practice of confining the evidence to a single transaction was always limited to felonies. In misdemeanours, several distinct offences, as assaults and libels, if charged separately in the indictment, may all be proved at the trial (*l*).

Previous conviction may be given in evidence, when.

A previous conviction of a prisoner is not to be given in evidence to a jury on a case before them, except when evidence to his character is given, and such evidence is given within the meaning of that rule, when it is elicited upon cross-examination of a witness for the prosecution by the prisoner or his counsel (*m*).

By the 24 & 25 Vict. c. 96, s. 116, in any indictment for any offence *punishable under this act*, and committed after a previous conviction or convictions for any felony, misdemeanour, or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was previously convicted of felony, &c., and the procedure thereupon is provided; and then it is provided, that if, upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor, *in answer thereto*, to give evidence of the conviction of such person *for the previous offence* or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. And there is a similar enactment as to indictments for offences against the Coinage Act, 24 & 25 Vict. c. 99, after a previous conviction against any act relating to coin (*n*).

Evidence of previous conviction to show guilty knowledge of receiver of stolen goods.

By 34 & 35 Vict. c. 112, s. 19, where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration, for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen: provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary, for the purposes of this

(*k*) *R.* v. *Westwood*, 4 C. & P. 547.
(*l*) *Ante*, pp. 135, 136; 2 Campb. 132.
(*m*) *Reg.* v. *Shrimpton*, 2 Den. C. C. 319; 21 L. J., M. C. 37.
(*n*) 24 & 25 Vict. c. 99, s. 37.

section, to charge in the indictment the previous conviction of the person so accused.

The best Evidence must be produced.

Section 7.

Of the necessity of producing the best evidence which appears to be in existence.

The best evidence must be produced.

It is a general and invariable rule of evidence, both in civil and criminal cases, that whether the proof be offered on the part of the prosecution or of the defence, the best evidence must be produced of which the nature of the case will allow (*o*). The meaning of this rule is, not that the greatest quantity of proof which might be obtained shall be imperatively required, but that nothing shall be admitted as proof, which, being in its own nature secondary, implies the existence of primary proof, unless it be shown that such primary proof is destroyed, or is out of the reach of the party desiring to use it. Thus, in general, where matter in writing is to be proved, no secondary evidence can be admitted, *i. e.*, no copy can be read, or oral evidence of its contents given, till it has been either proved that the original is lost, or is in the possession of the adversary; and further, that the party who offers the copy has done all in his power towards the production of the original, in the first case by making diligent search for it, and in the last by giving a timely notice to produce it. However, where the writing is not itself the fact to be proved, but is only one means of evidencing a fact, *other* means of proof may be at once adopted. Thus, the payment of money may be proved by a witness who saw it paid, or to whom the party receiving it has admitted the payment, although a receipt was given at the time (*p*). Resolutions passed at public meetings, or meetings of directors, &c., by being entered in books which are made evidence, are not excluded from proof by parol (*q*). The inscription on a monument may be proved by parol (*r*). And if several persons are present at the same transaction, and one of them only makes a memorandum to refresh his memory, the evidence of the witnesses who made no memorandum will not be excluded (*s*). So the fact of partnership may be proved by the acts of the parties, though there be a deed of partnership not produced (*t*); and a marriage by persons who were present at and witnessed

Secondary evidence is not admissible till the absence of primary evidence is accounted for.

Where writing only one means of evidencing a fact other means, *e.g.* by parol, are equally admissible.

(*o*) Bull. N. P. 293; 1 Taylor on Ev. chap. iv. § 363.
(*p*) *Rambert* v. *Cohen*, 4 Esp. 213; *Jacob* v. *Lindsay*, 1 East, 460; and see 8 C. & P. 14.
(*q*) *Miles* v. *Bough*, 3 Q. B. 845, 872; *Inglis* v. *Great Northern Railway Co.*, 1 Macq. 112.
(*r*) *Doe* v. *Cole*, 6 C. & P. 359.
(*s*) 2 Stark. Ev. 2nd ed. 922.
(*t*) *Alderson* v. *May*, 1 Stark. 405.

Of the production of the best Evidence.

the ceremony, or by reputation, though there be an entry in the parish register not produced (*u*). But there are no *degrees* in secondary evidence; and where it is admissible at all, any species of it in the party's power may be given (*x*). Thus, shorthand writer's notes of the contents of a deed as read at a former trial are evidence, though a copy exists. Where attestation is necessary to the validity of an instrument, the attesting witness must be called; but it is never necessary in point of law to call more than one, although there may be three names on the face of the instrument (*y*); but where attestation is not requisite, it is not necessary to prove the instrument by the attesting witness; but it may be proved by admission or otherwise as if there had been no attesting witness thereto (*z*).

No degrees of secondary evidence.

Intestacy.

It is sufficient proof of intestacy to prove an unsuccessful search for a will in the drawers and boxes of the deceased (*a*).

Proof of loss of document.

Where the original of any document is lost, it must be shown that all reasonable search was made for it in the places where it is likely to be found. It is for the court to be satisfied that due diligence has been used to find the document, so as to raise the presumption of its loss (*a*). If the instrument be traced to the possession of a particular person, that person must be called, and it will not suffice to show an application to him for it, and his answer that he cannot find it (*b*). And where an individual is by law entitled to the custody of an instrument, it is absolutely necessary to call him to disprove the presumption that he possesses it (*c*); or if he is dead, to prove a search of his papers (*d*). If two parts of a deed be executed, the non-production of both must be accounted for, before secondary evidence can be given of either (*e*). And all the witnesses to an instrument, to which attestation is necessary, must be proved to be dead or abroad, or not producible on diligent inquiry, before evidence of the handwriting of any can be given; but when this is done, proof of attestation by one will suffice; and, except in the case of a marksman to show the identity of the party, it

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(*u*) *Evans* v. *Morgan*, 2 Cr. & J. 453.

(*x*) *Doe* d. *Gilbert and others* v. *Ross*, 7 M. & W. 102. A party having a lien on a deed refused to produce it on subpœna. A copy was produced and rejected, because, though attested, it had no stamp. The contents of the deed were then proved by a shorthand writer's note of them, read at a former trial; nor need the copy have been produced at all, *S. C.*; see *Brown* v. *Woodman*, 6 C. & P. 206.

(*y*) Bull. N. P. 264.

(*z*) 17 & 18 Vict. c. 25, s. 26.

(*a*) *Reg.* v. *Johnson*, D. & B. 340; 27 L. J., M. C. 340.

(*b*) *R.* v. *Castleton*, 6 T. R. 236; see *R.* v. *Denio* (*Inhabs.*), 7 B. & C. 620; *R.* v. *Morton* (*Inhabs.*), 4 M. & S. 48; *Williams* v. *Younghusband*, 1 Stark. 139.

(*c*) *R.* v. *Stoke Golding*, 1 B. & A. 173.

(*d*) *R.* v. *Piddlehinton* (*Inhabs.*), 3 B. & Ad. 460.

(*e*) *Minshall* v. *Lloyd*, 2 M. & W. 450.

Of the production of the best Evidence.

is never necessary to prove the handwriting of the principal executing (*f*).

Notice to produce, when necessary.

Where an instrument is in the possession of a prisoner, notice to produce it must be given him as in a civil cause, or secondary evidence cannot be given (*g*). But this notice is not necessary where the nature of the charge implies that the instrument is in the possession of the prisoner, the instrument being the very object of the proceeding. Thus, on an indictment for stealing a security, parol evidence of its contents may be given without any notice to produce it (*h*). Again, on an indictment for forging a note, which the prisoner, on his apprehension, has swallowed or destroyed, no notice to produce is requisite (*i*); but on an indictment for perjury, alleged to have been committed in swearing that there was no draft in existence of a statutory declaration, it was not deemed sufficient evidence that the draft had come into the prisoner's possession, and that he was required to produce it (*k*). So a charge of arson, with intent to defraud an insurance office, is not a sufficient notice to produce, to let in secondary evidence of the policy of insurance (*l*). Inscriptions on banners used at a meeting, on a charge of holding a seditious meeting, are admissible without notice to produce (*m*). The contents of a notice board affixed to the freehold and not easily removable may be proved by parol without notice to produce (*n*). Where notice to produce is necessary, it may be by parol or in writing (*o*); if in writing, it should be intituled in the prosecution (*p*); and should express, if not with literal, at least with substantial accuracy, the document required, so as to leave no reasonable doubt which is meant. Notice to produce "all letters written by plaintiff to defendant relating to matters in dispute in the action," was held good, though no dates were given, because the names of the parties were mentioned (*q*). The mere fact of an instrument being in court, in possession of the adversary, will not justify the reception of secondary evidence, except *after* proper notice to him to produce it (*r*). But if the paper is admitted or proved to be in court, verbal notice on the party

When unnecessary.

(*f*) *Whitelock* v. *Musgrove*, 3 Tyr. 541. See as to this case, *Logan* v. *Allder*, 3 Tyr. 557; *Roden* v. *Ryde*, and *Sewell* v. *Evans*, 4 Q. B. 626; *Greenshields* v. *Crawford*, 9 M. & W. 314.

(*g*) *R.* v. *Watson*, 2 T. R. 201.

(*h*) *R.* v. *Aickles*, 1 Leach, 294.

(*i*) *R.* v. *Spragge*, cited by Lord *Ellenborough* in *Hare* v. *Hall*, 13 East, 124.

(*k*) *Reg.* v. *Elworthy*, L. R., 1 C. C. R. 103; 37 L. J., M. C. 3.

(*l*) *Reg.* v. *Kitson*, Dears. C. C. 187; 22 L. J., M. C. 118.

(*m*) *R.* v. *Hunt*, 3 B. & A. 566.

(*n*) *Bartholomew* v. *Stephens*, 8 C. & P. 728; *Jones* v. *Tarleton*, 9 M. & W. 675.

(*o*) *Smith* v. *Young*, 1 Campb. 440.

(*p*) *Harvey* v. *Morgan*, 2 Stark. N. P. C. 17.

(*q*) *Jacob* v. *Lee*, 2 M. & Rob. 33.

(*r*) *Bate* v. *Kinsey*, 4 Tyr. 662.

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having it in his possession given in court is sufficient (*n*). Nor will a party who is protected from producing a deed by holding it as trustee for one of the parties, be compelled to state its contents (*o*). If it is not shown that the instrument was ever in the prisoner's possession, no notice is necessary (*p*). The notice must be served either on the prisoner or his attorney, as in civil cases (*q*), in time sufficient to enable the prisoner to produce the paper (*r*), that is, before the first day of the sessions, if the prisoner reside at a distance from the sessions town (*s*), and if, in consequence of refusal to produce an original document after notice, secondary evidence of it is given, it is too late for the party who has refused to produce it to put in the original (*t*).

Notice to produce, when to be served.

Hearsay.

It follows as a plain example of this rule, that *hearsay*, that is, the statement of some third person, whether oral or in writing is not to be received; because the party himself who is represented as making the assertion might be called to prove it on his oath. But the fact of a recent complaint made in case of rape may be given in evidence as a part of the transaction, to sustain the prosecutrix in her story, though not to establish the particulars of her narrative (*u*). Expressions used in the course of a transaction may be proved as part of it, though not as showing any independent fact which might be deposed to by competent witnesses (*x*). As dying declara-

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(*n*) *Dwyer* v. *Collins*, 7 Exch. 639; 21 L. J., Ex. 225.

(*o*) *Davies* v. *Waters*, 9 M. & W. 608.

(*p*) *R.* v. *Hood and others*, 1 Mood. C. C. 281, 285. Where an officer called to produce a warrant under which he had acted, swore he lost it in the affray which ensued on his reading it at the offender's house, and had searched his pockets for it shortly after, while taking him to gaol, without finding it. A boy proved a search in the road between the house and the place where it was missed. No notice to produce, or search of the offender's house, was proved. *Vaughan*, B., admitted secondary evidence.

(*q*) *Attorney-General* v. *Le Merchant*, 2 T. R. 203, n.; *Houseman* v. *Roberts*, 5 C. & P. 394, *Gurney*, B.

(*r*) *Reg.* v. *Kitson*, Dears. C. C. 187, 22 L. J., M. C. 118; *Bryan* v. *Wagstaff*, Ry. & M. N. P. C. 327.

(*s*) *Trist* v. *Johnson*, 1 Moo. & Rob. 259. In *R.* v. *Ellicombe*, *id.* 260, notice to produce was served on prisoner in gaol during an assizes, viz., on 18th. Trial on 20th. Prisoner's house was ten miles from assize town, and the services held too late. See *Byrne* v. *Harvey*, 2 Moo. & Rob. 89; *Firkin* v. *Edwards*, 9 C. & P. 478; *Reg.* v. *Kitson*, *ubi sup.*; where service of notice in the middle of the day on the day before the assizes at the assize town, the prisoner's residence being thirty miles from the town, was held insufficient; *Houseman* v. *Roberts*, 5 C. & P. 94.

(*t*) *Doe* d. *Thompson* v. *Hodgson*, 12 A. & E. 135.

(*u*) *R.* v. *Clarke*, 2 Stark. N. P. C. 242; *R.* v. *Brazier*, 1 East, P. C. 444; see *Reg.* v. *Osborne*, 1 C. & M. 622. *Semb.*, the *terms* in which the complaint was made cannot be proved in detail as independent evidence with a view not to show the witness's credit and accuracy of recollection, but to establish who the prisoners committing the offence were; *Reg.* v. *Megson*, 9 C. & P. 420; *Reg.* v. *Gutteridge*, *id.* 472.

(*x*) See *R.* v. *Gordon* (*Lord George*), 21 St. Tr. 536; and *Aveson* v. *Lord Kinnaird*, 6 East, 193.

tions, *viz.*, the statements of a party mortally injured, in the immediate prospect of death, are only admitted in trials for homicide (*y*), on account of the solemnity attached to the words of a man who believes himself dying, they do not fall within the scope of this work; but as to the admissibility in certain cases and under certain conditions of depositions of persons taken under the 11 & 12 Vict. c. 42, and the examinations or depositions of persons taken under 30 & 31 Vict. c. 35, s. 6, see *post*, pp. 264, 266, "Depositions." *Of Statements of dying Persons.*

The previous statements of a witness relative to the transaction, whether made on oath or not, may be adduced to contradict him, after he has, on cross-examination, denied making them (*z*). And if such previous statements have been reduced into writing, the practice in such a case is treated of, *post*. Previous declarations.

Section 8.

Of Documentary Evidence.

Documentary evidence is not often requisite to any extent on the trial of prisoners at sessions. The following enumeration of the principal description of documents proveable, with the modes of establishing them, may therefore suffice.

Statutes of the Realm, or acts of parliament. Of these it is enough to observe, that "public acts," or acts relating to the general interests of the kingdom, or of any large portion of it (as, *ex. gr.*, Bedford Level), or of a whole profession (as, *ex. gr.*, the body of the clergy), are judicially noticed, and need not be proved further than by the production of the printed statute book, or of the Queen's printer's copy, if it is a recent act (*a*). Public acts.

And now "private acts," *viz.*, acts relating only to a "particular species of men or some individuals" (*b*), may be proved by a Queen's printer's copy by virtue of 8 & 9 Vict. c. 113, s. 3, which enacts, that all copies of private and local and personal acts of parliament not public acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations purporting to be printed by the printers to the crown, or by the printers to either house of parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices and others without any proof being given that such copies were so printed. Private acts.

By 13 Vict. c. 21, s. 7, every act made after the commencement of this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such act. What to be deemed public or private acts.

(*y*) *Post*, p. 323; *R.* v. *Lloyd*, 4 C. & P. 233.
(*z*) 2 Phill. Ev. 9th ed. 432—434.
(*a*) *R.* v. *Barnett*, 3 Campb. 344.
(*b*) 1 Gilb. Ev. by Lofft, 12.

Proclamations, orders or regulations of government departments.

By the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), it is enacted, that *primâ facie* evidence of any *proclamation, order*, or *regulation* issued before or after the passing of this act by her majesty, or by the privy council; also of any *proclamation, order*, or *regulation* issued before or after the passing of this act, by or under the authority of any such department of the government or officer as follows; *i. e.*, the commissioners of the treasury; the commissioners for executing the office of lord high admiral; the secretaries of state; the committee of privy council for trade; the poor law board; the local government board (34 & 35 Vict. c. 70, s. 5); may be given in all courts of justice, and in all proceedings whatsoever in all or any of the modes hereinafter mentioned, that is to say:—

(1) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.

(2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer; or where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

(3) By the production, in the case of any proclamation, order, or regulation, issued by her majesty or by the privy council, of a copy or extract purporting to be certified to be true by the clerk of the privy council, or by any one of the lords or others of the privy council; and in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers by the production of a copy or extract purporting to be certified to be true by the person or persons specified as follows, in connection with such department or officer; *i. e.*, any commissioner, secretary, or assistant secretary of the treasury; any of the commissioners for executing the office of lord high admiral, or either of the secretaries to the said commissioners; any secretary or under-secretary of state; any member of the committee of the privy council for trade, or any secretary or assistant secretary of the said committee; any commissioner of the poor law board, or any secretary or assistant secretary of the said board; and by 34 & 35 Vict. c. 70, a rule, order, or regulation made by the local government board shall be valid if it is made under the seal of the board and signed by the president, or one of the *ex officio* members of the board, and countersigned by a secretary or assistant secretary; and the production of such *primâ facie* evidence of any of the said rules, orders, or regulations, as is required by the Documentary Evidence Act, 1868, with respect to the rules, orders, or regulations of the poor law board shall, until the contrary is shown, be a sufficient proof that any such rule, order, or regulation of the local government board was duly made.

Of Proclamations, Orders or Regulations of Government Departments.

Any copy or extract made in pursuance of this act may be in print or in writing, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying in pursuance of this act to the truth of any copy of or extract from any proclamation, order, or regulation.

The provisions of this act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute or existing at common law.

Government printer includes Queen's printer; and Gazette includes the London Gazette, the Edinburgh Gazette, and the Dublin Gazette.

Proclamations, treaties, acts of state, judgments, decrees, &c. of foreign states or British colonies.

By 14 & 15 Vict. c. 99, s. 7, all proclamations, treaties and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs: and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport, either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence without any proof of the seal, where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

Public books of public bodies.

The public books of recognized public bodies are, in many cases, evidence. Thus, the entries in books of the navy office are sufficient evidence that a person of a particular name is dead, but not of the identity of that person, which, if doubtful, must therefore be proved by other evidence (*c*).

(*c*) Bull. N. P. 243.

Of Documentary Evidence.

General history may be referred to as proving a public matter relating to the government of the kingdom *in general*, but not any *particular* custom, or other matter affecting the private rights of individuals. And even books of general history, as topographical works, are not admissible on subjects of public history, if any documents from which they were compiled be capable of proof (*d*).

Surveys and inquisitions taken on *public occasions* are evidence to ascertain the rights of individuals, or of parishes, or places named in them; but *only* when they have been taken under some *public* authority, and not by that of any private individual (*e*).

Almanacks (anciently called *kalendars*) are good evidence to prove on what day of the week a particular day of the year fell, and such like events, for there can be no other evidence of such things (*f*).

Records of the queen's courts prove themselves, as do the *rolls* of courts *not* of record, so far as they affect the *public* interest (*g*). But records of the queen's courts are only conclusive evidence, generally speaking, against those who are parties to them. Thus, an accessory may controvert the guilt of his principal, notwithstanding the record of such principal's conviction (*h*). The records of the quarter sessions will be formally drawn up if required. Where an indictment is to be proved, the production of it, indorsed "true bill," is not sufficient; the record must be regularly drawn up, and produced, or an examined copy of it, and the caption is a necessary part of the record (*i*). When the record cannot be produced,

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(*d*) *Stainer* v. *Droitwich (Burgesses)*, as to Dugdale's Monasticon, the records from which it was taken being in the augmentation office; Salk. 281.

(*e*) Peake, Ev. 91.

(*f*) Cro. Eliz. 227; 3 Bla. Com. 333; Salk. 626; Ld. Raym. 994. The calendar on which the courts proceed is that annexed to the common prayer book; 6 Mod. 81.

(*g*) 10 Co. 92.

(*h*) 1 Stark. Ev. 238, 249, 2nd ed. See Index, *tit.* "Accessories."

(*i*) *Porter* v. *Cooper*, 6 C. & P. 354; *R.* v. *Ward*, 6 C. & P. 366. *A. Park*, J. Indictment for perjury committed on the hearing of an appeal at quarter sessions; the sessions minute-book was produced to prove that the appeal came on to be heard. (The form of the minute in the book does not appear from the report in C. & P.; but Lord *Denman*, in *R.* v. *Yeovcley* (*infra*), inferred that the minute was one made only for the convenience of the clerk, and that the caption which was necessary to show that a court of competent jurisdiction had tried the appeal did not appear in it.) The deputy clerk of the peace stated, that, if applied to, he would have drawn up a record of the appeal on parchment; but that it was not the practice to do so, unless bespoke. *A. Park*, J., rejected the minute-book, saying that a regular record, made up on parchment, as on a return to a *certiorari*, or a copy of such record, was the proper proof.

In *R.* v. *Yeoveley*, 8 A. & E. 806, see *ante*, p. 26, *Williams*, J., distinguished *R.* v. *Ward* as a case in which the possibility of the offence of perjury having been committed, as charged, would depend on the court in

being in another court, the proof is either by an exemplification under seal, or more commonly, by a copy examined with the original by the witness who produces it.

Records in the custody of the Master of the Rolls.

By the 1 & 2 Vict. c. 94 (An Act for keeping safely the public records), s. 12, "the master of the rolls, or deputy keeper of the records, may allow copies to be made of any records in the custody of the master of the rolls, at the request and costs of any person desirous of procuring the same; and any copy so made shall be examined and certified as a true and authentic copy, by the deputy keeper of the records or one of the assistant

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which the oath was taken having jurisdiction or not; and that, consequently, in that case, such a record as would show jurisdiction must be proved. *Patteson*, J., noticed the fact that higher evidence was attainable in *R.* v. *Ward*, and Lord *Denman* disclaimed interference with its authority.

In *R.* v. *Yeoveley*, on the trial of an *appeal* against an order of removal, appellants, in order to prove it to have been quashed, put in the original sessions book, being a *paper* book containing the orders of the court, made up and recorded after each session by the clerk of the peace, from minutes taken by him in court. This book he stated to be the "record itself of the proceedings of the court." In it the entry of the proceedings at each session was headed *with the usual caption* of the justices; and at the termination of the proceedings of the session was the signature, "By the Court, *John Charge*, clerk of the peace." No other record or entry of the proceedings at sessions appeared. The court held, that the only question being whether the order of sessions in question had been made at sessions, the book was good evidence of its being made, though that judgment of the court was not recorded on parchment; for the minute entered by the clerk of the peace was the only thing ever done at the sessions for the purpose of recording such an order; and no instance was adduced of its being held necessary to make up a formal record of the judgment of a quarter session on an appeal. See *R.* v. *Hains*, cited 1 Stark. Ev. 2nd ed. 257.

R. v. *Smith*, 8 B. & C. 341. Indictment for conspiracy stated, that "at the court of quarter sessions, holden, &c., an indictment against H. S. was preferred to, and found by, the grand jury;" and that defendants conspired to prevent W. B. from being examined before such grand jury. The deputy clerk of the peace produced an indictment against H. S., indorsed a true bill; on objection to receiving it in evidence without a general heading or caption, he stated, that it was not the practice to make up the records in form unless desired to do so, but produced his book, in which minutes were made of the proceedings, and from which records were afterwards made up. He was suffered to read this minute,—"Monmouthshire Sessions, 10 July, 1826, at the general quarter sessions of the peace, held at Usk, in and for the said county, this 10th July, 1826, before A. B., C. D., &c., &c." Then followed the business done at the sessions, *inter alia*, the indictment in question. Two defendants were convicted, but rule was made absolute for a new trial; for the quarter sessions, being a court of over and terminer (see, however, *ante*, Chap. I. Sect. 9), and of record, the record of the indictment should have been regularly drawn up on parchment (see also *Reg.* v. *Pembridge* (*Inh.*), 1 C. & Mar. 157), and an examined copy produced to prove the indictment found; and the minutes in the book kept by the clerk of the peace were held not sufficient for that purpose; *R.* v. *Thring*, 5 C. & P. 507. See *Edwards* v. *Williams*, 2 Esp. Ni. Pri. Digest, 37; cited Roscoe's Ev. at Ni. Pri. 382, 4th ed.

In *R.* v. *Tooke*, 25 St. Tr. 446, the minutes of a court were received to prove the acquittal of a prisoner (Hardy) tried before it, while sitting under the same commission.

From *R.* v. *Bellamy*, Ry. & M. N. P. C. 171, it seems that a minute book, in which entries of the proceedings at sessions are made, and from

Records in Custody of Master of the Rolls.

record keepers aforesaid, and shall be sealed or stamped with the seal of the record office and delivered to the party for whose use it was made;" and by sect. 13, "every copy of a record in the custody of the master of the rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the record office, shall be received as evidence in all courts of justice and before all legal tribunals, without any further or other proof thereof, in every case in which the original record could have been received there as evidence."

Ancient terriers.

Ancient terriers are, or are not, admissible in evidence, according to the possession from which they come, and the parties by whom, and in whose interest, they are produced. Thus they can only, under very particular circumstances, be evidence *for* the clergyman, but may generally be evidence *against* him. But if they be signed by churchwardens appointed by the parish at large, and not by the parson, and whose interests were rather *against* him than *with* him, they become good evidence, even of rights.

Ancient maps.

Ancient maps, like terriers, surveys, and other such instruments, are subject to similar observations. Their being admitted as evidence must depend on the circumstances under which, and the parties by whom, they were made, the purpose and interest in which they are produced, and the object to be supported by them (*k*). A map made under a private act is not even evidence of reputation, without proof of the act (*l*).

Awards under Inclosure Acts.

By 3 & 4 Will. 4, c. 87, s. 1, every *award* made before 28th August, 1833, under *any inclosure act*, is made valid from the time of its execution, as if enrolled in the manner limited by such act; and by s. 2, every award already made, *i. e.*, before same date, whether enrolled or not, and every copy of such award, when enrolled under s. 1, or of any part thereof signed by the clerk of the peace of the county, &c. or *place*, or his deputy, purporting to be a true copy, shall, at all times, be admitted in all courts as legal evidence.

Corporation books.

Corporation books, so far as they concern the public government of a town, when publicly kept, and the entries made by a proper officer, are received as evidence of the facts contained

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which book the roll containing the record of such proceedings is subsequently made up, is not itself a record so as to be admissible in evidence on an indictment, as a proof of the fact there stated.

Trespass and false imprisonment. Defendant, governor of Sierra Leone, arrested plaintiff at his factory on a river beyond the colony. Defendant objected to a witness called by plaintiff to prove his being convicted of trading in slaves in the court of Sierra Leone. The production of an instrument purporting to be an indictment on which a conviction had been had, and that it had been found by B. M. and his fellows on oath, was rejected by *Bayley*, J., for not showing by a caption that the indictment was found by persons competent to do so; *Cooke* v. *Maxwell*, 2 Stark. N. P. C. 183. And see *ante*, p. 26.

(*k*) Taylor on Ev. 6th ed. p. 564.

(*l*) *Reg.* v. *Milton*, 1 C. & K. 58.

in them (*m*). So the daily books of a prison are good evidence as to the time of a prisoner's discharge, &c., but not of the cause of his commitment (*n*). So the log-book of a convoy man-of-war is evidence to prove when a certain ship came under her convoy (*o*), and the time of sailing and the general motions of the fleet (*p*).

Entries made in Books in course of Duty.

By 8 & 9 Vict. c. 113 (An Act to facilitate the admission in evidence of *certain official and other documents*), "Whereas it is provided by many statutes, that various certificates, official and public documents and proceedings of corporations, and of joint stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in manner prescribed by such statutes; and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine, be it enacted that whenever by any act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed as directed by the respective acts made, or to be hereafter made, without any proof of the seal or stamp, when a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

Corporation books, public and official documents.

2. "That all courts, judges, justices, commissioners, judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate or other judicial or official document."

A certificate of a conviction given at a borough quarter sessions within the Municipal Corporations Act, purporting to be signed by the deputy clerk of the peace of the borough, and having the custody of the records of the court, is admissible in evidence under 5 Geo. 4, c. 84, s. 24, and 8 & 9 Vict. c. 113, s. 1, although the Municipal Corporations Act gives no power to

(*m*) Taylor on Ev. 6th ed. p. 515.
(*n*) *R.* v. *Rickles*, 1 Lea. 191.
(*o*) *D'Israeli* v. *Jowett*, 1 Esp. 427.
(*p*) Taylor on Ev. 6th ed. p. 1511.

Registers, Parochial and Non-parochial.

appoint a deputy clerk of the peace for a borough, there being proof that the person signed did in fact fill such an office (*q*).

Parish registers.

Parish registers are evidence of the entries of births, baptisms, deaths, burials, marriages, &c. therein made, but subject to the proof of the identity of the parties, in the same manner as has been observed respecting the books of the navy office (*r*); and such register may be proved either by the production of the originals from the proper custody, or of copies examined by a witness who produces them.

Certified extracts from parish registers.

Certified extracts from a parish register, signed by the rector or vicar or curate of the parish, are admissible (*s*).

Non-parochial registers of births, marriages, deaths and burial.

Non-parochial registers are by the 3 & 4 Vict. c. 92, admitted as evidence of births or baptisms, deaths or burials and marriages, for it is enacted that the registrar-general of births, deaths and marriages in England shall receive and deposit in the general register office all registers and records of births, baptisms, deaths, burials, marriages then in custody of the commissioners then in existence, and such other registers as thereinafter directed to be deposited with him. And he shall cause lists to be made of all the registers and records which may be placed in his custody by virtue of this act, and every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said lists and any register or record therein mentioned, between the hours of ten in the morning and four in the afternoon of every day, except Sundays and Christmas-day and Good Friday, but subject to such regulations as may be made from time to time by the registrar-general, with the approbation of one of her Majesty's principal secretaries of state, and to have a certified extract of any entry in the said registers or records (*t*). All registers and records deposited in the general register office by virtue of the act, except as therein mentioned, shall be deemed to be in legal custody, and shall be receivable in evidence in all courts of justice, subject to the provisions thereinafter contained; and the registrar-general shall produce, or cause to be produced, any such register or record on subpœna or order of any competent court or tribunal, and on payment of a reasonable sum, to be taxed as the court shall direct, and to be paid to the registrar-general on account of the loss of time of the officer by whom such register or record shall be produced, and to enable the registrar-general to defray the travelling and other expenses of such officer (*u*). But in all *criminal* cases in which it shall be necessary to use in evidence any entry or entries contained

In criminal cases.

(*q*) *Reg.* v. *Parsons*, L. R., 1 C. C. R. 24; 35 L. J., M. C. 167.

(*r*) Peake, Ev. 92. See Roscoe on Evidence at Nisi Prius, 4th ed. 27, 79, 140.

(*s*) See *In re Hall's Estate*, 22 L. J., Ch. 177; *Re Porter's Trusts*, 25 L. J., Chan. 688.

(*t*) 3 & 4 Vict. c. 92, s. 5.

(*u*) *Ibid.* s. 6.

Certified Extracts from Registers.

in any of the said registers or records, such evidence shall be given by producing to the court the original register or record (*x*).

Then, by 21 Vict. c. 25, the registrar-general is to receive and deposit in the general register office all the registers recommended to be deposited there by certain commissions appointed to inquire into the custody of registers throughout the kingdom. And the provisions of the 3 & 4 Vict. c. 92, ss. 5 to 19, both inclusive, are to be applicable to registers kept under the 21 Vict. c. 25.

By sects. 9, 10, 11 and 12 of the 3 & 4 Vict. c. 92, the registrar-general is to certify all extracts which may be granted by him from the registers or records deposited in the said office by causing them to be sealed or stamped with the seal of the office, and all extracts stamped with such seal shall be received in evidence in all civil cases, instead of the production of the original registers or records containing such entries. Every extract is to describe the register or record from which it is taken, and shall express that it is one of the registers or records deposited under this act, and production of the register or book from the general office in the custody of the proper officer thereof, or the production of any such certified extract containing such description as aforesaid, and purporting to be stamped with the seal of the said office shall be sufficient to prove that such register or record is one of the registers or records deposited in the general register office under this act. Where any party shall intend to use in evidence, on the trial of any cause, or on the hearing of any matter which is not a criminal case, at any session of the peace in England or Wales, any extract certified as hereinbefore mentioned from any such register or record he shall give notice in writing to the opposite party, his attorney or agent, of his intention to use such certified extract in evidence at such trial or hearing, and at the same time shall deliver to him, his attorney or agent, a copy of the extract and of the certificate thereof. And on proof by affidavit of the service, or on admission of the receipt of such notice and copy such certified extract shall be received in evidence at such hearing, if the court shall be of opinion that sufficient time before such hearing to have enabled the opposite party to inspect the original register or record from which such certified extract had been taken or within such time as shall be directed by any rule of the judges to be made under that act. And further, if any party intended to use the original register or record in evidence, he must give reasonable notice to the opposite party of his intention, and deliver a copy of a certified extract of the entry.

Every office or place where registers or records are deposited by the direction of the registrar-general is to be deemed to be a branch or part of the general register office (sect. 3).

(*x*) 3 & 4 Vict. c. 92, s. 17.

Extracts from registers.

A certified copy of an entry in the register books in a registrar's district, part of a superintendent registrar's district, certified by the deputy superintendent registrar, who also certified that the book was in his lawful custody, has been very recently held to be admissible in evidence in a criminal case upon mere production, coupled with proof of identity to prove the date of the birth of a child under the 14 & 15 Vict. c. 99, s. 14 (*y*); but it is to be observed that the 3 & 4 Vict. c. 92, s. 17, and 21 Vict. c. 25, s. 3, were not referred to in that case; see *ante*, p. 260, as to non-parochial registers.

Irish documents.

By 14 & 15 Vict. c. 99, s. 10, every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particulars in any court of justice in Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having, in England or Wales, by law or by consent of parties, authority to hear, receive and examine evidence without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

Diploma of Apothecaries Hall.

By 14 & 15 Vict. c. 99, s. 8, every certificate of the qualification of an apothecary, which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London, shall be received in evidence in any court of justice, and before any person having by law authority to hear, receive and examine evidence without any proof of the said seal, or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

Public documents—copies of.

By 14 & 15 Vict. c. 99, s. 14, "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence; provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

(*y*) *Reg.* v. *Weaver*, 43 L. J., M. C. 13; L. R., 2 C. C. R. 85.

Act book of an ecclesiastical court.

The act book of an ecclesiastical court is a book of a public nature, and an unstamped copy of the act book is sufficient evidence of the probate of a will to prove the executorship (*z*). The office copy of the bill of sale, and affidavit required to be filed by 17 & 18 Vict. c. 96, s. 11, are public documents and provable by a copy under the above act (*a*).

Minutes of proceedings in bankruptcy, and copies of petitions and orders, &c. therein, are made evidence under 32 & 33 Vict. c. 71, s. 107, *post*.

Previous convictions—certificates of.

In order to prove the trial and conviction, or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court, where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof (*b*).

But when the second indictment is preferred before the same court, sitting under the same commission, a minute of the former proceeding will be admitted, because the formal record cannot be supposed to be made up (*c*).

And by 34 & 35 Vict. c. 112, s. 18, a previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction, purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction, made in pursuance of

(*z*) *Dorrett* v. *Meux*, 23 L. J., C. P. 221.

(*a*) *Grindell* v. *Brendon*, 6 C. B., N. S. 698; 28 L. J., C. P. 333; *Sutton* v. *Bath*, 27 L. J., Ex. 388.

(*b*) 14 & 15 Vict. c. 99, s. 13.

(*c*) *R.* v. *Tooke*, 26 How. St. Tr. 446—449; *R.* v. *Justices of Middlesex*, 5 B. & Ad. 1113. See *ante*, p. 193.

Certificates of previous Convictions.

this section, shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the united kingdom may be proved against a prisoner in any other part of the united kingdom; and a conviction before the passing of this act shall be admissible in the same manner as if it had taken place after the passing thereof. A fee not exceeding five shillings may be charged for a record of conviction given in pursuance of this section.

The mode of proving a previous conviction, authorized by this section, shall be in addition to and not in exclusion of any other authorized mode of proving such conviction.

Parol evidence of a person who heard the sentence passed is not legal evidence of a previous conviction (*d*). Nor, it would seem, the evidence of policemen and prison officers that they had had the prisoner in their custody under a conviction (*e*).

Herald's books.

The herald's books are good evidence of pedigree, and such matters; but entries in them, taken from records, cannot be evidence, because the records themselves (or in cases hereafter to be noticed, copies of them) might be obtained (*f*). And, for numerous reasons, inscriptions on monuments and gravestones are evidence of the same, subject to the common rules respecting proof of identity (*g*).

Evidence of pedigree.

The sentence of the Ecclesiastical Court, on a subject within its jurisdiction, *e. g.*, the lawfulness of a marriage, was a judgment in rem and good evidence of the status of the parties (*h*), and now the decree of the court for divorce and matrimonial causes has the same effect (*i*).

Depositions.

By the 11 & 12 Vict. c. 42, s. 17, *depositions* (*viz.*, "information on oath" of persons acquainted with the facts) are taken by the justice or justices, before he or they commit the accused person to prison for trial, or before he or they admit him to bail, but the justice must in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement of such persons on oath or affirmation and put the same into writing, and such depositions must be read over to and signed respectively by the witnesses who shall have been so examined, and must be signed also by the justice or justices taking the same. . . . And if upon the trial of the person so accused, as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if, also, it be proved that such deposition was taken in the presence of the person so accused,

Admissibility of depositions in evidence on trial.

(*d*) *Reg.* v. *Bourdon*, 2 C. & K. 366.
(*e*) *Reg.* v. *Summers*, L. R., 1 C. C. R. 182; 38 L. J., M. C. 62.
(*f*) See *Davies* v. *Lowndes*, 5 B. N. C. 167.
(*g*) Taylor on Ev. 6th ed. pp. 587, 588.
(*h*) *Ibid.* pp. 1434, 1435.
(*i*) 20 & 21 Vict. c. 85, ss. 7, 16, 27, 31.

Depositions taken before the Justices.

and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same. Then, by 11 & 12 Vict. c. 42, s. 18, it is enacted, that after the examinations of all the witnesses on the part of the prosecution shall have been completed, the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.

After examination of the accused, justice to read depositions taken against him, and caution him as to any statement he may make;

and inform him that he has nothing to hope or fear from either promise or threat.

And by 30 & 31 Vict. c. 35, s. 3, in order to remove all ground for a complaint frequently made by prisoners on their trial, that they were unable by reason of poverty to call witnesses on their behalf, and that injustice was thereby done them, it was enacted that "such justice or justices, immediately after obeying the directions of the 18th section of the 11 & 12 Vict. c. 42, demand and require of the accused person whether he desires to call any witness, and if the accused person shall in answer to such demand call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examina-

Depositions of prisoners' witnesses.

Depositions of Prisoners' Witnesses.

tion and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know any thing relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing, and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same and transmitted in due course of law with the depositions, and such witnesses not being witnesses merely to the character of the accused as shall, in the opinion of the justice or justices, give evidence in any way material to the case, or tending to prove the innocence of the accused person shall be bound by recognizance to appear and give evidence at the said trial, and afterwards upon the trial of such accused person all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken.

And by sect. 4, all the provisions of the 11 & 12 Vict. c. 42, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognizance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read and have operation as part of this act.

Depositions to perpetuate testimony.

And by 30 & 31 Vict. c. 35, s. 6, it is recited, that by the above 17th sect. of 11 & 12 Vict. c. 42, it is permitted, under certain circumstances, to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said act of a witness who is dead, or so ill as to be unable to travel, and that it may happen that a person dangerously ill and unable to travel may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take in accordance with the provisions of the said act the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such

justice shall thereupon subscribe the same, and shall add thereto, by way of caption, a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof; and if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial shall transmit the same with the said addition to the proper officer of the court for trial, at which such accused person shall have been so committed or bailed, and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city or borough in which he shall have taken the same, who is hereby required to preserve the same and file it of record: and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence either for or against the accused without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or attorney had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same. *Depositions to perpetuate Testimony.*

By sect. 7, provision is made for conveying a prisoner in actual custody to the place mentioned in the notice, for the purpose of being present at the taking of the statement.

There is nothing in the 11 & 12 Vict. c. 42, s. 17, to restrict the rule of practice adopted since the statutes of Philip and Mary, with reference to the admissibility of depositions upon the trial of prisoners, and it has been said that it has added a different class of cases in which depositions are to be admissible, and has introduced in terms the principle that the prisoner should have full opportunity of cross-examination, which he formerly had only by the equitable construction of the law (*i*). Therefore the charge on which the depositions were taken need not be the particular technical charge on which the accused is afterwards tried, and depositions of the prosecutor taken on a charge of wounding with intent to do grievous bodily harm were received in evidence after his death on the trial of the accused for his murder, arising out of the same transaction (*k*). Where the charge at the trial is not identically the same with that before the magistrate, it ought to be a matter of inquiry for the judge trying the case whether the prisoner had a full

(*i*) *Reg.* v. *Beeston*, Dears. C. C. 412, per *Jervis*, C. J.; 24 L. J., M. C. 5.

(*k*) *Ibid.*; *R.* v. *Smith*, Russ. & R. 339.

Depositions of Witnesses taken before Justices.

opportunity for cross-examination (*l*), and was informed of the nature of the charge by the committing magistrate (*m*).

The deposition of a person suffering from a second attack of paralysis, whose physician would not consent to his attending at the trial, but who might be brought there without danger to his life, was held to be rightly received (*n*); but the illness contemplated by the statute must be such as to render the witness unfit to travel, though it need not amount to be dangerous to life (*o*). It is for the discretion of the judge at the trial to decide whether such illness is proved (*p*); but old age and nervousness and inability to stand a cross-examination is not sufficient to dispense with the attendance of the witness, and to enable the depositions to be read (*q*). Recent confinement or pregnancy, coupled with other evidence as to inability to travel, may render the depositions admissible, but alone it would not constitute sufficient reason (*r*).

It was holden on the statutes of Philip and Mary, now replaced as above, that in the cases of felony to which alone they extended, if a magistrate in the presence of the prisoner took the deposition on oath of the party injured, or of an accomplice, who died before, or was actually insane at the time of the trial, the deposition might be read in evidence at it (*s*); but that if the prisoner was not present at the examination, it could not; the rule being universal, that where there is no opportunity of cross-examination, a mere *ex parte* statement, though made on oath, and under the most solemn circumstances as respects the deponent's condition as a dying man, is not admissible as evidence, except in the single instance of an indictment for killing the deponent (*t*). The title or caption to the depositions is sufficient if it state the occasion on which it is taken and the matter to which it refers, and it need not state the charge upon which it is taken with technical accuracy; in fact, there is no necessity for any formal caption at all (*u*). Where statements elicited from the prosecutor's witness by cross-examination, on an occasion subsequent to that on which he was examined in chief, were taken down and returned to the court on a sheet not signed by the magistrate, or pinned

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(*l*) *Reg.* v. *Beeston*, Dears. C. C. 412; and *R.* v. *Smith*, Russ. & Ry. 339.
(*m*) *Reg.* v. *Langridge*, 1 Den. C. C. 448; 18 L. J., M. C. 198.
(*n*) *Reg.* v. *Cockburn*, Dears. & B. 203; 26 L. J., M. C. 136.
(*o*) *Ibid.*
(*p*) *Reg.* v. *Stephenson*, 31 L. J., M. C. 147.
(*q*) *Reg.* v. *Farrell*, 43 L. J., M. C. 94.
(*r*) *Reg.* v. *Wilton*, 1 F. & F. 309; *Reg.* v. *Walker*, *ibid.* 534; *Reg.* v. *Harvey*, 4 Cox, C. C. 441; *Reg.* v. *Croucher*, 3 F. & F. 285; *Reg.* v. *Parker*, Arch. Cr. Pl. 6th ed. 231.
(*s*) *Reg.* v. *Marshall and others*, C. & M. 147; *secus* if, though witness's intellects are affected by injuries on the head, he is expected to recover from them.
(*t*) *R.* v. *Dingler*, Lea. 561, and 504, n.; *Woodcock's case*, *id.* 502; 1 East, P. C. 357. See *R.* v. *Eriswell*, 3 T. R. 720.
(*u*) *Reg.* v. *Langridge*, 1 Den. C. C. 448.

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up with a sheet containing evidence given in chief for the prisoner, which was so signed, the whole deposition, as well in chief as on cross-examination, was rejected as inadmissible *against* the prisoner, the witness having died before the trial (*x*). But it is not absolutely necessary that the separate deposition of each witness should be signed by the justices; and where a deposition of a deceased witness, taken under the above 17th section, appeared to be the second of four depositions, all of which were pinned together, each occupying more than one piece of paper, the justices had not signed either of the sheets on which the depositions were written, except the last, and that sheet did not contain any part of the deposition in question, but their signatures were appended at the end of the last deposition, to a statement at the end of the form copied from Schedule (M), "the above depositions, naming the witnesses, were taken and sworn before us;" it was held that the depositions, signed as a body according to the Schedule (M), were sufficiently signed and admissible (*y*). In one case the deposition of a prosecutor was taken before a justice, in the presence of a prisoner, on the *same sheet* of paper with those of other witnesses. At the end of the last deposition were the words, "Sworn before me" (the magistrate's signature). The prosecutor having died before the trial, his deposition was read in evidence, though it had not been signed in particular by the magistrate (*z*).

Where, by mistake, depositions are begun to be taken and put in writing before the prisoner arrives, the party should be re-sworn in his presence, and the depositions then read over to the deponent, who must state them to be correct; or a still better course is to make the witness repeat his evidence before the prisoner (*a*). The prisoner should then be asked, if he will ask the witness any questions, and nothing should be returned as a deposition unless he has had an opportunity of knowing what was said, and of cross-examining the witnesses (*b*). The statements elicited on cross-examination should be carefully taken down, and each sheet signed by the magistrates (*c*).

(*x*) *Reg.* v. *France*, 2 M. & Rob. 207.

(*y*) *Reg.* v. *Parker*, 39 L. J., M. C. 60.

(*z*) *R.* v. *Osborne*, 8 C. & P. 113; per Lord *Abinger*, C. B., and *Coleridge*, J. In a proceeding which was at utmost of a penal, and not of a criminal nature, *viz.*, an appeal to the sessions against an order of filiation, the examination of a single woman before two justices as to the father of her child, taken in his absence, was held admissible in evidence before the quarter sessions, notwithstanding her death before the order was made; and being uncontradicted was held conclusive, being taken under 6 Geo. 2, c. 31, which prescribed the purpose and supplied the authority for so doing. *R.* v. *Clayton*, 3 East, 58; a case in which the court were strongly inclined to support an order of justices which had been confirmed on appeal to the sessions; and see 2 Stark. Ev. 2nd ed. 140, n. 279.

(*a*) See *Reg.* v. *Beeston*, Dears. C. C. 408; 24 L J., M. C. 5.

(*b*) *Reg.* v. *Arnold*, 8 C. & P. 621.

(*c*) See *Reg.* v. *France*, 2 M. & Rob. 207.

Manner in which Depositions must be taken.

The depositions may afterwards be signed by the magistrate, and when returned by him will be evidence at the trial (*d*), if proved by him or his clerk, who were present when they were taken, as before stated with respect to confessions (*e*); and the depositions, under 11 & 12 Vict. c. 42, s. 17, must be taken in the presence of the justice as well as be signed by him to be admissible (*f*).

The deposition, regularly taken as above, may also be read in evidence at the trial, if the witness is proved to be kept out of the way by the means or procurement of the prisoner (*g*); but where two or more prisoners are being tried jointly, the depositions of a witness whose absence is procured by one, without concert with the others, is only admissible against the one who has procured the absence (*h*); and the same has been said where, at the time of trial, the witness is sick and permanently unable to travel (*i*). But the case of temporary illness or inability to travel seems only to afford ground for postponing the trial (*k*). The mere absence of a witness is no ground for reading his deposition, though he cannot be found (*l*), or is residing abroad (*m*).

What a prisoner says in other places is, of course, receivable on oral testimony (*n*). Statements made under oath, and reduced into writing on a preliminary inquiry by a properly constituted tribunal without objection, are admissible afterwards on the trial of the person who made them on a charge arising out of the inquiry (*o*). Written depositions, properly taken as above before a magistrate, are the best evidence of the witness's statement on that occasion, not only in the proceeding for which they are taken, but also in all other proceedings, civil as well as criminal, in which it is sought to give the witness's statement in evidence (*p*). As to the prisoner's right to copies of the depositions, see *post*, p. 291.

Depositions of witnesses examined in bankruptcy since deceased.

In case of the death of the bankrupt or his wife, or of a witness whose evidence has been received by any court in any proceeding under this act, the deposition of the person so deceased purporting to be sealed with the seal of the court or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to (*q*).

(*d*) *R.* v. *Smith*, Russ. & Ry. 339.
(*e*) *Ante*, p. 196.
(*f*) *Reg.* v. *Watts*, 33 L. J., M. C. 63; L. & C. 339.
(*g*) *Reg.* v. *Scaife*, 17 Q. B. 238; 2 Den. C. C. 281; 20 L. J., M. C. 229.
(*h*) *Ibid.*
(*i*) *R.* v. *Lord Morley*, Kel. 55; *Reg.* v. *Wilshaw*, Car. & M. 145.
(*k*) *R.* v. *Savage*, 5 C. & P. 143; *ante*, pp. 202, 203.
(*l*) *Reg.* v. *Scaife*, *ubi sup.*; *R.* v. *Lord Morley*, Kelynge, 55.
(*m*) *Reg.* v. *Austin*, Dears. C. C. 612; 25 L. J., M. C. 48.
(*n*) *R.* v. *Jacobs*, 1 Lea. 310.
(*o*) *Reg.* v. *Coote*, 42 L. J., P. C. 45; M. C. 114.
(*p*) *Leach* v. *Simpson*, 5 M. & W. 309.
(*q*) 32 & 33 Vict. c. 71, s. 108.

Depositions.

Oaths and affidavits.

The 5 & 6 Will. 4, c. 8, was passed for the purpose of substituting *declarations* for the oaths and affirmations formerly necessary in many transactions of public business, and for suppressing extra-judicial oaths and affidavits; but being found totally ineffectual for those objects, it was repealed within three months after by 5 & 6 Will. 4, c. 62, which substitutes more considered enactments.

By 5 & 6 Will. 4, c. 62, ss. 6 and 7, nothing in that extends to dispense with administering the oath of allegiance, or any oath, solemn affirmation or affidavit, which now is or may hereafter be, or be required to be made or taken "in any judicial proceeding in any court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace." Sect. 13 recites that a practice had prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received, and that doubts have arisen whether or not such proceeding is legal; and then enacts, for the more effectual suppression of such practice and removing such doubts, "That it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation, touching any *matter or thing* (*r*) whereof such justice or other person hath not jurisdiction or cognizance, by some statute in force for the time being: provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation, which may be required by the laws of any foreign country to give validity to instruments in writing, designed to be used in such foreign countries respectively" (*s*).

(*r*) In indictments for breach of this act, it must be averred what was the "matter or thing" touching which the oath was administered; *Reg.* v. *Nott*, 4 Q. B. 768; 12 L. J., M. C. 142; 1 C. & Mar. 288; but not the *particulars* of the oath or statement sworn to, *ibid.*

(*s*) 5 & 6 Will. 4, c. 62, s. 18, reciting, whereas it may be necessary and proper in many cases not herein specified to require confirmation of written instruments, or allegations or proof of debts, or of the execution of deeds or other matters, enacts, that it shall be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to the act annexed, and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanour.

This section has been held to extend not only to the declarations men-

Ancient deeds.

Deeds purporting upon the face of them to be *thirty years old* or upwards, may be given in evidence without proof of execution; but some account of what custody they are produced from, and other circumstances to show the fairness of the exhibition, may be necessary to entitle them to unqualified credit. If there be any erasures or interlineations, or other circumstances to create doubts, such circumstances must be accounted for, to rebut the presumption of fraud or fabrication (*u*). Where attestation is requisite to the validity of any instrument the only proof of deeds or other writings to which there are subscribing witnesses, is by calling one of them; unless all be dead, or beyond seas, or incompetent; when the proof is by showing the handwriting of one of them, and the identity of the witness to the deed with the person whose handwriting is proved. But it is not necessary to prove by the attesting witness any instrument to which attestation is not necessary, and such instrument may be proved as if there had been no attesting witness thereto (*x*).

Copies.

It may be laid down as a general rule, that wherever original instruments can be obtained, no inferior evidence of their contents is admissible; but where the record, the contents of which it is necessary to give in evidence, is public property, and cannot be obtained by subpœna, or other process, from the place where it ought always to remain; or where, though private property, it is not produced *by the party possessing it* on notice or subpœna; or, in such instances as parish registers and other depositaries where the contents concern the public, attested copies of such records and entries are good evidence (*y*). A copy of a letter taken by a machine, worked by the witness who produces the copy, may be proved by him as secondary evidence, though he did not examine the impression with the original (*z*).

Private writings not under seal.

Private writings, not under seal, are proved by evidence of the handwriting of the party by whom they purport to be written or signed. This proof may be given either by a person who has seen the party write, or by one who has received letters from him in the course of correspondence, and acted on them (*a*). It is never necessary that a witness should swear positively to handwriting; it is sufficient if, having means of knowledge, he swears that he believes it to be the handwriting of the individual alleged to be the writer; this belief may be formed even from corresponding with a person of the same name as the alleged writer, as of the same address, there being

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tioned in the act, but to every other sort of declaration; *Reg.* v. *Boynes*, 1 C. & Kir. 65.

(*u*) Bull. N. P. 255.

(*x*) 28 Vict. c. 18, s. 17.

(*y*) See *ante*, pp. 257, 258.

(*z*) *Simpson* v. *Thoreton*, 2 M. & Rob. 433.

(*a*) Taylor on Ev. 6th ed. 1581.

Writings not Under Seal.

evidence that no other person of the same name lived at the same place without ever having seen the person write (*b*), or has only seen him write once (*c*); and it will be a question whether, under all the circumstances, the belief is such as the jury can safely act on. All evidence of handwriting, except where the witness sees the document written, is, in its nature, *comparison*. It is the belief which the witness entertains on comparing the writing in question with an exemplar in his mind derived from some previous knowledge. And now by 28 Vict. c. 18, s. 8, comparison of a disputed handwriting, with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

Comparison of handwriting.

Stamps on instruments.

By 17 & 18 Vict. c. 83, s. 27, "every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon or affixed thereto."

In civil matters at quarter sessions, to which matters the Common Law Procedure Act, 1854, does not apply, when an instrument is offered in evidence without the stamp required by law, the opposite counsel should ask to see it, and object immediately; for as the defect, *e. g.* the absence, or too small amount, of the stamp, appears *on the face* of it, it will be too late to do so after it has been put in and read (*d*), even if that has happened from accidental neglect of the counsel, after having asked to see it (*e*).

Impounding public documents.

By 8 & 9 Vict. c. 113, s. 4, it is provided, that whenever any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding shall have been received in evidence by virtue of that act, the court, judge, commissioner or other person officiating judicially who shall have admitted the same shall, on the request of any party against whom the same is so received, be authorized at its or his own discretion to direct that the same shall be so impounded and be kept in the custody of some officer of the court or other proper person until further order touching the same shall be given, either by such court or by the persons or person who constituted such court, or by some one of the equity or common law judges of the superior courts of Westminster on application being made for that purpose.

(*b*) *Harrington* v. *Fry*, Ry. & M. N. P. C. 90.
(*c*) *Lewis* v. *Sapio*, M. & M. 49.
(*d*) *Field and another* v. *Woods*, 7 A. & E. 114; *Robinson* v. *Vernon*, 29 L. J., C. P. 310.
(*e*) *Foss* v. *Wagner*, 7 A. & E. 116, n.

Section 9.

of the competency of witnesses.

Competency of witnesses.

Formerly witnesses who had been convicted of a crime were deemed incompetent witnesses unless and until they received a pardon under the great seal ; but this ground of incompetency was removed as to those who had undergone their punishment in cases of felony, and was entirely removed in nearly all cases of misdemeanour, and a pardon by warrant was made as good as under the great seal by 9 Geo. 4, c. 32, ss. 3 and 4, and 7 & 8 Geo. 4, c. 28, s. 13, respectively; and now since the 6 & 7 Vict. c. 85, no person offered as a witness shall be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, magistrate, officer or person having by law or consent of parties authority to hear, receive and examine evidence, but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation, in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the proceeding in which he is offered as a witness, and notwithstanding such person offered as a witness may have been previously convicted of any crime or offence. Then, by 14 & 15 Vict. c. 99, the parties to such proceedings, and the persons in whose behalf any such action or other proceeding may be brought or defended shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding. But by sect. 3, nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband (*f*).

Witnesses not to be incapacitated from giving evidence by reason of crime or having an interest.

In criminal proceedings accused not competent,

or husband or wife of accused.

Persons incompetent.

Since those acts it may be said that nearly all the parties who are disqualified from giving evidence are those who, from tender age or defect of intellect, are incapable of understanding

(*f*) See also a similar enactment in 16 & 17 Vict. c. 83, s. 2.

the obligation of an oath, and those who, from a total and admitted want of religious belief, are incapable of feeling its obligations, or those who, from their intimate connexion of husband and wife are, in the eye of the law, identified.

Who are Incompetent Witnesses.

The first class are—

Persons incompetent from defect of understanding, or ignorance, as children, lunatics, idiots, and ignorant adults. Mere youth, however tender, although a proper ground for cautious investigation as to the understanding of a child, is never in itself a reason for rejecting its testimony. Upon this subject, experience shows that no certain rule as to age could be adopted with propriety; if the child, of how tender age soever, comprehends the difference between truth and falsehood, and believes that falsehood is a crime, and will be punished by God in a future state, he may be sworn and examined; whereas if he has no such sense, though of an age when such knowledge might reasonably be expected, he cannot be sworn (*g*). The same rule applies to persons who are surmised to be insane or idiots; the court is to be satisfied by its own examination, or upon evidence called on either side, of the state of their intellects, and will judge whether the insane person has the sense of religion in his mind, and whether he understands the nature and sanctity of an oath, &c., and admit or exclude their testimony as may seem best to its discretion, and then the jury are to decide on the credibility and weight to be attached to the evidence (*h*). A person with a mere organic defect, as one who is deaf and dumb, is not, on that account, incompetent, provided it appears from the examination of those who are acquainted with his habits that he has a sense of the obligation of an oath on the conscience and a power of understanding and answering questions (*i*). In this case, some person acquainted with the signs by which he is accustomed to convey his meaning must be sworn truly to interpret between the court and the witness; and being so sworn (*k*), must first interpret and explain to him the oath, and inform the court that he understands and accepts it; and then must interpret to him the questions asked, and return his answers as he gives them. If, after the jury are charged, the witness, though adult and of sufficient intellect, appears to have no idea of a future state of rewards and punishments, an acquittal should be directed, and not the jury discharged (*l*). In cases of great importance, where a child, who is a necessary witness to support the charge, is found unfit to give evidence from the mere absence of instruction, a judge will sometimes postpone the trial till the next assizes, and order the prisoner to be detained in custody, in

Persons incompetent.

(*g*) *Brazier's case*, 1 Lea. 237.
(*h*) *Reg.* v. *Hill*, 2 Den. C. C. 254.
(*i*) *R.* v. *Ruston*, 1 Lea. 408.
(*k*) See form of oath, *ante*.
(*l*) *R.* v. *Wade*, 1 Moo. C. C. 86.

Persons incompetent to be Witnesses.

order that the child may be properly taught in the interval (*m*); but this course can scarcely be called for by any case likely to occur at sessions (*n*).

Persons incompetent from want of religious belief.

The *second class of* persons incompetent are *those who deny all religious sanctions* of every kind, and who, therefore, understand no peculiar sanctity in an appeal to heaven. It is not, however, necessary that the party should believe in the Old or New Testament; nor is it any objection that his belief is of the wildest or most superstitious kind; if he believes in a superior intelligence, the punisher of falsehood in a future state, he is a competent witness (*o*). Jews, Mahometans, Gentoos, and Deists, may, therefore, be sworn in such manner as, according to their own apprehension, is binding on their consciences, and if they are guilty of perjury are liable to prosecution for perjury (*p*); but a witness who does not believe in any obligation of an oath more than of his word, nor in a future state of reward and punishment, ought not to be sworn (*q*). But it is allowable to a counsel to question witnesses on the *voir dire* as to their religious belief; and upon their answers returned after being sworn on the *voir dire* the court may decline to allow them to be sworn on the trial (*r*). Such witnesses may now be allowed to make a promise and declaration to speak the truth under 32 & 33 Vict. c. 68, s. 4 (*s*).

Mode of swearing witnesses.

The common and regular way of swearing by a Christian is on the four Evangelists, viz. the New Testament (*t*). All witnesses, indeed, must be sworn after a form, the obligation of which they acknowledge; as a Jew on the Pentateuch or Old Testament, with his head covered (*u*); a Mahometan on the Koran (*x*); a Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest (*y*); a Chinese, by breaking a china saucer (*z*); a Scotch covenanter, or member of the kirk, by holding up the hand without kissing the book (*a*); but if a

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(*m*) *Reg.* v. *Bayliss*, 4 Cox, C. C. 23.
(*n*) See note to *R.* v. *White*, 1 Lea. 480.
(*o*) *Omichund* v. *Barker*, Willes, 549; *S. C.*, 1 Atk. 45; 1 Wils. 84.
(*p*) *Robeley* v. *Langston*, 2 Keb. 314.
(*q*) *Maden* v. *Catanach*, 7 H. & N. 360; 31 L. J., Ex. 118.
(*r*) *Ibid.*
(*s*) See next page.
(*t*) See per *Lee*, C. J., Strange, 1114; *R.* v. *Bosworth*, citing 1 Eliz. c. 1, s. 19. The abjuration oath was "on the true faith of a Christian," till altered for the Jews by 10 Geo. 1, c. 10, *S. C. Semble*, the swearing on a common prayer book with the four gospels in the same cover will suffice in order to an indictment for perjury; *Robeley* v. *Langston*, *supra*.
(*u*) *Gomez Serra* v. *Munoz*, Stra. 821. See *ibid.* 1113, and *Robeley* v. *Langston*.
(*x*) *R.* v. *Morgan*, 1 Lea. 54.
(*y*) *Omichund* v. *Barker*, *supra*.
(*z*) *Reg.* v. *Entrehman*, C. & Mar. 248.
(*a*) *R.* v. *Mildrone*, 1 Lea. 412; *R.* v. *Walker*, 2 Sid. 6, cited Cowp. 390; *Mee* v. *Reid*, Peake, N. P. C. 23; *Dr. Owen's case*, 1 Leach, 498.

witness himself declares that he acknowledges the sanction of the oath in the usual form, there seems no just ground for troubling him with further questions. It is certain, that in whatever form he consents to be sworn, *e. g.* if though Christian he declines to be sworn on the New, but consents to be sworn on the Old Testament (*b*), he may be afterwards asked whether he hold such oath binding on his conscience, but not whether he considers any other form of oath more binding (*c*): for he will be liable, if he gives false testimony, to the penalties of perjury (*d*).

Mode of Swearing Witnesses.

By 32 & 33 Vict. c. 68 (Evidence Further Amendment Act, 1869), s. 4, if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: "I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth, and nothing but the truth." And any person who having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried and convicted for perjury, as if he had taken an oath.

Declarations and affirmations of persons objecting to take an oath.

The words "court of justice," and "presiding judge," in that section, shall be deemed to include any person or persons having by law authority to administer an oath for the taking of evidence (*e*).

It had been previously enacted by the 24 & 25 Vict. c. 66, that "if any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required or desiring to make an affidavit or deposition in the course of any criminal proceeding, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, videlicet: 'I, A. B., do solemnly, sincerely and truly affirm and declare, that the taking of any oath is according to my religious belief unlawful, and I do solemnly, sincerely, and truly affirm and declare, &c.,' which solemn affirmation and declaration shall be of the same force and effect as if such

(*b*) *Edmonds* v. *Rowe*, Ry. & M. N. P. C. 77.

(*c*) *The Queen's case*, 2 Br. & B. 284. A witness for a prosecution after being sworn on the New Testament, said, on cross-examination, that he was a Protestant, and, though born of Jewish parents, had been of the established religion since he had had capacity to judge for himself; he was examined, though he had never been baptized or formally renounced the Jewish faith, and had married his first wife, a Jewess, by its rites; *R.* v. *Gilham*, 1 Esp. 286.

(*d*) *Sells* v. *Hoare*, 3 Br. & B. 232; *S. C.*, 7 Moore, 36.

(*e*) 33 & 34 Vict. c. 49, s. 1.

Incompetency of Witnesses.

person had taken an oath in the usual form." And by sect. 2, the penalties of perjury are imposed upon a false affirmation.

Husband and wife may not give evidence for or against each other.

In criminal, as in civil cases, there is only *one relationship which disqualifies, viz., that of husband and wife.* In no cases, except those where either husband or wife complains of an injury directly inflicted by the one on the other, can either party in this connection give evidence for or against the other. They cannot be witnesses for each other, because their interests are supposed to be the same; nor can they be either required or allowed to give adverse testimony, on account of the respect which the law has for the sacredness of the marriage tie, and the comfort and security of domestic life; and so strenuously has this policy been sustained, that Lord Hardwicke, in a civil case, refused to permit a wife to give evidence for her husband, though the other party consented (*e*). And this rule is preserved by 14 & 15 Vict. c. 99, s. 3, and 16 & 17 Vict. c. 83, s. 2 (*f*); and as to communications which have passed between them, it is declared by statute, that no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage (*g*). The wife cannot be called to prove an *alibi* set up by a prisoner arraigned and tried with her husband for a felony charged against them jointly, though such *alibi* be totally unconnected with her husband's defence of a similar kind supported by other testimony (*h*). For as her evidence would go to show that the witness against her husband was mistaken as to the other prisoner, that would be to benefit her husband incidentally by indirectly weakening the evidence against him as well as against the prisoner, on whose behalf she was examined (*i*). And it had been long before held in misdemeanour, that the wife of one of several defendants charged as conspirators could not be a witness for the others, as their acquittal might incidentally procure the discharge of her husband (*k*). But if the evidence of either husband or wife can have no further effect than a latent possibility of inconvenience to the other, without contradicting his or her testimony previously given in the same cause, and without criminating, or furnishing matter which might be used as evidence to support a charge against

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(*e*) Cas. temp. Hard. 264; 1 Hale's C. 301. Like refusal in a criminal case where the husband consented to the wife being examined *against* him; 1 Hale, P. C. 47.

(*f*) *Ante*, p. 274.

(*g*) 16 & 17 Vict. c. 83, s. 3.

(*h*) See *R.* v. *Rudd*, Lea. 154; *Reg.* v. *Denslow*, 2 Cox, C. C. 230.

(*i*) *R.* v. *Hood*, 1 Moo. C. C. 281; *R.* v. *Smith and others, id.* 289; *Reg.* v. *Payne and others*, L. R., 1 C. C. R. 149; 41 L. J., M. C. 65.

(*k*) *R.* v. *Lockyer and others*, 5 Esp. N. P. C. 107; *R.* v. *Frederick and Tracy*, Stra. 1095; *R.* v. *Sherman*, Ca. t. Hard. 303. Indictment against several for assault. The wife of one defendant cannot be a witness for another defendant, for it is impossible to separate the cases of the two.

Evidence of Husband and Wife for or against each other.

that other, a mere *tendency* in the proof to have that effect will not prevent the testimony from being given; though the witness may object to undergo the examination, as likely to criminate the wife or husband. Where a prisoner was indicted in the first count for obtaining money by falsely pretending that a document presented to a bank by Eliza T., was signed by Daniel T., her husband, and a third count charged a conspiracy with Eliza T. to cheat the bank. Eliza T. was not put upon her trial, it was held that Daniel T. was admissible as a witness on the first count to negative the signature on the document, inasmuch as that count involved no criminality in the wife. The verdict was guilty on the first count and not guilty on the third, and was upheld (*l*). Thus, where a pauper woman, who had been married, was removed to her maiden settlement, the removal was supported by proof that the man to whom she was married had before his marriage to her been married to another woman, who was still alive at the time of the second marriage; and it was held that this might be properly proved by the first wife (*m*).

In cases of personal violence.

In cases of personal violence or wrong, however, the wife is from necessity a competent witness against the husband, and the husband against the wife (*n*); thus, the wife has been admitted to give evidence against her husband, on a charge against him for attempting to poison her (*o*), or for assaulting or assisting in a rape on her (*p*); or on any other charge affecting her liberty and person (*q*). On a charge of conspiracy to affect the marriage of a minor by unlawful means, the lady, even though lawfully married, is a witness against her husband (*r*); though a husband has been rejected by Lord *Tenterden* on an indictment for conspiring to effect his marriage; and it seems that wherever the one party would be a witness against the other, that party is competent for the other (*s*).

Proof of relationship.

No other tie except that of marriage, nor any relationship, however near, ever disqualified a witness. A parent might be

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(*l*) *Reg.* v. *Halliday*, 29 L. J., M. C. 148.

(*m*) *R.* v. *All Saints, Worcester* (*Inhab.*), 6 M. & S. 194; overruling *R.* v. *Cliviger*, 2 T. R. 263. A. and B. were indicted for burglary and stealing; part of the stolen property was found in the house of each, *Tindal*, C. J., held the wife of A. competent to prove that she took to B.'s house the stolen chattel found there; *Reg.* v. *Sills*, 1 C. & K. 494.

(*n*) *R.* v. *Jagger*, 1 East, P. C. 455; *Reg.* v. *Pearce*, 9 C. & P. 667.

(*o*) *R.* v. *Whitehouse*, 2 R. C. & M. 606.

(*p*) Bull. N. P. 187; *Castlehaven's* (*Lord*) *case*, 1 Hale, 301; 2 Stark. Ev. 900, 2nd ed.

(*q*) Per *Hullock*, B., in *R.* v. *Wakefield*, 2 R. C. & M. 607; *Castlehaven's* (*Lord*) *case*, 2 Stark. Ev. 900, 2nd ed.; 1 Hale, 629; 12 Mod. 340; Hutton, 116; 1 St. Tr. 317; Stra. 633.

(*r*) *R.* v. *Wakefield*, 2 R. C. & M. 605. So held in *R.* v. *Fullwood*, Cro. Car. 488. See *ante;* and *Brown's case*, 1 Hale, 301, a case of abduction, where the force continued to the time of the marriage.

(*s*) See *R.* v. *Serjeant et al.*, Ry. & M. N. P. C. 354, where the husband was rejected.

Competency of Witnesses.

a witness for or against a child, brothers and sisters for or against each other, and parties who had cohabited for however long a time without marriage; and each of these might be compelled to give evidence against the party to whom he or she is related. Where a witness for the prosecution was examined on the *voir dire* by one of the prisoners, and deposed that she was married to one of them, it was held proper that the prosecution should further examine as to whether the prisoner to whom the witness was married had not previously married a sister of the witness who had died before the second marriage, and upon her answering in the affirmative her evidence was held admissible (*t*). But where a woman had always passed as the wife of the prisoner, and had been so alluded to by him during the trial, Lord *Kenyon* refused to allow her to be examined for him on her proposing to be sworn, and denying the marriage (*u*).

Competency of accomplice.

An accomplice, though brought in custody, and giving evidence under the expectation of a pardon, was always a competent witness. The usual mode of admitting him to give evidence is on the motion of counsel, who, having read the depositions, takes on himself the responsibility of stating to the court, that in his judgment it is necessary to the ends of justice that the accomplice should go before the grand jury. As that course is for the justification of the gaoler, for carrying the witness who happens to be in his custody before them, it is no objection to the evidence of an accomplice that he has been irregularly and improperly taken before the grand jury (*x*). Indeed, the implied condition of pardon under which an accomplice makes his disclosure is, not that the prisoner shall be convicted, but that he shall give a candid and fair account of the transaction; where he does this to the satisfaction of the court, he will receive his pardon, though there should be an acquittal; and, on the other hand, if he obstinately prevaricates, he may be ordered into custody, indicted, tried, and punished (*y*). If a committal takes place on the evidence of an accomplice, the accomplice should also be committed, and not allowed to go on bail, because he is so likely to abscond (*z*).

In order to identify prisoners, a witness may be asked in direct terms whether any of the prisoners jointly indicted with the party tried is the person he means, and may have the party pointed out to him (*a*).

Notwithstanding the 14 & 15 Vict. c. 99, s. 3, one of several defendants standing jointly indicted, and on his trial, is not a competent witness *for* his fellows (*b*); nor though he had

(*t*) *Reg.* v. *Young*, 5 Cox, C. C. 296.
(*u*) *Campbell* v. *Twemlow*, 1 Price, 83.
(*x*) *R.* v. *Dodd*, 1 Lea. 155; Hawk. b. 2, c. 46, s. 93.
(*y*) *R.* v. *Rudd*, Cowp. 331; 1 Lea. 115.
(*z*) *R.* v. *Beardmore*, 7 C. & P. 497.
(*a*) *R.* v. *Watson*, 2 Stark. N. P. C. 116, 128.
(*b*) *Reg.* v. *Payne and others*, L. R., 1 C. C. R. 149; 41 L. J., M. C. 65.

suffered judgment by default before their trial (*c*). But where there is no case for the jury against one party, the court may, in its discretion, allow of his acquittal in any stage of the cause before the reply, in order that he may be examined as a witness for the other defendants (*d*); but if after any evidence at all has been given against him, it appears nevertheless that he is entitled to a verdict in his favour, he is not entitled to demand an acquittal until all the other evidence for the defendants is concluded and the whole case is thus ready for the jury (*e*).

Prisoners jointly Tried are inadmissible for or against each other.

We have seen that the counsel for the *prosecution* in misdemeanour is entitled, before he opens his case, to obtain from the jury an acquittal of any of the defendants against whom he declines to offer evidence, proposing to examine them as witnesses (*f*). A witness may be heard for the defence, though himself charged with a participation in the crime, if he be not included in the same indictment (*g*), or for the prosecution on one count of an indictment, though his wife be charged with participation in the crime if she be not included in the same count; but though jointly indicted for felony if one alone be given in charge to the jury, the other is an admissible witness (though neither acquitted nor convicted, though a *nolle prosequi* has not been entered) upon the trial of the prisoner with whom the jury are charged (*h*).

Parties jointly indicted, how made witnesses.

The judge is to determine the question of the competency of the witness, and if he has in the first instance decided in the affirmative, and the witness has been sworn, but in the course of the examination facts are ascertained upon which he forms the opinion that the witness is incompetent, he is at liberty to stop the further examination of the witness and withdraw the evidence of such witness entirely from the jury, and leave the case to them solely upon the other evidence in the case (*i*).

Question of competency is for the judge at the trial.

(*c*) *R.* v. *Lafone and others*, 5 Esp. N. P. C. 155.

(*d*) So held where there was a strong case against the prisoner proposed to be called as a witness; *R.* v. *Owen and others*, 9 C. & P. 83, *Williams*, J.

(*e*) *Emmett* v. *Butler*, 7 Taunt. 607; *Wright* v. *Paulin*, R. & Moo. N. P. C. 128; *Wynne* v. *Anderson*, 3 C. & P. 596; *Sowell* v. *Champion*, 6 A. & E. 415. But *Child* v. *Chamberlain*, 6 C. & P. 213; 1 M. & Rob. 197, was *contra*, as was *Russell* v. *Rider*, 6 C. & P. 416; and see *King* v. *Baker*, 2 A. & E. 333.

(*f*) *R.* v. *Rowland et al.*, Ry. & M. N. P. C. 401. *Ante*, p. 221.

(*g*) Three were severally indicted (as they must be) for perjury in the same deposition; two who had pleaded, but were untried, were held good witnesses on the first trial for the defendant, however strong their bias, having no legal interest in that issue, 1 Hale, 305. A. and B. were jointly indicted for breaking into the house of J. H. and stealing his goods therein. A. pleaded "guilty," B. "not guilty," and was tried. A.'s plea of "guilty" was recorded, but no sentence had been passed on him. *Coleridge*, J., held B. was entitled to call A. as a witness for himself; *Reg.* v. *George and Ford*, C. & Mar. 111.

(*h*) *Winsor* v. *The Queen*, 35 L. J., Exch. 161.

(*i*) *Reg.* v. *Whitehead*, 35 L. J., M. C. 186.

Section 10.

of calling and examining witnesses.

Withdrawal of witness out of court.

It is frequently requested by one party, at the commencement of the trial, that the witnesses may withdraw, in order that they may not hear the examination of each other, or the speeches of counsel. This request is always complied with (*k*); and is often accompanied by an intimation from the court, that if any witnesses should remain, in disobedience of its order, they will not be permitted to give evidence (*l*). But where a witness does so remain, it is difficult to show by what authority a court can deprive either litigant party, not implicated in such misconduct, of testimony to which he is otherwise by law entitled. Were the law so, the result would be that reluctant witnesses would avoid the necessity of giving evidence, by disobeying the order of the court, and intimating that disobedience to the party against whom their evidence, if examined, must be given, but whom they wish to favour; accordingly it has been held, that the testimony of such a witness cannot be excluded, though he may be committed for contempt, and his wilful disobedience of the order of the court calls for remarks on the value of his evidence (*m*). By the uniform practice of all courts, the attornies on both sides, whose presence is necessary to the conduct of the case, are excepted from the general order (*n*); and it is usual to extend the same indulgence to witnesses who are merely to prove matters of form, to medical witnesses, and to witnesses intended to depose to character only.

Calling witness on his recognizance.

If witnesses, when called, do not appear, they may be called on their recognizances if bound over to give evidence, or on their subpœnas if subpœnaed to attend, with a view to ulterior proceedings against them. Where the absconding or absence of a material witness for the prosecution can be traced to the acts or connivance of the prisoner or his friends, the trial may, in the discretion of the judge, be postponed (*o*), and in such case the prisoner will not be discharged on his own recognizance only, but two other persons may be required to enter into heavy recognizances for his appearance; while in cases where no such collusion appears, he is usually discharged on his own recognizance only (*p*).

(*k*) *Reg.* v. *Murphy*, 8 C. & P. 297, 307.

(*l*) When judges have refused to hear the witness, it has been as a mere act of their discretion, and not required as a right by counsel; *R.* v. *Wylde*, 6 C. & P. 380; *Beaman* v. *Ellice*, 4 C. & P. 585; *R.* v. *Brown*, *id.* 588, n.

(*m*) *Chandler* v. *Horne*, 2 M. & Rob. 423; *R.* v. *Colley*, M. & M. 329.

(*n*) Per *Littledale*, J., *Pomeroy* v. *Baddeley*, Ry. & M. N. P. C. 430; *Everett* v. *Lowdham*, 5 C. & P. 91; but *R.* v. *Webb*, 3 Stark. Ev. 1733, *contra*.

(*o*) See *ante*, pp. 202, 203.

(*p*) Per *Patteson*, J., in *R.* v. *Beardmore*, 7 C. & P. 497. Indictment for felony was not preferred on account of absence of an accomplice sworn

Calling witnesses on their subpœna.

The means of securing the attendance of witnesses has been considered already (*q*); the expenses of their attendance will be included in the consideration of costs (*r*). In civil cases, a witness, who has come from a distance, may refuse to be sworn till his expenses are paid or secured; but no witness has a right to make this demand in criminal cases (*s*). Witnesses who have been regularly subpœnaed or bound over, ought to *attend*, although they may have reason to think that they will be prevented from giving evidence by a valid objection to their competency (*t*); and if subpœnaed to produce documents, ought to *bring them*, though they may be committed to their care under circumstances which may ultimately excuse them from producing them; for it would be dangerous if witnesses were encouraged to take upon themselves to decide on the admissibility of the proofs required of them (*u*). And, therefore, where a prisoner was indicted for stealing certain clover seed, the property of a woman who had been bound over by recognizance to give evidence, and, before the trial, she became the wife of the prisoner, on her failing to appear, Lord *Ellenborough* refused to discharge her recognizance, although he admitted that, if she had appeared, she could not have been examined against her husband (*x*). Any person present in court and called as a witness is bound to take the oath, or affirmation or declaration, and give his evidence, though he has not been subpœnaed (*y*). A witness, however, being sworn and having a document in his possession, was held bound to produce it, though he had not

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to be a material witness, and that his attendance at the next assizes might be insured. (See p. 280.) (The affidavit was by the committing magistrate; but *semb.* should have been by the prosecutor or his attorney.) After the grand jury were discharged, the prisoner was discharged on entering into his own recognizance to appear at the next assizes, and answer such charges as should be there put against him, particularly as to stealing two rams.

In *R.* v. *Parish*, 7 C. & P. 782, indictment for forging the acceptance of Tyler, just before the prisoner was put to the bar, Tyler was called on his recognizance, but did not answer. It appeared on affidavit of the prosecutor, that Tyler had applied to the prosecutor to settle the matter without a trial, saying money should not be wanting if it could be settled. The judge remanded the prisoner till the next assizes, unless he entered into recognizance of 100*l.*, with two sureties at 50*l.* each, for appearing there, giving seven days' notice of bail to the magistrates.

True bill for murder, a principal witness for the crown too ill to give testimony; trial was postponed, but the prisoner was kept in custody till the next assizes, bail being refused; *Reg.* v. *Chapman*, 8 C. & P. 558. See *Reg.* v. *Owen and others*, 9 C. & P. 86; and *Reg.* v. *Bowen*, 9 C. & P. 509.

(*q*) *Ante*, Chap. II.

(*r*) *Post*, Sect. 12, p. 336.

(*s*) *R.* v. *Cooke*, 1 C. & P. 321; and see *ante*, Chap. II.

(*t*) *Amey* v. *Long*, 9 East, 473.

(*u*) *Reg.* v. *Greenaway*, 14 L. J., M. C. 190.

(*x*) Chelmsford Assizes, 1817, Dickenson's MSS., 3 Dick. Pract. Expos. 935.

(*y*) *R.* v. *Sadler*, 4 C. & P. 218.

Calling Witnesses on their Subpœna.

been served with a subpœna *duces tecum* (*z*). A witness producing documents merely under a subpœna *duces tecum* need not be sworn if the party who calls him does not wish to examine him (*a*); and if he is sworn by mistake and a question put to him which he does not answer, the opposite party is not entitled to cross-examine him (*b*).

Witnesses, how called by counsel.

The witnesses are called by the counsel on either side in the order which they deem proper. Where there is more than one counsel on a side, they usually examine in turn; but this is mere matter of arrangement among themselves, not subject to any interference from the adversary, or the court: and a leading counsel may not only take the examination of such witnesses as he thinks fit on himself, but may take a witness out of the hands of his junior after an examination has begun (*c*).

As to calling all witnesses on back of the indictment.

Where any witness on the back of the indictment has not been called, the court, in the exercise of its discretion, may, and generally will, in case of felony, require him or her to be called into the box, that the prisoner may have the opportunity of *cross*-examining (*d*); and any examination to which such witness may be subjected for the prosecution after being so cross-examined, must be treated as a mere re-examination, limited to the points on which he has been cross-examined (*e*). In cases of misdemeanour, it is usual to leave the defendant to take the responsibility of calling such persons as *his own* witnesses, if he thinks they can depose anything in his favour; in neither class of cases is there any objection to calling and examining witnesses at the trial who have not been before the grand jury, or whose depositions have not been taken, but where such witnesses are called, it is proper to give a copy of their evidence to the counsel on the other side a reasonable time before the case is tried, and if this course is not pursued it is open to legitimate observation.

Privilege of attornies, &c., and witnesses not to answer certain matters.

In general, a witness may be examined as to all matters which are not privileged from disclosure for the sake of others, or which do not tend to show that he has himself been guilty of an indictable offence, or of some conduct which will render him infamous. But a legal adviser, be he counsel, solicitor, or attorney, is precluded from disclosing communications imparted to him on the faith of his character as such, by or on behalf of his client (*f*), either of necessity, in reference to a suit or

(*z*) *Snelgrove* v. *Stevens*, Car. & M. 508.

(*a*) *Davis* v. *Dale*, Moo. & M. 514; *Perry* v. *Gibson*, 1 A. & E. 48; *Summers* v. *Moseley*, Cr. & Mee. 477.

(*b*) *Rush* v. *Smith*, 1 C. M. & R. 94.

(*c*) *Doe* v. *Roe*, 2 Campb. 280.

(*d*) *Reg.* v. *Bailey*, 2 Cox, C. C. 191; *Reg.* v. *Edwards*, 3 Cox, C. C. 82; *R.* v. *Simmonds*, 1 C. & P. 84; *Reg.* v. *Bull*, 9 C. & P. 32; *R.* v. *Bodle*, 6 C. & P. 186. But this is not *of course* even in *felony*, so as to entitle the prisoner to call on the prosecutor's counsel to do so; *R.* v. *Vincent and others*, 9 C. & P. 91.

(*e*) *Reg.* v. *Beezley*, 4 C. & P. 220.

(*f*) Taylor on Ev. § 832.

Privilege of Witness not to answer.

prosecution anticipated or pending, or in the ordinary scope of his professional employment as an attorney (*g*): and the rule is the same, if in the course of such employment he committed them to writing (*g*), or saw a fact done, *e. g.* the destruction of a document which he had prepared and attested as such (*h*). In every case the privilege is that of the client, not of the witness, who may accordingly be stopped, even if he does not object to answer (*i*). However, if the client himself examines his attorney as to a matter which has been the subject of confidential communication, he waives the privilege and opens all communications on that subject to the cross-examining counsel (*k*); and an attorney may depose to facts, his knowledge of which was obtained by means independent of any confidence reposed in him as such, *e. g.* before his retainer begun, or since it ceased (*l*), or to the execution of a deed which he has attested (*m*).

The privilege (or disability) alluded to is extended to the clerk of an attorney (*n*); to an agent of an attorney (*o*); to an interpreter between an attorney and client (*p*); and to a barrister's clerk, if it is proposed to examine him as to the time when a particular retainer was delivered for his master (*q*). But if a person, who is not an attorney, has been consulted under the erroneous impression that he is one, he will be obliged to disclose all that was told him by a party under that error (*r*). Nor does this anomalous rule extend beyond the above legal persons. Thus, physicians (*s*), bankers (*t*), stewards (*u*), clergymen (*x*), popish

(*g*) See Ld. Ch. *Brougham's* judgment in *Greenough* v. *Gaskell*, 1 Myl. & K. 98, after consulting *Tindal*, C. J., Lord *Lyndhurst*, C. B., and *Parke*, B. And see by *J. Parke*, J., *Moore* v. *Terrell*, 4 B. & Ad. 876. In favour of the *extension*, see *Cromack* v. *Heathcote*, 2 Br. & B. 4; *Brand* v. *Ackermann*, 5 Esp. 120; *Robson* v. *Kemp*, *id.* 52; *Walker* v. *Wildman*, 6 Mod. 47: for the *restriction*, see *Williams* v. *Mundie*, Ry. & M. N. P. C. 34; *Clark* v. *Clark*, 1 M. & Rob. 3; *R.* v. *Withers*, 2 Campb. 578. See 2 M. & W. 101; 6 *id.* 548, *per cur.* See a case where facts came to the witness's knowledge while acting as solicitor, though not communicated to him by his client; *Desborough* v. *Rawlins*, 3 Mylne & Cr. 515.

(*h*) *Robson* v. *Kemp*, *supra*.

(*i*) *Wilson* v. *Rastall*, 4 T. R. 759; *Reg.* v. *Greenaway*, 14 L. J., M. C. 190.

(*k*) *Vaillant* v. *Dodemead*, 2 Atk. 524.

(*l*) *Cuts* v. *Pickering*, 1 Vent. 197; *Cobden* v. *Kenrick*, 4 T. R. 431.

(*m*) *Doe* v. *Andrews*, Cowp. 846; *Robson* v. *Kemp*, 5 Esp. 53.

(*n*) *Taylor* v. *Forster*, 2 C. & P. 195.

(*o*) *Parkins* v. *Hawkshaw*, 2 Stark. N. P. C. 239; or Scotch agent; *Lawrence* v. *Campbell*, 28 L. J., Chan. 782.

(*p*) *Du Barré* v. *Livette*, Peake, C. 78.

(*q*) *Foote* v. *Hayne*, Ry. & M. C. 165.

(*r*) *Fountain* v. *Young*, 6 Esp. 113.

(*s*) *R.* v. *Kingston* (*Duchess*), 20 How. St. Tr. 612.

(*t*) *Lloyd* v. *Freshfield*, 2 C. & P. 325.

(*u*) *Vaillant* v. *Dodemead*, 2 Atk. 524.

(*x*) *Gilham's case*, 1 Moo. Cr. C. 194, cited *Broad* v. *Pitt*, 3 C. & P. 519; *R.* v. *Sparkes*, cited in *Du Barré* v. *Livette*, Peake, 108, and see Taylor on Ev. § 837.

How far privilege of Witnesses not to answer extends.

priests (*y*), and private friends (*z*), have been compelled to disclose on their oaths matters learnt by them, either from intimacy, or in their professional character. Even a clerk to the commissioners of property tax has been compelled to state facts with which he became acquainted in his official character, though sworn to conceal them; for the tax act must be taken to have excepted evidence given by a witness in a court of justice under a subpœna (*a*).

Questions witness not bound to answer.

A witness is privileged from answering any question, the answer to which would tend to expose him (*b*), or the husband or wife of the witness (*c*), to punishment, or to a criminal charge (*d*), or to a penalty or forfeiture, unless the time for recovering it has expired (*e*). But a witness is not privileged from *answering* any questions which may produce answers merely degrading to his character, or going to his credit, where the question is directly material to the issue (*f*), but where the question goes to the credit only of the witness, and is not material to the issue, it is doubtful whether the witness is compellable to answer (*g*). No answer forced from a witness who has reasonably declined to answer, after he has claimed his privilege, can be afterwards given in evidence against him (*h*). A Roman Catholic priest cannot decline to say from whom he received property alleged to be stolen, on the ground that he obtained it through the confessional (*i*). But it seems that such questions may legally be *asked* whether they do or do not include matter which must be evidenced by a record (*k*); though the inquiry ought not to be pursued after the witness has once objected; and Lord *Tenterden* refused to permit counsel to comment on the refusal of a witness to answer so as to imply an admission of the charge (*l*); and this ought now to be the rule, since the 28 Vict. c. 18, s. 6, enables the cross-examining party to prove a previous conviction, if one exist. The witness must object, not the counsel (*m*). If the witness

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(*y*) *Butler* v. *Moore*, MacNally, 253.

(*z*) *Ratcliffe's case*, 9 How. St. Tr. 599; *Lord Russell's Trial*, 3 *id.* 715; *Wilson* v. *Rastall*, 4 T. R. 760.

(*a*) *Lee* v. *Birrell*, 3 Camph. 337; *Reg.* v. *Hay*, 2 F. & F. 2.

(*b*) *Reg.* v. *Garbett*, 1 Den. C. C. 236.

(*c*) *R.* v. *All Saints, Worcester*, 6 M. & S. 200; per *Bayley*, J., *Cartwright* v. *Green*, 8 Ves. 405.

(*d*) *Cates* v. *Hardacre*, 3 Taunt. 424.

(*e*) *Roberts* v. *Allatt*, M. & M. 192. See *R.* v. *England*, Lea. 767.

(*f*) Taylor on Ev. §§ 1313, 1314; *Reg.* v. *Hay*, 2 F. & F. 2.

(*g*) Taylor on Ev. § 1314.

(*h*) *Reg.* v. *Garbett*, 1 Den. C. C. 236.

(*i*) *Reg.* v. *Hay*, 2 F. & F. 2.

(*k*) *Henman* v. *Lester*, 31 L. J., C. P. 366; 12 C. B., N. S. 776.

(*l*) *Rose* v. *Blakemore*, Ry. & M. N. P. C. 383; and see *R.* v. *Watson*, 2 Stark. N. P. C. 158; and *Lloyd* v. *Passingham*, 16 Ves. 64; *Waitworth* v. *Lloyd*, 10 H. & C. 589; 33 L. J., Chan. 688.

(*m*) *Thomas* v. *Newton*, Moo. & M. 48; nor will counsel be heard in support of the objection; *R.* v. *Adey*, 1 M. & Rob. 94.

chooses to answer, he must answer throughout (*n*); but unless the matter directly relates to the subject of the trial, the party asking the question is bound by his answer, and cannot give evidence to contradict him on the collateral issue, which he, or those who call him, may not be prepared to enter upon (*o*).

Party asking, bound by witness's answer, when.

A witness, however, cannot by law refuse to answer any question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to a penalty or forfeiture, on the sole ground that the answer may tend to establish that he owes a debt, or otherwise to subject him to a civil action (*p*). A witness will not be compelled to produce his title deed (*q*), or to answer matter showing that he has done acts creating a forfeiture of an interest in land (*r*) The witness is not the sole judge of whether his answer is like to put him in peril of proceedings against him, but the court must see from the nature of the case and the evidence he is called upon to give whether he has reasonable grounds to apprehend danger. If that be made to appear to the court, then the witness should be allowed great latitude as to deciding whether the answer he may give forms a link in a chain of evidence or not. The danger to be apprehended must be in the ordinary course of things, and not a merely possible but extraordinary proceeding, *e. g.*, an impeachment (*s*).

The question of privilege is for the court.

On the examination in chief, the questions must be pertinent to the matter immediately in issue; and counsel are not in general permitted to ask leading questions, that is, questions which, in their terms, suggest the answers, and to which the answer yes or no would be conclusive (*t*). But a prisoner who has been described by a witness, may be pointed out to him, and he may then be asked in direct terms, if that is the person he meant (*u*). Again, where a witness is obviously hostile or unwilling, the court may, in their discretion, allow the examination in chief to assume the form of a cross-examination, and permit the witness to be severely pressed with direct questions on points upon which he seems inclined to palter (*x*). Where a witness gives evidence destructive of the case he was called

Of the examination in chief.

(*n*) *East* v. *Chapman*, Moo. & M. 47.

(*o*) *Reg.* v. *Holmes*, 41 L. J., M. C. 12; 2 Watson's Trial, by Gurney, 288; *Rose* v. *Blackmore, supra; R.* v. *Clarke*, 2 Stark. N. P. C. 244, *post*, Sect. XIV., *Verdict.*

(*p*) 46 Geo. 3, c. 37.

(*q*) *Pickering* v. *Noyes*, 1 B. & C. 262; *R.* v. *Hunter*, 3 C. & P. 591.

(*r*) *Pye* v. *Butterfield*, 34 L. J., Q. B. 17.

(*s*) *Reg.* v. *Boyes*, 30 L. J., Q. B. 301; *Cates* v. *Hardacre*, 3 Taunt. 424.

(*t*) *Nicholls* v. *Dowding*, 1 Stark. N. P. C. 81, per Lord *Ellenborough*, C. J.

(*u*) *R.* v. *Watson*, 2 Stark. N. P. 128.

(*x*) *Clarke* v. *Saffery*, Ry. & M. 126; *Reg.* v. *Ball and others*, 8 C. & P. 745, *Erskine* and *Patteson*, JJ. See *Reg.* v. *Farr*, *id.* 768, and *post.*

Of a Witness adverse to the Party calling him.

to prove, the party calling him may, in order to neutralize his statement, show that he had, *before* the trial, given the attorney an account of the transaction entirely different from that sworn to by him *at* the trial.

Power of party to discredit his own witness.

But a *party producing* a witness shall not be allowed to impeach his credit by general evidence of bad character, though by statute he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or by leave of the judge prove that he has made, at other times, a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement (*y*). This section is framed on the 22nd section of the C. L. P. Act, 1854, and under that section it has been held that it applies only when a witness appeared to be, in the opinion of the judge, "hostile," and not merely unfavourable (*z*). This section seems to lay down three rules as to the power of a party to discredit his own witness. (1) He shall not be allowed to impeach his credit by general evidence of his bad character. (2) He may contradict him by other evidence if, in the opinion of the judge, he is a hostile witness. (3) He may, with the leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony. The law as to the first point was settled before; and as to the second it was permissible to contradict him by other evidence relative to the issue, as to the last it was an unsettled point. The rule applies where the witness for the prosecution gives the evidence sought to be discredited on cross-examination, and on re-examination denies having given a different account of the matter spoken to.

To show the contradiction a series of letters may be used where it is intended to convey an impression of the existence of the contradictory fact, though the letters do not directly and positively affirm the fact (*a*).

Leading questions.

It is usual, also, for convenience sake, to allow in all cases questions merely introductory to be put in a leading form; and where the matter is really not essential, or disputable, an objection to such questions ought to be discouraged as vexatious (*b*). A counsel should also, except in peculiar cases, be permitted to lead to the *matter* as to which he is instructed to examine, though not to the *answer;* for otherwise the time of the court may be occupied with hearing wholly irrelevant facts and conversations. On this subject, it is impossible to lay down any general rule: on the one hand, any attempt to suggest the answer, where that answer is material, ought to be vigilantly repressed; but, on the other, objections to questions which

(*y*) 28 Vict. c. 18, s. 3.
(*z*) *Greenough* v. *Eccles*, 5 C. B., N. S. 786.
(*a*) *Jackson* v. *Thomason*, 31 L. J., Q. B. 11; 1 B. & S. 745.
(*b*) *Nicholls* v. *Dowding*, 1 Stark. N. P. 81, per Lord *Ellenborough*.

merely tend to confine the witness to the subject-matter of inquiry, or which even lead him as to introductory matters, should be repressed by the court as tending to introduce perpetual discussions, to waste the time of the public, and distract the attention of the jury. After exhausting a witness's memory as to the contents of a letter which is destroyed or lost, he may be asked, in examination in chief, if it contained a particular passage recited to him, which it had been sworn on the other side that it did; or it would be impossible ever to come to a direct contradiction of the adversary's evidence on that subject (*c*). A leading question must be objected to immediately; and if a witness is asked as to any statement having been made, which the opposite counsel believes to have been in writing, he should immediately interpose by asking whether it was in writing, or by word of mouth only, for if in writing, it must be produced (*d*).

Examination in Chief.

Leading questions.

A witness may refresh his memory by written entries of his own or others, subject to certain restrictions. Thus, where a witness speaks to specific facts (*e. g.*, dates of the commencement of tenancies), not from his own recollection independently of any writing, but merely from finding such entries of them in a book made by himself and another person in his presence, at the time the facts were ascertained by them, the original book must be produced, and the witness cannot refresh his memory by extracts. The original writing is required to be produced, however, not in order to make it evidence of itself, but that the witness may refresh his memory by every part of it; a benefit to which, as well as that of cross-examining upon it, the other side is entitled (*e*); and such a witness cannot refresh his memory by extracts made by himself, or by any other at a subsequent period (*f*). For the rule that the best evidence must be produced is applicable, whether a paper be produced as evidence in itself, or merely to refresh the memory (*g*); so that the copy of an entry, &c. not made by the witness contemporaneously with his making such entry, does not seem admissible for the latter purpose, any more than the copy of an instrument is admissible in evidence where the instrument itself would be the best evidence (*h*). The writing when produced for the purpose of refreshing the memory is not made evidence by being used for that purpose, but still the other side ought to see it (*i*). But a written entry which for want of a stamp is not

Refreshing memory by reference to entries, &c.

(*c*) *Courteen* v. *Touse*, 1 Campb. 44, per Lord *Ellenborough*.
(*d*) *The Queen's case*, 2 Br. & B. 292.
(*e*) *Doe* d. *Church* v. *Perkins*, 3 T. R. 749; see *Patteson*, J., *R.* v. *St. Martin's, Leicester*, 2 A. & E. 215; and see *Burrough* v. *Martin*, 2 Campb. 112.
(*f*) *Ibid.*; *Burton* v. *Plummer*, 2 A. & E. 343.
(*g*) Per *Patteson*, J., in *Burton* v. *Plummer*, 2 A. & E. 343, 344.
(*h*) *Ibid.*
(*i*) *R.* v. *St. Martin's, Leicester*, 2 A. & E. 215, per *Patteson*, J. See *R.* v. *Duncombe*, 8 C. & P. 369, *post*, p. 293.

Of Witness refreshing his Memory.

in itself admissible to prove a specific fact of receipt of money, &c. may be looked at by a witness to refresh his memory of the payment having been made. Thus, when on seeing a written entry the witness said, "The entry of 20*l.* in the plaintiff's book has my initials written at the time; I have no recollection that I received the money: I know nothing but by the book: but by seeing my initials I have no doubt that I received the money;" it was held that the book was properly used to refresh his memory, and that his saying afterwards that he had no doubt that he received it, was sufficient parol evidence of such receipt, without using the unstamped entry to prove it (*k*).

A clerk to a tradesman was called for his master to prove the ordering and consequent delivery of goods to the defendant. The clerk entered orders as they occurred in a waste-book from his own knowledge. The tradesman copied the entries day by day into a ledger, in the presence of the clerk, who checked them as they were so copied, and thus ascertained their correctness. It was held, that as these entries so checked were in the nature of entries made by the clerk himself, they might be used by him to refresh his memory of the orders, without producing the waste-book, or accounting for its absence (*l*). For they are held in the nature, not of copies, but of original and contemporaneous memoranda made by the witness himself, though not with his own hand. This last circumstance is never held essential. Thus, in the case of a log-book produced to refresh the memory of a witness as to a particular voyage, he said he had not written the entries himself, but had from time to time examined them while the events recorded were fresh in his recollection, and always found them correct; for not only were the occurrences recent, but he had ample opportunity to have corrected the entries if wrong (*m*).

Of the cross-examination.

On cross-examination, a much greater latitude is necessarily allowed than in examining in chief, though since the prisoner's counsel may in all cases address the jury, it is no longer proper to carry cross-examination to that length, which was only excusable, while it was the only mode of suggesting an important view of the case to the minds of the jury. Leading questions may be asked; but the witness must not, even when cross-examined, be supplied with the very words he is desired to echo (*n*), unless he is so cross-examined with a view to contradict him, as, *e. g.* to show that he has used particular words which he swears he did not. And now, by statute 28 Vict.

(*k*) *Maugham* v. *Hubbard*, 8 B. & C. 14; *Rambert* v. *Cohen*, 4 Esp. N. P. C. 213; *Jacob* v. *Lindsay*, 1 East, 468.

(*l*) *Burton* v. *Plummer*, 2 A. & E. 341.

(*m*) *Burrough* v. *Martin*, 2 Campb. 112. The questions there put under Lord *Ellenborough's* sanction were, 1st, whether the witness saw in the log-book an entry of a stated date at a time when he had a memory of the fact stated in it; and, 2ndly, whether, looking at the entry, he could now state positively on his oath when the ship arrived at her port of destination.

(*n*) *R.* v. *Hardy*, 24 How. St. Tr. 755.

c. 18, s. 4, if a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does *not distinctly admit* that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

As to former inconsistent and contradictory Statement of Witness.

Contradiction of witness by his own former statements.

This section cannot be made use of to enable a party to contradict his own witness (*o*).

Where it is proposed to contradict a witness by something which he has written, or which has been reduced into writing, he may be cross-examined as to the contents of the paper, without the paper itself being shown to him, and, on his admitting the handwriting, it may be read as the evidence of the cross-examining party, either at that time, or when he calls his witnesses; for by 28 Vict. c. 18, s. 5, it is enacted, that a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. Provided always, that it shall be competent for the judge at any time during the trial to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit (*p*).

Contradiction of witness by his own writing.

Since this statute it is no longer the practice to have the depositions read as part of the evidence of the cross-examining counsel before cross-examining as to the making of any statement in the depositions, as was formerly the case under the rules laid down by the judges, as stated in 7 C. & P. 676.

It is permissible to ask a witness upon his cross-examination, with a view to impeach his credit, whether there had not been proceedings in an action against him in the County Court in respect to a similar claim to the one then being tried, which he had resisted, and upon which he had given evidence, and the jury, notwithstanding, had found their verdict against him, without producing or proving the record of the proceedings in the County Court (*q*), and probably the same would have been held if the witness had been a third person. In that case the witness answered the question, so that it must not be taken that if the witness had objected to answer he would have been compelled to do so without the record being produced.

(*o*) *Ryberg* v. *Ryberg*, 32 L. J., P. & M. 112.
(*p*) 28 Vict. c. 18, s. 5.
(*q*) *Henman* v. *Lester*, 12 C. B, N. S. 776; 31 L. J., C. P. 366.

Cross-examination as to previous Conviction of Witness.

By 28 Vict. c. 18, s. 6, a witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of 5*s*., and no more, shall be demanded or taken) shall, upon proof of the identity of the person be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

If a witness for the prosecution, on cross-examination by the prisoner or his counsel, states that the prisoner bears a good character, the prosecution is at liberty to give evidence of a previous conviction under 24 & 25 Vict. c. 96, s. 116 (*r*).

To whatever point a witness may be called, even if he be merely sworn and not examined in chief, he is open to cross-examination as to every matter relative to the cause (*s*). If a witness admits, that when before the justice he was cross-examined by the prisoner's attorney, his counsel may question him as to the answers he gave on that occasion, if it appears to the court that no such cross-examination has been returned by the magistrate (*t*). To try his memory or his credit, he may be asked as to a former account verbally given by him of the transaction; and hypothetical questions may be put to show the value of any judgment he has given; but it must not be assumed that he said on his examination in chief what he did not say, nor must any thing be suggested as a fact proved which is not in proof (*u*).

Cross-examination as to the witness's credit.

On cross-examination of a prosecutrix on a charge preferred by her of indecent assault, she may be asked whether she had not had connexion with a number of persons named to her, being other than the prisoner at other times, but upon such question being put it is competent to her to object to answer (*x*). If, however, she answers and denies it, her answer is conclusive as going to her credit only, and she cannot be contradicted by calling the persons named (*y*), though she may be indicted for perjury upon her answer if it be false (*z*); but it appears that if such evidence in contradiction were admitted, though im-

(*r*) *Reg.* v. *Shrimpton*, 2 Den. C. C. 319; 21 L. J., M. C. 37.
(*s*) *Phillips* v. *Eamer*, 1 Esp. N. P. C. 356.
(*t*) *R.* v. *Edwards*, 8 C. & P. 26.
(*u*) 1 Stark. Ev. 2nd ed. 163.
(*x*) *R.* v. *Hodgson*, R. & R. 211.
(*y*) *Reg.* v. *Holmes*, L. R., 1 C. C. R. 334; 41 L. J., M. C. 12.
(*z*) *R.* v. *Overton*, 2 Moo. C. C. 263; *R.* v. *Lavey*, 3 C. & K. 26.

properly, and an issue were thus raised before the jury as to the credibility of the witness for the prosecution, and the evidence in contradiction appeared to be false, the witness might be indicted for perjury assigned upon their evidence in contradiction (*a*). *Questions going to Witness's Credit.*

And where, upon an application for a bastardy order, the complainant is cross-examined as to acts of connexion with other men than the alleged father, at such times as would make it appear that they could not be the father of the child in question, her answer is final, and the men named should not be called in contradiction (*b*), but if the connexion with such persons is alleged to be at a time when the child whose paternity is in question might have been the result, such persons might be called (*c*). Nevertheless, if a person is allowed to be called in contradiction on a matter merely going to the credit of the complainant, and on a collateral issue, as in *Reg.* v. *Gibbon*, and gives false evidence, it may become material, or if not, it does not lie in his mouth to say that his evidence was immaterial to the issue, and he is liable to be indicted for perjury so committed (*d*).

If on cross-examination a paper is put into the witness's hands and questions put on it, and nothing comes of it, the opposite counsel cannot demand to see the paper; but, if anything comes of it, the counsel has a right to see the paper, and re-examine on it (*e*).

A court of quarter sessions has now the power to direct a prosecution for perjury to be instituted, as a judge has at assizes (*f*). Power to direct prosecution for perjury.

The task of watching the proofs adduced by prosecutors, and of cross-examining the witnesses, will be materially assisted by the copies of the depositions. To such copies, or to a sight of the originals, the prisoner is now entitled; for by 11 & 12 Vict. c. 42, s. 27, it is enacted, that at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions, or other first sitting of the court at which any person so committed to prison or admitted to bail is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words. Prisoners entitled to copies of depositions before the first day of the sessions.

The interval between the first day of the assizes or sessions, or other first sitting of the court, and the time of the trial is Between first day of sessions and trial.

(*a*) *Reg.* v. *Gibbon*, L. & C. 109; 31 L. J., M. C. 98; *Garbutt* v. *Simpson*, 32 L. J., M. C. 186.
(*b*) See *Reg.* v. *Gibbon*, 31 L. J., M. C. 98; L. & C. 109.
(*c*) *Garbutt* v. *Simpson*, 32 L. J., M. C. 186.
(*d*) *Reg.* v. *Gibbon*, *ubi supra*.
(*e*) *R.* v. *Duncombe*, 8 C. & P. 369; see *R.* v. *St. Martin's, Leicester*, 2 A. & E. 215, *ante*, p. 289.
(*f*) 14 & 15 Vict. c. 100, s. 19.

As to Right of Accused to Copies of Depositions.

not provided for by statute with respect to this matter, and at common law the prisoner was not entitled to a copy nor to inspection of the depositions at any time (*g*).

Allowing inspection of the depositions at the trial.

And by 6 & 7 Will. 4, c. 114, s. 4, persons under trial shall be entitled, at the time of their trial, to inspect, without fee, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had.

Right of accused to copies of depositions.

The right to the copies of depositions is confined, by 11 & 12 Vict. c. 42, s. 27 (*supra*), in cases where the defendant has been committed to prison, to committals for trial, and therefore does not extend to the case of a party committed in default of finding sureties of the peace to the next session (*h*).

Re-examination.

After the cross-examination is finished, the counsel, by whom the witness was called, is entitled to re-examine, for the purpose of explaining any matter into which confusion may have been introduced by the questions of his adversary. So he may ask questions to show inducements the witness has had to betray the party who called him, by answering unfavourably on cross-examination (*i*). But the questions must be confined to matters touched on or referred to in the cross-examination. Where, however, any new matter occurs to the counsel as important, he may request the court to examine respecting it, or allow him to do so; and this indulgence, if properly asked, is always granted. When the questions are put by the court, as is the regular course, it is also of course for the court to put any questions suggested on the new matter by the other side; and when the examining counsel is himself suffered to put them, his adversary has, of course, the right of cross-examining upon them.

Examination by court or jury.

When the examinations of each witness by counsel are concluded, any of the justices or jurors may put such questions as occur to him to be fitting for the further elucidation of the matter in issue; and for this purpose, the court may recall a witness at any stage whatever of the inquiry, even after the case for the prosecution is closed, and an objection has been taken to the evidence (*k*). It is right that the prisoner's counsel should be allowed to cross-examine on this evidence (*l*). So a witness may be recalled at request of a juror.

(*g*) 4 T. R. 692, per Lord *Kenyon*, C. J.
(*h*) *Ex parte Humphreys*, 19 L. J., M. C. 189.
(*i*) *Dunn* v. *Aslett*, 2 M. & Rob. 122.
(*k*) *R.* v. *Remnant*, R. & Ry. 136.
(*l*) *R.* v. *Watson*, 6 C. & P. 653.

Section 11.

OF THE DEFENCE, REPLY, AND SUMMING-UP.

When the case for the prosecution is closed, the chairman, in all cases where the prisoner has no counsel, asks him what he has to say in answer to the charge. Duty of chairman on close of prosecution.

If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel, whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanour, whether the prisoners or defendants, or any of them shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening, or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit; and when all the evidence is concluded to sum up the evidence respectively, and the right of reply and practice, and course of proceedings, save as hereby altered, shall be as at present (*m*). Duty of chairman or judge where prisoner defended by counsel.

The word "counsel" in this act is to be construed to apply to attornies in all cases where attornies are allowed by law or by the practice of any court, to appear as advocates (*n*).

The prisoner or his counsel, as the case may be, may now submit to the bench any point of law arising on the evidence, or any deficiency in proof of a part of the charge, which may entitle his client to an acquittal. Thus, he may suggest that there is no evidence that any part of the offence occurred within the county where the trial is had, or within 500 yards of its boundary; that there is a substantial variance between some material allegation and the proof offered to support it; or that the offence, supposing the evidence to be credible, does not amount in law to that which is charged, *e. g.* that an appropriation charged as a larceny is a mere breach of trust, or such an embezzlement as is only a misdemeanour (*o*), or that the goods alleged to be stolen were part of a freehold and therefore not the subject of

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(*m*) 28 Vict. c. 18, s. 2; 6 & 7 Will. 4, c. 114.

(*n*) 28 Vict. c. 18, s. 9.

(*o*) For instance, such as comes within the statute relating to frauds by agents, bankers or factors, which are not triable at sessions (24 & 25 Vict. c. 96, s. 75, *et seq.*).

Of the Defence.

larceny (*p*); for these are matters which show that the prisoner ought not to be put on his defence. He may sometimes submit that there is nothing for the jury to consider, as when *no* evidence in the case has brought the charge near to his client; and, if the bench think so, they will direct an acquittal; but no question can be thus withdrawn from the jury where there is *any* evidence, however slight. Where an objection is taken which the bench do not immediately overrule, the counsel for the prisoner are first heard in its support; the counsel for the prosecution then give their answer to it *seriatim;* and the leading counsel for the prisoner replies; after which the justices deliberate, and the chairman, after collecting their votes, announces their decision. Where the objection relates to the absence of some formal proof, which can be immediately supplied, the court always allows such proof to be given, for it will not permit justice to be defeated by a mere accidental omission of counsel. When the bench has decided that the case for the prosecution has failed in point of law, the accused is *entitled* to his acquittal. Accordingly the chairman ought not to *recommend*, but simply to *direct* the jury to acquit, and the officer ought immediately to take and record the verdict (*q*).

Reserving case for opinion of the Court of Crown Cases Reserved.

If the bench decide that there is a case for the jury calling upon the prisoner for his defence, but that questions of law have been raised upon which they entertain doubts, they direct that the case shall proceed, but reserve the questions of law in the event of there being a conviction. With respect to cases referred for the consideration of the Court of Crown Cases Reserved, under the 11 & 12 Vict. c. 78, the procedure and practice on such case will be considered hereafter, Chap. VII., Sect. 2, p. 345.

Counsel's or prisoner's opening address.

Where there is evidence which ought to be submitted to the jury, the accused, or his counsel, in his opening address, comments on the entire case for the prosecution. If he thinks it discreet to adduce evidence, he should open that evidence to any extent, and with any particulars which he may think proper; but he must not assume as proved that which is not proved (*r*), nor is he at liberty to introduce new matter, whether it be the prisoner's story or not, unless he proposes to establish it by legal evidence (*s*); and if in point of fact he *does* introduce the prisoner's account of the facts without intending to support it by evidence, the prosecutor will have a

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(*p*) 1 Hawk. c. 33, s. 35; 2 Russ. on Cr. 251.

(*q*) Lord *Tenterden's* course on acceding to an objection was merely to tell the jury, "Gentlemen, I am of opinion that, in point of law, the case has failed, and therefore you will say that the defendant is not guilty;" on which the officer immediately said, "Gentlemen, you will say the defendant is not guilty;" to which they assented, and the verdict was recorded. Dick. Q. S. ed. Talf. p. 571, n. (*b*).

(*r*) *Post*, p. 308.

(*s*) If a case were necessary, *R.* v. *Beard*, 8 C. & P. 142, might be mentioned; and see *post*, p. 309.

reply (*t*). It was formerly held, on the trial of misdemeanours, that an accused, who addressed the jury in person, must also examine and cross-examine without the assistance of counsel, though he might have it for suggesting questions to him, and arguing such points of law as arose (*u*); but no such division of the conduct of a case is now sanctioned (*x*). Where the party accused is obliged to defend himself, any statement which he may make ought to be the more attentively heard, and though not made on oath, or supported by proof, still, if it offers a reasonable explanation of the circumstances which seem to bear against him, should be carefully weighed and candidly estimated by a jury.

Conduct of the Case may not be divided between Counsel and Prisoner.

Where several persons are jointly indicted either for felony or misdemeanour, and are defended by different counsel, they or their counsel, as the case may be, have to address the jury in such order as the judge in his discretion shall permit (*y*); and the judge may call on counsel to address the jury, either in the order of their seniority (*z*) or in that in which the names of the prisoners stand on the indictment (*a*). Where two prisoners are indicted together, and one of them only is defended by counsel, it seems to be in the discretion of the judge whether he will allow the prisoner who is undefended to make his statement to the jury before or after the address of counsel (*b*), or the order in the indictment may be followed (*c*), and the latter would appear to be the general rule (*d*).

If after counsel for the defence of several prisoners have respectively addressed the jury for each prisoner one of them calls a witness in favour of the prisoner whom he defends, who gives evidence criminating another prisoner, the counsel for the latter prisoner has the right to cross-examine the witness, and to address the jury again with respect to that evidence (*e*). However, where the counsel for one has witnesses to *facts* to examine, the counsel for another cannot be allowed to postpone his address till after those witnesses have been examined (*f*), except by the express permission of the court.

It had become matter of complaint by persons charged with indictable offences, upon their trial, that they were unable by

Attendance of prisoner's witnesses, how

(*t*) *Reg.* v. *Butcher*, 2 M. & Rob. 228. See *post*, pp. 305, 309.
(*u*) *R.* v. *Parkins*, 1 C. & P. 548; *R.* v. *White*, 3 Campb. 98; *Reg.* v. *Taylor*, 1 F. & F. 535; *Shuttleworth* v. *Nicolson*, 1 M. & Rob. 254.
(*x*) See *ante*, p. 151.
(*y*) *Fletcher* v. *Crosbie*, 2 M. & Rob. 417, per *Rolfe*, B., and per *Cressmell*, J., Spring Assizes, York, 1852, MS.; Chit. Cr. Pl. 16th ed. p. 154.
(*z*) *Reg.* v. *Esdaile*, 1 F. & F. 213.
(*a*) *Reg.* v. *Barker*, 1 C. & K. 434.
(*b*) *Reg.* v. *Belton*, 5 Jur., N. S. 276; *Reg.* v. *Holman*, 3 Jur., N. S. 722.
(*c*) *Reg.* v. *Harris*, 3 Jur., N. S. 272; *Reg.* v. *Meadows*, 2 Jur., N. S. 718.
(*d*) *Ibid.*
(*e*) *Reg.* v. *Burdett*, Dears. C. C. 431.
(*f*) *Reg.* v. *Barber*, 1 C. & K. 434.

secured, and their depositions.

reason of poverty to call witnesses on their behalf, and that injustice was thereby occasioned to them; therefore, by 30 & 31 Vict. c. 35, s. 3, it is enacted that "in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed within this realm or upon the high seas, or upon land beyond the sea, and whether such person appear voluntarily upon summons, or has been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused for trial, or admit him to bail, shall, immediately after obeying the directions of the eighteenth section of the act eleventh and twelfth Victoria, chapter forty-two, demand and require of the accused person whether he desires to call any witness; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same in writing; and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions, and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case, or tending to prove the innocence of the accused person, shall be bound by recognizance to appear and give evidence at the said trial; and afterwards, upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken." By sect. 4, "all the provisions of the said act eleventh and twelfth Victoria, chapter forty-two, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognizance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read and shall have operation as part of this act."

Evidence for defence.

It is, of course, impossible to lay down general rules for the conduct of defences. They may consist of evidence tending to explain the circumstances on which a charge mainly rests; or of the evidence of witnesses present at a transaction tending to contradict directly the statement of the witnesses for the prosecution; or of evidence tending to show that the prisoner could not be guilty of the crime, because he was in another place at the period when it is said to have occurred, and which is

popularly called an *alibi;* or of evidence calculated to show that the witnesses for the prosecution are unworthy of credit, by contradicting them upon points of their evidence relative to the transaction; or lastly, of evidence tending to show the improbability of the prisoner's guilt, by proving that he has borne a character for qualities the reverse of those which would produce the criminality imputed.

Drunkenness. Drunkenness at the time of committing the offence affords no excuse, but is rather an aggravation of the act (*g*), and this is so even in murder, where premeditated malice is a necessary ingredient. But where the intention with which an act is done is material, the drunken state is a circumstance to be taken into consideration with reference to whether the person was in a condition to form any intention at all (*h*). So, where in a case of assault it became material to see whether the prisoner apprehended an assault upon himself, the state of drunkenness in which he was should be considered (*i*).

Insanity. Insanity at the time of committing the act will be a defence, if it be clearly proved that the accused was then labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or as not to know that it was wrong (*k*). A medical man who has been present in court and heard the evidence may be asked as a matter of science whether the fact stated by the witnesses, supposing them true, show a state of mind incapable of distinguishing between right and wrong (*l*).

Infancy. When a child of any age between seven and fourteen is indicted, it should be left to the jury to say, first, whether the offence was committed by the prisoner, and if it was, then whether at the time it was so committed the child knew that it was wrong; and the legal presumption being that a child of that age has not such (*viz.* guilty) knowledge, it is for the prosecutor to rebut it by evidence (*m*); but in particular cir-

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(*g*) Co. Lit. 247; *R.* v. *Carroll*, 7 C. & P. 145; 1 Hale, 32; *R.* v. *Meakin*, 7 C. & P. 297.

(*h*) *Reg.* v. *Monkhouse*, 4 Cox, C. C. 55; *Reg.* v. *Moore*, 3 C. & K. 319.

(*i*) *Reg.* v. *Gamlen*, 1 F. & F. 90.

(*k*) *Reg.* v. *M'Naghten*, 10 Cl. & Fin. 200.

(*l*) *Ibid.* In *Reg.* v. *Higginson*, C. & K. 129, *Maule*, J. (who had differed from the other judges in *Reg.* v. *M'Naghten*), asked the jury, whether the prisoner at the time of committing the offence was so insane as not to know right from wrong?

(*m*) *R.* v. *Owen*, 4 C. & P. 236; see 1 Hawk. ch. 1, s. 8. In *York's case*, Foster, 70, which occurred in 1748, a little girl of five years old, supported in a parish workhouse, was murdered by blows, and her body found concealed in a dunghill. A boy of ten years old, who inhabited the same house, confessed several times that he had deliberately murdered her; giving a methodical and consistent detail of a multitude of circumstances, showing what Lord *Hale* calls (1 Hale, 630) a "mischievous discretion" in himself. He was found guilty, but sentence was respited for the opinion of the judges. They all thought that to spare this criminal merely on

Of the Defence—Infancy.

cumstances conclusive presumptions are made by the law with respect to infants. Thus an infant under the age of seven years is conclusively presumed to be incapable of committing any felony for want of discretion (*n*), and under fourteen a male infant is presumed incapable on the ground of impotency of committing a rape as a principal in the first degree; and this presumption is not affected by 24 & 25 Vict. c. 100, s. 48 (*o*); and it applies to the offence of carnally knowing and abusing a girl under ten years of age (*p*); and, therefore, evidence is not admissible to show that in fact he has attained the full state of puberty, and was in fact capable of committing the crime (*q*). So that he is also presumed incapable of committing an assault with intent to perpetrate that crime (*r*), and equally so of attempting to commit the crime (*s*); but an adult patient, in an unnatural offence, may be convicted though the agent was a boy under fourteen (*t*). So a girl under the age of ten is presumed incapable of consenting to sexual intercourse (*u*), but is nevertheless capable of assenting to indecent liberties being taken with her so as to prevent such acts being an assault (*x*); but two boys of eight years of age, submitting through ignorance of the moral nature of the acts to indecent acts on the part of a grown up man, are not deemed to consent to the acts so that the adult may be convicted of indecent assault (*y*).

Coercion of husband.

The general rule governing the defence of coverture is that a wife cannot be convicted of a bare theft or even of a burglary committed in the company of her husband; such act of hers being presumed to be done under his coercion, and therefore punishable in his person only. But this is in all cases merely a presumption, open like all others to be rebutted by evidence to the contrary; for if the husband is crippled or bed-ridden, or if she is the principal actor in and incitor to the felony, she seems punishable as well as the husband (*z*). And it is quite

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account of his age would be of very dangerous consequence, considering the many serious offences, as arson, &c. of which children are capable. However, many reprieves were granted to afford time to investigate the origin of the matter more closely, but no light being cast on it, it was resolved to grant no more of them; when, after nine years, a pardon was granted at the Summer Assizes, 1757, on condition of the prisoner immediately entering the sea service.

(*n*) 1 Hale, 27; Taylor on Ev. vol. 1, p. 112, § 91.

(*o*) *R.* v. *Groombridge*, 7 C. & P. 582.

(*p*) *Reg.* v. *Jordan*, 9 C. & P. 118.

(*q*) *Reg.* v. *Phillips*, 8 C. & P. 736.

(*r*) *R.* v. *Eldershaw*, 3 C. & P. 396.

(*s*) See as to attempts to commit offences, *Reg.* v. *McPherson*, D. & B. 197; *Reg.* v. *Collins*, L. & C. 471; 33 L. J., M. C. 177.

(*t*) *Reg.* v. *Allen*, 1 Den. C. C. 364; 18 L. J., M. C. 72.

(*u*) 1 Russ. C. & M. 693, 694.

(*x*) *R.* v. *Read*, 1 Den. C. C. 377; 18 L. J., M. C. 38.

(*y*) *Reg.* v. *Lock*, 42 L. J., M. C. 5; L. R., 2 C. C. R. 10.

(*z*) See *R.* v. *Archer*, 1 Moo. C. C. 143, cited in *R.* v. *Cruse*, 2 *id.* 53; *R.* v. *Hughes*, 1 Russ. Cr. 18, relied on in *R.* v. *Cruse*, 2 Mood. C. C. 58.

clear that if in his presence she commits treason, homicide, robbery, or, as it would seem, any felony accompanied with violence she will be liable to be convicted; or if in his absence she steals, or takes an active and independent part in receiving stolen goods, or in receiving a person whom she knows to have committed felony; or utters a forged order for the payment of money; or aids or abets her husband in assaulting another, and causing a bodily injury dangerous to life, she will be liable as if she were sole, though her offence may have been planned or commanded by her absent husband (*a*). For offences of this nature committed by a wife in the absence of her husband they may be indicted together, charging the wife as principal, and the husband as accessory (*b*); but if stolen goods are found in the house of a man not being the thief, that is primâ facie evidence against him alone though his wife live with him. And upon a joint indictment for receiving against the husband and his wife, who is found in the house with the goods, and gives a false account of them in the absence of her husband, but against whom there is no evidence of any independent act at the time of the original receipt, he may be convicted, but she must be acquitted (*c*), and a married woman cannot be convicted of receiving stolen goods who has received them from the hand of her husband (*d*). Therefore, where the facts admit of such a construction, the jury should in such a case be asked whether the wife received them from her husband or in his absence from some other person (*e*). *As to Husband and Wife.*

A distinction has been laid down that a wife is punishable for any offence *short* of felony committed by her, whether alone or in company with her husband (*f*); but its soundness may be questioned, and it has been disregarded in a case where husband and wife were jointly indicted for uttering base coin: the utter-

(*a*) See 1 Hawk. c. 1, ss. 2, 9; 1 Hale, 45, 47, 516, 621; 2 East, P. C. 552; *R.* v. *Morris*, R. & Ry. C. C. 270; *S. C.*, 2 Lea. 1096; *R.* v. *Archer*, 1 Moo. C. C. 143; *R.* v. *Dicks*, 1 Russ. C. & M. 16; *Reg.* v. *Manning*, 2 C. & K. 903. As to wife's aiding and abetting her husband's felonious assault on another, see *R.* v. *Cruse*, 2 Moo. C. C. 53; *Reg.* v. *Smith*, D. & B. 553; 27 L. J., M. C. 204, where upon a joint indictment for feloniously wounding with intent to disfigure, the jury found that the wife acted under the coercion of her husband, and did not personally inflict any violence, the wife was held to be entitled to be acquitted.

(*b*) See last note.

(*c*) *Reg.* v. *Matthews*, 1 Den. C. C. 596.

(*d*) *Reg.* v. *Brooks*, 1 Dears. C. C. 184.

(*e*) *Reg.* v. *Wardroper*, Bell, C. C. 243; 29 L. J., M. C. 116.

(*f*) *Reg.* v. *Williams*, 10 Mod. 63; 1 Salk. 384; Ryland's note (10) to 4 Bla. c. 29; 1 Hawk. c. 1, s. 13; Dalton, c. 139, p. 314, *e. g.*, keeping a disorderly house, for which she may be indicted alone, if her husband does not live with her, 1 Bac. Ab. 294, or jointly with him if he does, 1 Hawk. c. 1, s. 12. So she is indictable jointly with him for keeping a gaming house; *R.* v. *Dickson*, 10 Mod. 335; and for conspiring with another as well as her husband; and for forcible entry, &c.; and alone for riot, assault, &c. See 1 Hawk. c. 1, s. 10—14.

Of the Defence— Coverture.

ing being by the wife in her husband's presence (*g*). Again, a wife, being looked upon as the servant of the husband, is not indictable for breach of duty in not providing his apprentice with sufficient food and necessaries, whereby he died, unless she wilfully withheld them when furnished to her for his use by her husband (*h*).

A wife cannot be indicted for conspiring with her husband alone, or as accessory after the fact for receiving him after knowing him to have committed felony, or for receiving jointly with her husband a third person known to be in a like circumstance (*i*). She is absolved from liability in the first case, by being in law one person and having but one will with her husband, and by her subjection to him in the other two. On the other hand, a husband is indictable as accessory after the fact for receiving his wife, knowing her to have been guilty of felony (*k*).

Larceny by wife and avowterer.

The possession of the wife being in point of law identical with that of the husband, she cannot be guilty of stealing any article belonging to him alone, or to him and others (*l*), unless in the latter case, where he would be liable, as, for instance, where the property so stolen was in the actual possession of a third person, who by any rule of a society of which he is a member, or by compulsion of law, would, in case of its loss, be chargeable for it as bailee (*m*). So a stranger is not guilty of larceny who merely asssits the wife to take and carry away her husband's goods, apart from any question of adultery (*n*); but it is said, that if the stranger acted as principal in the taking, and the wife merely assented, the stranger would be guilty of larceny if he acted with a felonious intention (*o*). Though a wife may thus with impunity part with her husband's property to another, yet if, as in a common case in the humbler walks of life, in contemplation of adultery, and the adulterer take part with the wife in abstracting the goods in order to go and live in adultery, it is larceny in him (*p*); but the wife's necessary

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(*g*) *R.* v. *Price*, 8 C. & P. 19, by *Mirehouse*, C. S., after consulting *Bosanquet* and *Coltman*, JJ. See *R.* v. *Conolly*, cited as *Anon.*, Matthew's Crim. Law, 262, *acc.*

(*h*) *R.* v. *Squire*, 1 Russ. C. & M. 80, 678.

(*i*) 1 Hawk. c. 27, s. 8; 1 Hale, 47, 621.

(*k*) 1 Hawk. c. 1, s. 10.

(*l*) 1 Hale, 513; 1 Hawk. c. 33, s. 19; *R.* v. *Willis*, 1 Moo. C. C. 375; where a wife took money from the box of a friendly society deposited with her husband, a member of it.

(*m*) *R.* v. *Bramley*, R. & Ry. 178, and see *ante*, p. 159. See *R.* v. *March*, 1 Moo. C. C. 182, when a wife was held not liable to be convicted of the arson of a husband's house.

(*n*) *Reg.* v. *Avery*, 28 L. J., M. C. 185; Bell, C. C. 150. See also *Reg.* v. *Berry*, 28 L. J., M. C. 70; Bell, C. C. 95.

(*o*) *Ibid.*

(*p*) *Reg.* v. *Thompson*, 1 Den. C. C. 549; *R.* v. *Mutters*, 34 L. J., M. C. 54; L. & C. 511; *Reg.* v. *Featherstone*, Dears. C. C. 369; 23 L. J., M. C. 127; *Reg.* v. *Tolfree*, 1 Moo. C. C. 243; *R.* v. *Tollett*, C. & M. 112.

Of the Defence—Husband and Wife.

wearing apparel may even under such circumstances be taken away by her, and it is no larceny for the adulterer to assist her in so doing (*q*). The principle is, that in the eye of the law the husband and wife are one person; but when she becomes an adulteress she thereby determines her quality of wife, and her property in her husband's goods ceases (*r*). But if she abstract her husband's goods and with them join an adulterer for the purpose of living in adultery, and he takes personal possession of them, it is larceny in her, and the adulterer may be convicted of receiving the goods knowing them to have been stolen (*s*); it is, however, not enough merely to show that they were brought by the wife to the place where they are found together, unless circumstances appear to show that he had possession of them (*t*).

Proof of coverture.

A woman who sets up her coverture in her defence must prove it (*u*), unless her character as such is admitted by her description in the indictment, *e. g.* "wife of" A. B. (*x*); and though strict evidence of a marriage need not perhaps be given, the jury must be satisfied of it on the evidence given. Cohabitation and reputation of a marriage have been considered sufficient evidence of it for this purpose (*y*), though mere cohabitation and passing by a man's name are not (*z*).

Discrediting witness called for the prosecution.

With reference to discrediting a witness called for the prosecution, where it is proposed to discredit a witness called on the other side, by showing that, on another occasion, he has given a different account of the transaction, he must be first cross-examined as to such account, and the subject brought distinctly to his memory, by specifying the circumstances of time and place, and of the person, if any, involved in the contradiction to be afterwards given (*a*). When this has been first done, evidence of his declarations, or acts inconsistent with his testimony, on matters relevant to the issue, and which he has denied on cross-examination, may be admitted (*b*). And such declaration can be received to contradict him, where he does not distinctly admit that he ever used it, and when a witness has been cross-examined in accordance with the 28 Vict. c. 18, s. 5 (*ante*, p. 291), as to previous statements made by him and put into writing, he may be contradicted by parts of the

(*q*) *Reg.* v. *Fitch*, Dears. & B. C. C. 187; 26 L. J., M. C. 169.
(*r*) *Reg.* v. *Featherstone*, Dears. C. C. 369; 23 L. J., M. C. 127.
(*s*) *Reg.* v. *Deer*, L. & C. 240; 32 L. J., M. C. 33.
(*t*) *R.* v. *Rosenberg*, 1 C. & K. 233.
(*u*) *R.* v. *Jones*, Kelynge, 37.
(*x*) 1 Hale, 46; *R.* v. *Knight*, 1 C. & P. 116.
(*y*) *R.* v. *Atkinson*, Russ. C. & M. 20.
(*z*) *R.* v. *Hassall and another*, 2 C. & P. 434.
(*a*) 28 Vict. c. 18, s. 4, *ante*, p. 291.
(*b*) *De Sailly* v. *Morgan*, 2 Esp. N. P. C. 691; but if the particular question which should have been put to the plaintiff's witness for the defendant has not been put, the court has a discretion to suffer him to be recalled before the defendant's proceeding to contradict him; *Angus* v. *Smith*, M. & M. 474.

Discrediting Witness called for the Prosecution.

writing. If he has been asked whether he has committed a crime, or any other matter intended to affect his general credit, and denies the imputation, evidence cannot be received to show that his denial is false; or else the time of the court might be occupied in the trial of a number of collateral circumstances on which neither the witness nor those who call him can be supposed ready to enter (*c*); though now he may be questioned as to whether he has been convicted of any felony or misdemeanour; and if it is not admitted, the cross-examining party may prove the previous conviction by a certificate (*d*). With the above exception it is not allowable to adduce evidence to prove that the witness is unworthy of credit, because he has been guilty of a crime, or a number of crimes, as to which he has not been examined; the reverse was strenuously contended for in a case of high treason, in reference to the principal witness for the crown; and the judges then, without requiring the attorney-general to reply, rejected the evidence, as clearly inadmissible (*e*). Thus, upon a charge of indecent assault, or rape, or attempt to commit rape, upon questions put to the prosecutrix as to particular acts of connexion with other men than the prisoner her answers are final, and the men named to her cannot be called to contradict her (*f*). Thus, where a witness, on the trial of his master for felony, was asked whether he had not been charged with robbing the prisoner, and also whether he had not threatened to be revenged of him, and to fix him in gaol, but denied both; on the offer of evidence in contradiction, it was holden that the witness's answer as to the charge of robbery against him was conclusive; but that on the latter, as the words might have reference to his testimony on the pending indictment, evidence might be received to show that the words were spoken by the witness (*g*). The only general evidence to discredit a witness which is allowed in any case (except the production of a record of conviction to disqualify him in point of law), is that of witnesses who state *that they would not believe him on his oath* (*h*). This is the simple answer which such witnesses can be allowed to give on examination in chief, but they may be cross-examined as to the grounds of their opinion, and, unless they can give some very satisfactory reasons, little weight will be attached to such a statement. It is obvious that such an assertion is as difficult to support as it is easy to make. Its admission seems inconsistent with the principle, that irrelevant facts shall not be allowed to heap infamy on a witness, since such testimony can only be supported as the result of facts known to the party who makes

(*c*) *R.* v. *Clarke*, 2 Stark. N. P. C. 244.
(*d*) 28 Vict. c. 18, s. 6; see the section in full, *ante*, p. 291.
(*e*) *R.* v. *Watson*, 2 Stark. N. P. C. 150.
(*f*) *Reg.* v. *Holmes*, 41 L. J., M. C. 12; L. R., 1 C. C. R. 334; *R.* v. *Hodgson*, R. & Ry. 211; *Reg.* v. *Cockroft*, 11 Cox, C. C. 410.
(*g*) *Harris* v. *Tippett*, 2 Camp. 637; *R.* v. *Yewin*, 2 Camp. 638.
(*h*) *Reg.* v. *Brown*, 36 L. J., M. C. 59; L. R., 1 C. C. R. 70.

it; and, in practice, judges are in the habit of directing juries that it is worthy of very little attention. Where a witness is unimpeachable in his general character and uncontradicted by contrary testimony, and there is no want of probability in the facts which he relates, a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act on them accordingly (*i*). *Discrediting Witness.*

A party indicted (*k*) is always permitted to call witnesses, who have been more or less acquainted with him, to bear testimony to the character he has maintained in respect of the qualities which are inconsistent with the imputed offence; as to his character for honesty, on a charge of stealing; to his humanity, on a charge of violent assault; to his loyalty, on a charge of sedition or libel. These witnesses will be permitted to speak to general character only, and not to particular actions; but they may be allowed to state their peculiar means of knowledge, as, that the prisoner was in their employ and trusted by them; and the jury may draw the inference of the value of character derived from such sources. Evidence to character of prisoner.

It is not usual to cross-examine witnesses to character unless the counsel cross-examining has some distinct charge on which to cross-examine them (*l*).

As to the *effect of character*, and the manner in which it should be left to the consideration of the jury, it may be observed, that it is rather difficult to understand the general practice of some learned judges on the subject. On this point, the following observations of a criminal lawyer of great experience and learning (*m*) are well worthy of the attention of justices who may preside in sessions:—"It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told, that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference, that the good character of the party accused, when satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; Effect of character.

(*i*) Per Lord *Tenterden*, *Davis* v. *Hardy*, 6 B. & C. 231. See *Bayley*, J., judgment, *ibid.*, and 2 New Cas. (217).

(*k*) This rule does not apply to informations for penalties; *Huntley* v. *Luscomb*, 2 B. & P. 532.

(*l*) *R.* v. *Hodgkiss*, 7 C. & P. 298.

(*m*) Mr. Serjeant *Russell*, late chief justice of Bengal, in his work on Crimes and Misdemeanours, vol. 2, ed. Greaves.

Of Evidence to Character.

but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion upon the evidence, whether an individual whose character was previously unblemished, has or has not committed the particular crime for which he is called on to answer."

To these remarks we may be permitted to add that, according to the language frequently adopted by judges in their charges, it may be proved that character is, *in no case*, of any value. They say that "In a clear case character has no weight; but if the case be doubtful - if the scale hangs even, — then the jury ought to throw the weight of character into the scale, and allow it to turn the balance in the prisoner's favour." But the same judges will tell juries "that, in every doubtful case, they ought to acquit," stopping far short of the even balance, and "that the prisoner is entitled to the benefit of any reasonable doubt." In clear cases, therefore, the character is of no avail, and in doubtful cases it is not wanted; it is never to be considered by the jury but when the jury would acquit without it! The sophism lies in the absolute division of cases into *clear and doubtful*, without considering character as an ingredient which may render that doubtful which would otherwise be clear; there may certainly be cases so made out that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character will *produce a reasonable doubt*, nay, in which character will actually outweigh evidence which might otherwise appear conclusive (*n*). It is in truth a fact varying greatly in its intrinsic value, according to its nature; varying still more in its relative value, according to the proofs to which it is opposed; but always *a fact*, fit, like all other facts proved in the cause, to be weighed and estimated by the jury (*o*). And *Cockburn*, C. J., in *Reg.* v. *Rowton* (*p*), says, "It has been put that evidence in favour of the character of a person on his trial raises a collateral issue. I can hardly think that it is a collateral issue in the proper sense of the term. It becomes one of the points on which the jury are to found their verdict."

Evidence in reply; and herein of proving the previous conviction of the prisoner for felony.

When the evidence for the party accused has been closed, the prosecutor's counsel may offer any evidence in reply which is strictly applicable to the defence, and which could form no part of his original case. Thus he may give specific contradictions to denials by the defendant's witnesses on cross-examination (*q*); he may call persons to swear that they would not believe the witnesses on their oaths; but if a prisoner on his trial gives evidence that his character is good, it is open to the

(*n*) Dick. Q. S. ed. Talf. p. 578.
(*o*) *Ibid.*
(*p*) 34 L. J., M. C. 60.
(*q*) See *ante*, p. 291, *et seq.*

Evidence in Reply.

prosecution, by way of reply, to prove that the prisoner's character is bad (*r*); but a witness called for the prosecution, to rebut evidence of good character for decency and morals, given on behalf of a prisoner on a charge of indecent assault, was not permitted to give evidence of his own opinion and that of his brothers on the subject formed from his and their knowledge of him when at school (*s*). So he may apply an answer to any matter of excuse which the prisoner has set up, and which he could not anticipate; but he must not address the jury in introducing such evidence, nor make a new case, nor seek to fill up the chasms or supply the deficiencies of that on which he originally relied.

Previous conviction of prisoner may be proved in reply to rebut evidence to character.

If the prisoner has called witnesses to character, and is charged upon an indictment for an offence punishable under the 24 & 25 Vict. c. 96 (the Larceny Act), and committed after a previous conviction or convictions for any felony, misdemeanour, or offence or offences punishable upon summary conviction, if, upon the trial for any such subsequent offence, such persons shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such prisoner for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence (sect. 116). As to the mode of proving the conviction, see same section, and see *ante*, p. 263. And under the Coinage Act (24 & 25 Vict. c. 99), where any person shall have been convicted of any offence *against that act or any former act relating to the coin*, and shall afterwards be indicted for any *offence against that act* committed subsequently to such conviction, if, upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence (sect. 37). As to mode of proof of conviction by a certificate, see *ante*, p. 263.

A person is deemed to have given evidence of his good character within the meaning of the above sections, whether he has done so by calling witnesses, or in cross-examining the witnesses for the prosecution (*t*).

Defendant's right to sum up his evidence for the defence.

After the evidence for the defence is concluded, the prisoner or his counsel has the right to sum up under 28 Vict. c. 18, s. 2, *ante*, p. 295.

(*r*) *Reg.* v. *Rowton*, 34 L. J., M. C. 57; L. & C. 520.
(*s*) *Ibid.*
(*t*) *Reg.* v. *Shrimpton*, 2 Den. C. C. 319; 21 L. J., M. C. 37; *Reg.* v. *Gadbury*, 8 C. & P. 676, per *Littledale*, J., and *Parke*, B.

Speech in Reply.

When the defence is ended, the counsel for the prosecution, in every case in which the accused has called and examined any witnesses or has caused any evidence to be given, or a witness's deposition has been read on cross-examination, has a right to reply on the entire case, and on all the observations made by the other side during its progress.

The like right exists if the witnesses for the defence speak merely to the character of the accused (*e*). If two are indicted jointly for the same offence, and one calls witnesses, the counsel for the prosecution is entitled to a general reply (*f*). But if the offences are separate, and might have been separately indicted, the reply must be confined to the case of the party who called witnesses: though departing from this course is no ground for arresting the judgment (*g*). It is not the practice to reply in cases of a statement by a defendant in person, though unsupported in evidence (*h*); and a usage of forbearing to reply where the defendant's witnesses were only to character, has been so long acted on, that a court would be justified in refusing to hear a counsel who asserted his right to a reply, after such evidence only had been given. By the Fourth Regulation of the Judges in 1837, respecting the trial of felonies, "if the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do." The cases here alluded to are only those singular instances where it is necessary to contradict the witness to character, either by cross-examination or otherwise, so as to develop any improper scheme for supporting the defence.

In one case there seems little question as to the propriety of a reply from the prosecutor's counsel, though the only witnesses called for the accused should be to character, *viz.* where the indictment charges a previous conviction for felony; so that, unless the evidence to character is restricted to a period after the former conviction, it appears a fair case for a reply on the whole facts.

In cases of public prosecutions for felony instituted by the crown itself (and, as it would seem, in misdemeanours), as, for instance, in Mint or Post Office prosecutions, the law officers of the crown, and those who represent them, are in strictness entitled to reply, although no evidence is produced on the part

(*e*) *R.* v. *Whiting*, 7 C. & P. 771; *R.* v. *Stannard*, *id.* 673. See Fourth Regulation of Practice of the Judges issued before Spring Circuit, 1837, as to trials of felonies, *supra*.

(*f*) *Reg.* v. *Briggs*, 1 F. & F. 106; *Reg.* v. *Blackburn*, 3 C. & K. 330; *Reg.* v. *Jordan*, 9 C. & P. 118.

(*g*) *Reg.* v. *Hayes and others*, 2 M. & Rob. 155; *Reg.* v. *Burton*, 2 F. & F. 278.

(*h*) Recognized by *Coleridge*, J., in *Reg.* v. *Butcher*, 2 M. & Rob. 229; *R.* v. *Bignold*, *ubi sup.*

Right of Reply.

of the prisoner (*i*); and this as well on collateral (*k*) as original issues, but this right of reply has been objected to by some judges (*l*).

An important rule, which was promulgated by Lord *Kenyon*, was revived by Lord *Tenterden*, by which a reply is allowed to a counsel for the prosecution, if the counsel for the defendant, in his address to the jury, opens any fact or document not already in evidence, but afterwards declines to call a witness, or put in the writing (*m*). But the rule does not extend further, so as to give the prosecutor's counsel a right to reply, where cases and authorities only are cited for the defence (*n*).

(*i*) Fifth Regulation of Practice of twelve Judges, &c.; also *R.* v. *Marsden*, M. & M. 439; *R.* v. *Bell*, *id.* 440, Lord *Tenterden*; *Reg.* v. *Gardener*, 1 C. & K. 628; *Reg.* v. *Toakley*, 10 Cox, C. C. 406.

(*k*) *E. g.*, issues of identity; *R.* v. *Radcliff*, 1 W. Bla. 6.

(*l*) By *Martin*, B., in *Reg.* v. *Christie*, 1 F. & F. 75, and by *Byles*, J., in *Reg.* v. *Taylor*, 1 F. & F. 535.

(*m*) *R.* v. *Bignold*, 1 D. & R. N. P. C. 59; 4 D. & R. 70. Indictment for misdemeanour (perjury), tried at *nisi prius*, at Westminster after Hilary Term, 1823. The then solicitor-general was counsel for the defendant, and stated the contents of a paper not referred to by the counsel for the prosecution, or forming a part of his case; but afterwards, on communicating with his client, sat down, saying he should call no witnesses. The counsel for the prosecution claimed a right to reply, mentioning a case in which Lord *Kenyon* had allowed it to *Erskine* in a similar situation. *Abbott*, L. C. J., assented to the principle as undoubted, and the counsel replied shortly, stating that he did so in assertion of the right. Defendant was convicted, but judgment was afterwards arrested for matter on the record. (The above statement has been collated with Mr. Jardine's MS. notes.) Dick. Q. S. 5th ed. 58 (n).

This right of reply was considered a settled rule. However, in *Crerer* v. *Sodo et al.* in 1827, M. & M. 86, Lord *Tenterden* said, "If the defendant's counsel refuses to call a witness to establish the facts which they have undertaken to establish, the judge may, in his discretion, *permit* a reply; but as to the strict right, the practice is clearly against it." (*R.* v. *Bignold* had not been cited.)

In *Faith* v. *M'Intyre*, 7 C. & P. 44, the defendant began, and one of his witnesses, when cross-examined, proved the handwriting of a letter, which the plaintiff's counsel afterwards read to the jury in the course of his address, without putting it in as his evidence. The defendant's counsel claimed to reply. As the jury had been put in possession of the contents of the letter, *Parke*, B., said that he had often heard a reply threatened if a counsel or a party opened new facts, but had never heard one actually made on a mere opening. He suggested, that in good faith the letter should be put in, which was done, and the reply followed of course. (No case was cited on either side.)

The right of reply in the text was again recognized in *R.* v. *Carlisle*, 6 C. & P. 636; and see *Stevens* v. *Webb*, 7 C. & P. 60.

In *Reg.* v. *Butcher*, 2 M. & Rob. 228, *Coleridge*, J., held, in a case of felony, that a statement by counsel of facts which they cannot, or do not intend to prove, gives a reply to the prosecutor, adding, "the same rule ought to prevail as in civil cases." It is irregular and improper in counsel to state to a jury, as facts, any matter which cannot be proved before them; *e. g.*, an account given by his client of a conversation between him and a witness who has been called and exposed to cross-examination. See *Stevens* v. *Webb*, 7 C. & P. 60.

(*n*) *Power* v. *Barham*, 7 C. & P. 356, *Coleridge*, J.

Right of Reply.

However, it has been held in a civil case, that if the counsel for a defendant, in his address to the jury, cites a case, but calls no witness, the plaintiff's counsel has a right to observe on the case so cited (*o*).

Summing up by chairman.

When the case on both sides is closed, the chairman sums up the evidence. He states the substance of the charge, divesting it of all technical phraseology which may encumber it, directs the attention of the jury to the precise issue they have to try, and applies the evidence to that issue. Having taken accurate notes of the evidence, he will either read over the whole evidence, or state its substance, as the case may seem to his judgment to require. He will always read the whole if requested by the jury; though in many cases this will be found unnecessary, and will rather tend to confuse than to assist them.

Bill of exceptions.

A bill of exceptions cannot be tendered on indictments for felony, nor, as it would appear, for misdemeanours (*p*).

Discharge of jury from giving a verdict.

The contention that the prisoner has a right after the trial has begun, and he has been given in charge to the jury, to demand that the trial should be continued till a verdict should be given, or if that cannot be done, that he should be acquitted and discharged, cannot be maintained (*q*). The failure of the jury to agree, after several hours' consideration, in the last case at the sessions, at twelve o'clock on a Saturday night, would constitute such a high degree of necessity as to justify the discharge of the jury and the remanding of the prisoner into custody till the following session (*r*).

Absence of witness through collusion.

If a material witness for the prosecution be absent, or refuse to be sworn or to give evidence, and such absence or refusal be brought about in collusion with or at the instigation of the accused, in order to prevent a failure of justice, the court should discharge the jury and postpone the trial (*s*); but whether, if no such collusion or instigation could be shown, it would be a proper exercise of the judge's discretion to discharge the jury, is doubtful (*t*).

Where, after the jury have been charged, a prisoner indicted for felony becomes, from sudden illness, incapable of remaining at the bar during the trial, the jury must be discharged. If he recovers during the session, he may be retried, the whole of the proceedings in his trial being commenced *de novo* (*u*); if not, the

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(*o*) *Power* v. *Barham*, 7 C. & P. 356, *Coleridge*, J.

(*p*) *Vane's* (*Sir Harry*) *case*, 1 Sid. 85, cited Sir T. Raym. 486. See 1 Ch. Cr. L. 622.

(*q*) *Winsor* v. *The Queen*, 35 L. J., M. C. 161 (Ex. Cham. *ibid.* 121, in Q. B.); 7 B. & S. 490; *Reg.* v. *Charlesworth*, 31 L. J., M. C. 25; 1 B. & S. 460.

(*r*) *Ibid.*

(*s*) *Reg.* v. *Charlesworth*, *ubi sup.*

(*t*) *Ibid.*

(*u*) *R.* v. *Stevenson*, 2 Lea. C. C. 546; *R.* v. *Streek*, 2 C. & P. 413; see *Reg.* v. *Fitzgerald*, 1 C. & K. 201; *Wedderburn's case*, Foster's Cr. L. 22.

recognizances must be respited till the next session. A trial for manslaughter has been postponed till next day, and a jury discharged, on the request of the prisoner's counsel, on account of the absence of a material witness, *e. g.* the surgeon, who examined the body (*x*). *Of Discharging the Jury before Verdict.*

If a juryman dies during the trial, or is taken so ill as to be unable to attend to the evidence or agree in the verdict, the survivors must be discharged, and the prisoner tried afresh. A sick juror may be attended by another juror, or a surgeon, accompanied by a bailiff, sworn to remain constantly with him. The juror or surgeon, on his return, may be questioned on oath, to make true answer to such questions as the court shall demand of him respecting the state of the absent juror. If it appear that he will in all probability speedily recover, he may have refreshment; but if not, or if he dies, the eleven jurors must be discharged from giving any verdict. Their names should then be called over again instanter, and another person on the panel of jurors called into the box. The prisoner must then be offered his challenges to all twelve, after which each of them, or of those substituted for them on challenge, must be sworn *de novo*, and be charged with the prisoner. The trial must then begin again (*y*). Where the eleven were all resworn without challenge, the evidence which had been given was read by consent, from the judge's notes, before them and the twelfth juror; and each witness was asked whether it was true (*z*). A jury will not be discharged because it is discovered during the trial that one of them is related to the prisoner (*a*). If after the jury is charged (*viz.* after plea), and before any evidence given, it appears that the prosecutor's principal witness is incapable of being examined, he having no idea of a future state of reward and punishment, the jury should not be discharged in order to give an opportunity to instruct the witness, but the prisoner ought to be acquitted (*b*). Illness of juror.

It is said that a juror cannot be withdrawn in case of a capital felony, even with consent of the prisoner (*c*), but this was held otherwise afterwards (*d*). The general rule appears to be that a juror may be withdrawn, whenever he is either Withdrawing a juror.

(*x*) *R.* v. *Stokes*, 6 C. & P. 151, per *Tindal*, C. J., and *Gurney*, B. See *R.* v. *Crowe*, 4 C. & P. 251; *R.* v. *Hunter*, 3 *id.* 541.

(*y*) See by eleven judges in *R.* v. *Edwards*, 3 Campb. 207. See *R.* v. *Scalbert*, Lea. 706; 1 Chit. Cr. L. 629; 2 Hale, 216; 1 Shower, 131; *Howe's case*, 1 Vent. 210; *R.* v. *Woodfall*, 5 Burr. 2667; *Reg.* v. *Beere*, 2 M. & Rob. 472, *Cresswell*, J.

(*z*) See *R.* v. *Edwards*, R. & Ry. 224; 2 Lea. 621, n.; 3 Campb. 207, n.; 4 Taunt. 309; 1 Ch. Cr. L. 629; Foster, 31.

(*a*) *Reg.* v. *Wardle*, 1 C. & M. 647.

(*b*) *Reg.* v. *Charlesworth*, *ubi sup.*; *R.* v. *Wade*, 1 Mood. C. C. 86. See *R.* v. *White*, 1 Lea. 430; 2 Bac. Abr. 577, 5th ed.

(*c*) *R.* v. *Perkins*, Carth. 465, by all the judges; *S. C.*, Sir T. Raym. 84; *Reg.* v. *Charlesworth*, *ubi sup.*

(*d*) *Kinloch's case*, *Foster*, J., *diss.*, Foster, 28; *Reg.* v. *Charlesworth*, *ubi sup.*

Withdrawal of a Juror.

favourable or unindifferent to the party indicted, or, as it seems, without his consent, where he has purposely kept back evidence for the crown: or where a material witness is suddenly incapacitated by illness from attending (*e*). But in criminal cases, not capital, a juror may be withdrawn by consent of the prosecutor and defendant, though not without it (*f*). By this course one of the jurors being allowed nominally to withdraw, the rest are discharged from giving any verdict. This course is sometimes suggested by the court in cases of a personal kind, as assaults, with a view to a reconciliation between the parties, or that neither may have a triumph.

Section 12.

Of the Deliberation and Verdict of the Jury—Recording the Verdict—Defects cured by Verdict.

Of the deliberation of the jury on their verdict.

When the charge is concluded, the jury proceed to consider of their verdict. If, on consultation in the box, they are not able to agree in a convenient time, they retire, and a bailiff is sworn to keep them in the following terms:—

"You shall keep this jury without meat, drink, fire, or candle, except by leave of the court; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them if they are agreed.—So help you God."

Allowance of use of fire and refreshments.

Now by the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 23, jurors after having been sworn may, in the discretion of the judge, be allowed at any time before giving their verdict the use of a fire when out of court, and be allowed reasonable refreshment to be procured at their own expense. And the restriction as to candle has been always dispensed with on the retirement of a jury at night, when they require the inspection of documents which have been given in evidence. If the jury eat without permission, after they leave the box, they are fineable (*g*), but their breach of the rule in this respect will not avoid their verdict. Whether the jury shall be permitted to separate before giving their verdict, is in all cases a question for the court; but in a long trial for misdemeanour, lasting more than the day, their dispersion to their several homes during an adjournment, though without leave or consent of the court, or knowledge of the parties, does not avoid their subsequent verdict, if there is no suggestion of their having been

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(*e*) 1 Ch. Cr. L. 631.

(*f*) *R.* v. *Perkins*, *ubi sup.*, *R.* v. *Stokes*, *ubi sup.*, *ante*, p. 311; *Reg.* v. *Charlesworth*, *ubi sup.*

(*g*) 1 Chit. Cr. L. 632.

practised on in the interim (*h*). In a case of high treason (*i*), they were permitted to retire, in a body, to a tavern, where accommodations were provided for them by the sheriff; and six bailiffs were sworn well and truly to keep them together, and neither to speak to them themselves nor suffer any other to speak to them (*j*) touching any matter relating to the trial. A separation enabling the jurors to return to their homes is frequently agreed to in cases of misdemeanours, where the trial lasts more than a single day, the jury engaging to allow no one to speak to them on the subject of the trial. *Of the Deliberation of the Jury on their Verdict.*

If the jury separate after they have retired to consider their verdict, in a case of felony, and one of their number converse with a third person, a verdict of guilty delivered subsequently is bad, and may be treated as a nullity as upon a mistrial, and, as the prisoners have put themselves upon the country, they may be tried at the next sessions, and, if found guilty by another jury, a court of error will uphold the verdict, and a proper sentence passed upon them (*k*). May not separate in felonies.

When the jury retire, they may take with them any papers which have been proved in the cause, but no others (*l*). If any difficulty suggests itself to them in point of law, they may return into court and there receive the assistance of the bench; and if they desire to examine again any witness who has been called, they may request that he may be called again for their satisfaction, and the request will be granted; but they can ask him no question except in open court (*m*). If they desire to view the *locus in quo*, it is discretionary with the court to permit them, the court taking precautions to prevent improper communications being made to them at the view (*n*). If at such view statements are made in the absence of the prisoners, or not on oath, the evidence given should be taken on oath in open court on the return of the jury, and in presence of the prisoners (*o*). If one of the jurymen dies before the verdict is given, the survivors must be discharged, for the eleven can return no verdict; but a new indictment may be preferred against the prisoner. May have witness recalled. May have a view. Death of juror before verdict.

Jurors are not now punishable, except for gross acts of misconduct, as casting lots or tossing up for a verdict (*p*), or

(*h*) *R.* v. *Kinnear*, 2 B. & A. 462; *S. C.*, nom. *R.* v. *Woolf*, with learned notes, 1 Chit. R. 401.

(*i*) *R.* v. *Stone*, 6 T. R. 530; *R.* v. *Watson*, 2 Stark. 116. This course was taken in *R.* v. *Williams*, indicted at the Old Bailey for forgery, in April, 1838, the trial of which occupied several days, including Sunday, on which day the jury took the air in carriages, attended by the sheriff's officers.

(*j*) *R.* v. *Fowler*, 4 B. & A. 273.

(*k*) *Ibid.*

(*l*) 1 Inst. 227.

(*m*) 2 Hale, 296.

(*n*) *Reg.* v. *Martin*, 41 L. J., M. C. 113; L. R., 1 C. C. R. 378.

(*o*) *Ibid.*

(*p*) *R.* v. *Suffolk* (*Justices*), 5 N. & M. 139; 3 *id.* Mag. Cas. 221.

Deliberation of Jury on their Verdict.

for actual corruption. Of the verdict itself they are the sole and absolute judges; if they return it in a legal form, the court must receive it; and unless they are guilty of embracery or indecent conduct, they can never be questioned civilly or criminally on account of their decision. The proceeding by writ of attaint for false verdict has long fallen into disuse. And by the general act regulating juries, it is entirely abolished (*q*); but with a proviso, "that every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and punished by fine or imprisonment, as every such person and juror might be before the passing of this act" (*r*).

Attaint abolished.

Embracery of jurors.

Of the verdict.

Delivery of verdict.

The jury having agreed, signify that they are ready to deliver their verdict. If the jury retire to deliberate, their names must be called over when they return into court to deliver the verdict, and all the twelve must be within hearing when it is given. The officer then, in case of felony, desires the prisoner to hold up his hand, and addresses the jury,—"*Gentlemen, are you agreed on your verdict; how say you, is A. B. guilty of the felony whereof he stands indicted, or not guilty?*" The foreman delivers the verdict *guilty* or *not guilty*. In case of felony this verdict can only be received in open court, and in the prisoner's presence, though the court may be adjourned during the deliberation (*s*). In cases of misdemeanour, it may be delivered elsewhere, even out of the county by consent, and is often given in the defendant's absence (*t*). In general the assent of all the jury to the verdict pronounced by their foreman, if in their presence and hearing, is to be conclusively inferred, and no affidavit can be admitted to the contrary (*u*). And where on the trial of two prisoners for larceny one of the jurors delivered a verdict of not guilty, which was entered by the clerk in the minutes of the clerk of the peace, from which the record is made up, and also by the chairman, who heard the words "not guilty," in his note book, and the prisoner being thereupon discharged out of the dock, others of the jury interfering said the verdict was guilty, and the juror who had spoken said that he meant to say guilty, the prisoner was recalled into the dock, the verdict was again taken, and he was sentenced. It was held that the mistake had been corrected in time and the conviction proper (*x*).

Mode of delivery of the verdict.

Upon the trial of an indictment at the sessions, the court is the sole judge whether the entry of the verdict is proper or not; so that if, upon a special finding of a jury amounting to an

(*q*) 6 Geo. 4, c. 50, s. 60.
(*r*) *Ibid.* s. 61.
(*s*) Co. Lit. 227 b.; 1 Chitt. Cr. L. 636.
(*t*) *R.* v. *Woodfall*, 5 Burr. 2667, *ante*, p. 200; 1 Chitt. Cr. L. 636.
(*u*) *R.* v. *Wooller*, 2 Stark. N. P. 111.
(*x*) *Reg.* v. *Vodden*, Dears. C. C. 229; 23 L. J., M. C. 7.

Taking the Verdict.

acquittal, the chairman directs a verdict of guilty to be entered, which is done accordingly, the Court of Queen's Bench will not grant a *mandamus* commanding the minute to be entered according to the fact, and the proper course for the prisoner is to apply for a pardon (*y*). And sometimes the jury are requested to reconsider it, when it is manifestly against evidence; but in these last instances the interference requires great caution, and the jury may always persist in an absolute finding, however contrary to the opinion of the court. When they have finally delivered such verdict as can in point of law be received, the officer proceeds to address them,—

"Hearken to your verdict, as the court records it; you say A. B. is guilty (*or* 'not guilty') of the felony whereof he stands indicted (*and so of the others, if more than one*); that is your verdict, and so you say all."

Recording the verdict.

The verdict is, at the same time, recorded by the officer on the indictment.

Partial verdicts.

They may, as we have already seen, find a prisoner or defendant guilty on one count, and acquit him on others; or they may find him guilty of a part of a count where a substantive offence is charged and proved, and acquit him of the mere aggravations, provided the offence of which they convict him is of the same kind with that which the indictment set forth, and is included in it. Thus, on an indictment for stealing from the person, or in a dwelling-house, they may find the prisoner "guilty of stealing, but not from the person," or "not in the dwelling-house" (*z*); for the lesser charge is included in the greater, and both are felonies, although subjecting the offender to punishments differing in severity. Again, on an assault with intent to ravish, they may find the defendant guilty of a common assault, and acquit him of the intent; for both are misdemeanours, though the aggravated assault is punishable with hard labour, and the common assault with fine and imprisonment only. But they cannot in general find a prisoner guilty of a misdemeanour on an indictment for a felony; though it is true that a verdict of assault with intent to rob may be found (*a*) upon an indictment for robbery, but such an indictment is not triable at sessions. If upon the trial of any servant for feloniously taking from his master any corn, pulse, roots, or other food consumable by horses or other animals, such servant shall allege that he took the same under such circumstances as would constitute an offence punishable under 26 & 27 Vict. c. 103 (*b*), and thereof shall satisfy the jury charged with his trial, then it shall be lawful for such jury to return a verdict accordingly; and thereupon the court before which such trial shall take place shall proceed to award such punishment against such servant as may be awarded by two justices of the peace on the conviction of any

(*y*) *R.* v. *Suffolk* (*Justices*), 5 R. & M. 139; 3 *id.* Mag. Cas. 221, *sub nom. R.* v. *Hewes*, 3 A. & E. 725, *post*, p. 320.

(*z*) See other instances, *ante*, p. 228.

(*a*) 24 & 25 Vict. c. 96, s 41.

(*b*) See next page.

What is a lawful Verdict.

person under the provisions of that act (*c*). The offence under that act is, "if any servant shall contrary to the orders of his master take from his possession any corn, pulse, roots, or other food for the purpose of giving the same, or having the same given, to any horse or other animal belonging to or in the possession of his master"—and the punishment is, "at the discretion of two justices of the peace, either to be imprisoned, with or without hard labour, for any term not exceeding three months, or else to forfeit and pay such penalty as shall appear to them to be meet, not exceeding the sum of 5*l.*, and if such penalty shall not be paid, either immediately after the conviction or within such period as the justices shall at the time of the conviction appoint, the servant so offending shall be imprisoned, with or without hard labour, for any term not exceeding three months, unless such penalty shall be sooner paid; and so in case of nonpayment of any penalty imposed by a court, he shall be imprisoned, with or without hard labour, for any term not exceeding three months, as the court shall order, unless such penalty be sooner paid" (*d*). If, upon the trial of any person for misdemeanour, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour (*e*). As to a verdict of guilty of obtaining money, &c. by false pretences on proof of a larceny, see 24 & 25 Vict. c. 96, s. 88 (*f*). If there be several persons charged with a joint felony, they cannot be convicted severally of distinct felonies (*g*), except under the provisions of a statute; but in the case of receivers of stolen property, see 24 & 25 Vict. c. 96. But sentence may be passed on the one found guilty of the offence first in point of time, as the conviction may be treated severally as to each (*h*). And it should be borne in mind that on a charge of felony or misdemeanour, if upon the evidence the defendant did not complete the offence, he may be found guilty of an attempt to commit the same, and not guilty of the offence charged (*i*). If, of two persons indicted jointly for the same robbery, one appears to be innocent (as by having

Where on trial for misdemeanour the facts amount to felony.

(*c*) 26 & 27 Vict. c. 103, s. 1.
(*d*) *Ibid.*
(*e*) 14 & 15 Vict. c. 100, s. 12.
(*f*) *Ante*, p. 140.
(*g*) *R.* v. *Messingham*, 1 Moo. C. C. 257; *Reg.* v. *Gray*, 2 Den. C. C. 86; *Reg.* v. *Matthews*, 1 Den. C. C. 596. See *ante*, p. 134.
(*h*) *Reg.* v. *Gray*, *ubi sup.*; *Reg.* v. *Matthews*, *ubi sup.*
(*i*) 14 & 15 Vict. c. 100, s. 12.

desisted from prosecuting his intent to rob), and the other guilty, but the prosecutor cannot identify which committed the offence, both must be acquitted (*j*). On indictment against three for burglary and stealing in a dwelling-house to the value of 40*s*., one pleaded guilty, and the other two were found guilty of stealing in a dwelling-house to the value of 40*s*., both being then capital offences, seven judges were of opinion that judgment might be entered against one as guilty of the burglary and capital larceny, and against the two others as guilty of the capital larceny only; but two of the judges were of opinion that if a *nolle prosequi* was entered as to the party found guilty of the burglary, judgment might be given against all three for the capital larceny (*k*). This course had been taken in a previous case, where two were charged jointly with a capital larceny, and the finding was that one was guilty of capital and the other of simple larceny only, so that the judgments would be distinct (*l*). If they deliver a verdict which plainly amounts in law to an acquittal, as, on an indictment for receiving,—"guilty of receiving, but not knowing the goods to be stolen;" on an indictment for larceny,—"guilty of having the goods in his possession, but not of stealing them;" on an indictment for an assault,—"guilty of the assault, but it was in self-defence;" the chairman should direct them to acquit; but if their meaning is expressed in doubtful terms, he should explain to them exactly the points by which their verdict must be governed, and send them back to reconsider it (*m*).

What is a lawful Verdict.

Direction to jury to reconsider their verdict.

Where a chairman, through a mistake in the law in supposing that a conviction for a common assault could not be had on an indictment charging an assault occasioning actual bodily harm, told the jury on their finding such a verdict, before it was entered, that they must reconsider their verdict, and that they must either find the prisoner guilty of the charge in the indictment or acquit him, and they then found him guilty. The chairman passed sentence upon that verdict. It was held upon a case reserved, that the first verdict ought to have been taken and that the second verdict could not stand, and that it was a

A lawful verdict must not be refused.

(*j*) *R.* v. *Richardson*, 1 Lea. C. C. 387.

(*k*) *R.* v. *Butterworth*, R. & Ry. 520 See *R.* v. *Turner*, 2 East, P. C. 519; 1 Siderfin, 171. See 1 East, P. C. 371.

(*l*) *Ibid.*; *R.* v. *Hempstead*, R. & Ry. 344. Prisoners were jointly indicted for stealing to above the value of 5*l*. in a dwelling-house, which was then capital. The second count resembled the first, except in laying the dwelling-house to be that of a different person. It was not shown that the prisoners acted together in the felony, or that the articles were not stolen by them at different times and unknown to each other, though when taken they were together, and stolen articles were found on each. Hempstead was capitally convicted of stealing to the value of 6*l*. in the dwelling-house, and Hudson of stealing to the value of 10*s*., being two different felonies, one capital, the other simple larceny, entailing different judgments. Held that judgment could not be given against both prisoners, but that on a pardon given to Hudson, or *nolle prosequi* entered as to *him*, judgment might be given against Hempstead.

(*m*) See *Reg.* v. *Malony*, 9 Cox, C. C. 6.

What is a lawful Verdict.

mistrial, and that there ought to be a *venire de novo* (*m*). So, upon a count alleging an assault and a wounding and ill-treating, thereby doing actual bodily harm, a verdict of guilty of common assault justifies a conviction (*n*). So, where an indictment contained a count for unlawfully and maliciously wounding, and another for unlawfully and maliciously inflicting grievous bodily harm, a verdict of guilty of an assault is a lawful verdict (*o*). And on an indictment charging an assault and carnally knowing and abusing, a verdict of common assault was held good (*p*). And where an indictment contained a count for maliciously inflicting grievous bodily harm, and another count for a common assault, it is sufficient to justify a conviction on the first count that the jury find the prisoner guilty of an aggravated assault and that the act was done intentionally and without cause, although also without premeditation, and under the influence of passion (*q*). There is no inconsistency in a general verdict of guilty on an indictment charging a larceny against the prisoner on one count and a receiving of the stolen goods in the other count, since the 11 & 12 Vict. c. 46, s. 1, now repealed but re-enacted by 24 & 25 Vict. c. 94, s. 2 (*r*); and upon an indictment charging a larceny by the prisoner on the first count and a receiving of the goods "so as aforesaid" feloniously stolen in the second, a verdict of not guilty on the first count and guilty on the second count is good, the words "so as aforesaid" being rejected (*s*).

Upon an indictment against a man and his wife for a joint receiving, and after a general verdict against both, where the evidence showed either one joint receiving, in which case the wife could not be convicted, as the offence was committed in the husband's presence, or two several acts of receiving, in which case as against the wife the offence was not proved as laid. The verdict was taken to be several as to each, and was upheld as to the man and reversed as to the wife (*t*).

Recommendation to mercy no part of verdict.

What a jury may say in recommending a prisoner to mercy is not a matter upon which a case should be reserved for the opinion of the Court of Crown Cases Reserved, as where upon a charge of larceny the jury found the prisoner guilty but recommended him to mercy, "believing that he intended ultimately to return the property," the court considered that such recommendation was consistent with the verdict, as much as their opinion may have had reference to his state of mind at a time subsequent to the taking, but thought that what they

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(*m*) *Reg.* v. *Yeadon*, 31 L. J., M. C. 70; L. & C. 81.
(*n*) *Reg.* v. *Oliver*, Bell, C. C. 287; 30 L. J., M. C. 12.
(*o*) *Reg.* v. *Taylor*, 38 L. J., M. C. 106; L. R., 1 C. C. R. 194.
(*p*) *Reg.* v. *Guthrie*, 39 L. J., M. C. 95; L. R., 1 C. C. R. 241.
(*q*) *Reg.* v. *Sparrow*, Bell, C. C. 298; 30 L. J., M. C. 43.
(*r*) *Reg.* v. *Hughes*, 29 L. J., M. C. 71; Bell, C. C. 242.
(*s*) *Reg.* v. *Huntley*, 29 L. J., M. C. 70; Bell, C. C. 238; *Reg.* v. *Craddock*, 2 Den. C. C. 31.
(*t*) *Reg.* v. *Matthews*, 1 Den. C. C. 596.

gave as their reason for recommending the prisoner to mercy ought not to be considered as part of the finding (*u*). So where the jury gave as the ground for their recommendation to mercy that perhaps the prisoner did not know that he was acting contrary to law, this addition was held not to invalidate their verdict of guilty (*x*) *What is a lawful Verdict.*

The jury have a right to deliver a special verdict, that is, a verdict finding all the facts specially, and leaving the court to give judgment according to their legal effect. Such verdict must find all the circumstances distinctly as facts, for the court cannot supply any thing by implication or inference. If the circumstances so found do not substantially support the indictment (with the qualifications already referred to), no judgment can be passed, although they may show the prisoner to be guilty of a different offence (*y*). Special verdict.

On an indictment for a common assault on a girl nine years of age, a special verdict of "guilty, the child being an assenting party, but that from her tender years she did not know what she was about." Held to amount to not guilty, the verdict showing an assent by the girl (*z*). A verdict of not guilty of stealing the watch, but guilty of keeping possession of it, in the hope of reward from the time he first had the watch is a verdict of not guilty (*a*). Where, upon an indictment for obtaining goods by false pretences contained in forged letters, the jury said on giving their verdict that "we find the person guilty of obtaining the property by the false representations in the two forged letters, and that the parties would not have parted with it without those letters having been used, but we think that he meant to pay for them," it was held that the judge was right in refusing to receive this verdict, on the ground that they must find whether the prisoner had a fraudulent intention or not, and that if he had they must find him guilty, and if he had not, not guilty, and sending them back to reconsider the matter. They then found a verdict of guilty, which was held to be their true verdict (*b*).

The court may reserve any question of law arising on the trial for the consideration of the Court of Crown Cases Reserved; but what a jury may say in recommending a prisoner to mercy is not a proper matter to be reserved for the Court of Crown Cases Reserved (*c*).

The verdict cannot be altered after it is once *recorded;* but Pronouncing, altering and recording verdict.

(*u*) *Reg.* v. *Trebilcock*, D. & B. 453; 27 L. J., M. C. 103.
(*x*) *Reg.* v. *Crawshaw*, Bell, C. C. 303.
(*y*) 2 Stra. 1015; 1 Chitt. Cr. L. 643.
(*z*) *Reg.* v. *Read*, 1 Den. C. C. 377.
(*a*) *Reg.* v. *York*, 1 Den. C. C. 335; 18 L. J., M. C. 38. See *post*, p. 365.
(*b*) *Reg.* v. *Meany*, L. & C. 213; 32 L. J., M. C. 24; and it is there said, "The judge has a right, and sometimes it is his bounden duty, to tell the jury they ought to reconsider their verdict. He is not bound to receive their first verdict unless the jury insist upon having it recorded."
(*c*) *Reg.* v. *Trebilcock*, D. & B. 453; 27 L. J., M. C. 103.

Recording the Verdict.

it may be, and often is, altered after it has been *pronounced*, at the suggestion of the court, if its terms imply a contradiction, or are accompanied by something which renders the meaning doubtful. Where a verdict is thus offered by the jury, but not immediately accepted and recorded by the court, it has been the practice for some clerks of the peace to enter a note of it in the minute book of the sessions, as a memorandum of the proceedings as they go on, and afterwards to record the ultimate finding on the indictment in the usual manner (*c*). A jury at sessions, on an indictment for poisoning mares, found the accused "guilty by mischance." This was entered by the clerk of the peace in his minute book. The defendant's counsel submitted that this finding amounted to an acquittal; and the chairman told the jury to find the prisoner guilty, or not guilty, directing them to reconsider their verdict. They retired, and afterwards gave their verdict "guilty; but recommended to mercy." The clerk of the peace recorded that finding, with the recommendation, on the indictment in the usual manner. After which the court asked the jury the ground of their recommendation. They answered, that the prisoner did not do it with a malicious intent, but to benefit the condition of the horses. On a motion to the king's bench for a *mandamus* to the sessions to alter the minutes of the verdict according to the fact, &c., on an affidavit that the verdict was erroneously entered on the trial, the court refused to interfere with the minutes, the quarter sessions being a court of competent criminal jurisdiction (*d*).

Recording the verdict.

In recording a verdict the word misdemeanour is *nomen collectivum*, and if the indictment charges an assault with intent to ravish in one count and a common assault in another count, a statement on the record that the prisoner was found guilty of the misdemeanour and offence in the said indictment specified, is in effect that he has been found guilty of the whole matter charged by the indictment, so as to warrant a judgment of a sentence applicable to the first count of the indictment but inapplicable to the second count (*e*); but felony is not *nomen collectivum*, and in an indictment for felony whether it is or is not permitted to charge the same felony in different ways in different counts in the same indictment, when there are more than one count for felony in the indictment, it is wrong to record the award of jury process or verdict as for the felony aforesaid, and a *venire de novo* would be awarded on a writ of error by the Court of Queen's Bench (*f*). And where the

(*c*) See *R.* v. *Hewes*, 3 A. & E. 725; *sub nom. R.* v. *Justices of Suffolk*, 5 R. & M. 139.

(*d*) *R.* v. *Hewes*, 3 A. & E. 725. See *ante*, p. 315; *Walcott's case*, 4 Mod. 395, afterwards confirmed in Dom. Proc., 1 Stark. Crim. Pl. 2nd edit. 271, and *Reg.* v. *Yeoveley* (*Inhab.*), 8 A. & E. 806; 1 P. & D. 60, *ante*, p. 26. The record of a quarter sessions is not necessarily on parchment.

(*e*) *R.* v. *Powell*, 2 B. & A. 75; *Ryalls* v. *The Queen*, 11 Q. B. 781, 798.

(*f*) *Campbell* v. *Reg.*, 11 Q. B. 799.

indictment contains two counts for a misdemeanour, and the jury find a verdict of guilty on the second count, and are silent as to the other count, and the entry of the verdict is so made, and therefore the first count appears to be undisposed of, this is no error so as to vitiate the judgment on the second count, because each count stands by itself as a separate indictment and is not affected by the other (*g*); but it is better to apply to the court before which the trial is had to have the findings duly entered on all the issues. See *post*, p. 325.

Where more Counts than one in the Indictment.

A conviction, however, contrary to the opinion of the court at sessions, cannot be set aside; for the justices have no power, like the Court of Queen's Bench, to grant a new trial on the merits, except the trial has been void for irregularity (*h*), though they may request the jury to reconsider the verdict; and where the punishment is discretionary, they may mark their opinion of the case by passing a nominal sentence, or may recommend the party to the crown, through the secretary of state, as a proper object of pardon, and may respite execution on the judgment (*i*). A verdict of acquittal, when returned on a valid indictment, is always conclusive when pleaded in bar to any subsequent indictment *for the same charge;* but does not prevent a party from being afterwards indicted on another charge having reference to the same transaction. Except when on a charge of larceny it appears to be embezzlement, or *vice versâ* (*k*), or on a charge of false pretences if it appear to be larceny (*l*). But apart from statute, if a party be acquitted of a felony, on the ground that the proof only sustains a charge of misdemeanour, he may afterwards be tried on a bill found for the misdemeanour. A new trial of the same indictment is never granted by any court after a verdict of *acquittal* (*m*), not even in the Court of Queen's Bench, after a verdict on an indictment for obstructing a highway removed by certiorari (*n*). Even on indictments for not repairing roads and bridges, which are substantially civil proceedings, the utmost the Court of Queen's Bench will do after acquittal is to suspend the judgment until after the trial of another indictment, in order to prevent the acquittal from being given in evidence at such subsequent trial to disprove the liability of the parties

New trial.

(*g*) *Latham* v. *Reg.*, 33 L. J., M. C. 197; *Reg.* v. *Jones*, 2 Moo. C. C. 94.

(*h*) Per *Denison*, J., 1 Burr. 572; speaking, however, of an inferior court, which a quarter sessions is not, *ante*, p. 63; and see *R.* v. *Smith*, 8 B. & C. 343, and the cases cited 2 Tidd, Prac. 9th ed. 905.

(*i*) 2 Hale, P. C. 309. See *R.* v. *Parry*, 7 C. & P. 862.

(*k*) 24 & 25 Vict. c. 96, s. 72.

(*l*) *Ibid.* s. 88.

(*m*) *R.* v. *Reynell*, 6 East, 315; see *R.* v. *Parry*, 7 C. & P. 836; *Reg.* v. *Brice*, 2 B. & A. 606; *R.* v. *Cohen*, 1 Stark. N. P. 516; *R.* v. *Burbon*, 5 M. & S. 392.

(*n*) *Reg.* v. *Johnson*, 29 L. J., M. C. 133.

Discharge of prisoners.

acquitted (*l*). Acquitted prisoners may, it seems, be detained till the grand jury is discharged. Prisoners against whom no bill is preferred or found, are discharged at the end of the sessions by proclamation.

Forfeitures, &c. abolished.

Since the passing of the 33 & 34 Vict. c. 23, no confession, verdict, conviction, or judgment of or for any felony shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in that act is to affect the law of forfeiture consequent upon outlawry (*m*). Provided nevertheless, that if any person hereafter convicted of felony, for which he shall be sentenced to penal servitude, or any term of imprisonment with hard labour, or exceeding twelve months, shall at the time of such conviction hold any military or naval office, or any civil office under the crown or other public employment, or any ecclesiastical benefice, or any place, office, or emolument in any university, college or other corporation, or be entitled to any pension or superannuation allowance payable by the public, or out of any public fund, such office, benefice, employment or place shall forthwith become vacant, and such pension, superannuation, allowance or emolument shall forthwith determine and cease to be payable unless such person shall receive a free pardon from her Majesty within two months after such conviction, or before the filling up of such office, benefice, employment or place if given at a later period; and such person shall become, and (until he shall have suffered the punishment to which he had been sentenced, or such other punishment as by competent authority may be substituted for the same, or shall receive a free pardon from her Majesty) shall continue thenceforth incapable of holding any military or naval office, or any civil office under the crown or other public employment, or any ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either house of parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever within England, Wales, or Ireland.

Defects cured by verdict or judgment after plea or otherwise.

As judgment would formerly have been arrested on an indictment for a defect which, in a civil proceeding, would only have been ground for special demurrer, *e. g.*, if a plea to an indictment against a parish for not repairing a way does not aver who is liable to repair by custom, tenure, &c. (*n*); and, therefore, in order to prevent any informality in respect of the technicalities which had come to be required in indictments, and which have been alluded to before at p. 163, causing a miscarriage of justice, it is enacted by 7 Geo. 4, c. 64, s. 20, "That no judgment

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(*l*) *R.* v. *Wandsworth* (*Inhab.*), 1 B. & A. 63; *Reg.* v. *Challicombe*, 6 Jurist, 481; *R.* v. *Sutton*, 5 B. & Ad. 52.

An acquittal is never *conclusive* evidence for the party acquitted, for it concludes no fact as a conviction does; *Crosby* v. *Leng*, 12 East, 410. See 1 B. & Ald. 63.

(*m*) Sect. 1.

(*n*) *R.* v. *Eastrington Inhabs.*, 5 A. & E. 765—770.

upon any indictment or information for any felony or misdemeanour, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'by force and arms,' nor for the insertion of the words 'against the form of the statute' instead of 'against the form of the statutes,' or *vice versâ;* nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed in any case where the time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or exhibiting the information, or on an impossible day, or on a day that never happened; nor for the want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence."

Judgment not to be stayed or reversed for certain Defects.

And by sect. 21, *no judgment after verdict* upon any indictment or information for any felony or misdemeanour shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer on an insufficient suggestion; nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors; nor because any person has served on the jury who has not been returned as a juror by the sheriff or other officer; and where the offence charged has been created or else subjected to a greater degree of punishment by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

A verdict cures, by the Common Law, any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer; so that if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict and there s no distinction in such a case between the pleadings in civil and criminal cases (*o*).

Defects in indictment cured by verdict at Common Law.

An indictment charged a conspiracy at common law to do an act contrary to the Debtors Act, 1869, that is to say, that

(*o*) 1 Wms. Saund. 228, n. (1), and authorities there cited; *Heymann* v. *The Queen*, L. R., 8 Q. B. 102; *Reg.* v. *Goldsmith*, L. R., 2 C. C. R. 74; 42 L. J., M. C. 94.

Defects in Pleadings cured by Verdict.

being a trader and liable to become bankrupt, within four months before the presentation of a bankruptcy petition, fraudulently to remove property of the trader to the value of 10*l.*, without containing any allegation that it was in contemplation of a petition in bankruptcy, the omission was held, upon a writ of error, cured by verdict, though the court say that it might possibly have been a good objection on demurrer (*p*). And under an indictment against a bankrupt for not discovering his property on his examination, contrary to the 221st sect. of the Bankruptcy Act (*q*), inasmuch as the indictment followed the words of the section, an omission to state that he had such property was held to be cured by verdict, and an objection to the indictment for duplicity in alleging two distinct offences is no ground for a writ of error, though it may properly form ground for an application to the judge at the trial to quash part of the indictment, or might possibly be taken by demurrer (*r*).

So, upon an indictment for receiving goods unlawfully obtained by false pretences, an omission to set forth the particular false pretences made use of, even if an objection on demurrer, was held to be cured by verdict (*s*).

Statutory offences after verdict are sufficiently described in the words of the statute.

And by statute 7 & 8 Geo. 4, c. 64, s. 21, where an offence has been created by any statute or subjected to any greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute (*t*).

Section 13.

of judgment and sentence and order of restitution.

On plea by the party charged, or verdict by the jury, of guilty, the party charged is said to be *convicted* of the crime whereof he stands indicted (*u*). On that conviction *judgment* may or may not follow (*x*). The convicted party, if present in court, may now be called on to say whether judgment should not be passed on him. If any errors appear on the face of the

(*p*) *Heymann* v. *The Queen*, L. R., 8 Q. B. 102.
(*q*) 24 & 25 Vict. c. 134.
(*r*) *Nash* v. *The Queen*, 4 B. & S. 935; 33 L. J., M. C. 94.
(*s*) *Reg.* v. *Goldsmith*, L. R., 2 C. C. R. 74; 42 L. J., M. C. 94; *Latham ats. Reg.*, 5 B. & S. 135; 33 L. J., M. C. 197.
(*t*) *Reg.* v. *Goldsmith*, 42 L. J., M. C. 94; L. R., 2 C. C. R. 74.
(*u*) 4 Bla. Com. 362, 329.
(*x*) *Ibid.*, see 13 L. J., M. C. 125; and *Sutton* v. *Bishop*, 1 W. Bla. 665; 4 Burr. 2283.

indictment which are not cured by verdict, (as to which, see *ante*,) this is the time for him to move the court to arrest (or stay) the judgment (*y*), or to offer something in extenuation of his offence. If the court thinks the indictment bad, and not cured by verdict, the judgment may be suspended, so that another and amended bill may be preferred (*z*), to which, if found, the prisoner must plead, though at an adjourned session, if the prior session has been properly adjourned (*a*).

Motion to arrest the Judgment.

Thus, where an indictment for receiving stolen goods omitted to allege a scienter in the prisoner, owing to the count being drawn with the prosecutor's name being inserted instead of the prisoner's before that allegation, the prisoner had a right to move in arrest of judgment, and to have the judgment arrested on that ground (*b*). Thus, the want of the allegation of a scienter in such a case is not deemed a formal defect within the 25th sect. of the 14 & 15 Vict. c. 100, which requires every objection to an indictment for any formal defect apparent on the face thereof to be taken by demurrer or motion to quash the indictment before the jury shall be sworn, and not afterwards.

Motion in arrest of judgment.

In the case of an indictment with some good and some bad counts, after a verdict for the crown upon all the counts, the court ought to arrest the judgment on the bad counts and pass sentence on the good counts. Should it, however, have pronounced judgment generally, on a writ of error the court of error may now order judgment to be arrested on all the bad counts and pronounce the proper judgment on all the good counts, or on the one good count, if one only be good (*c*).

So, after verdict the words of the different counts of an indictment will be construed *ut res magis valeat quam pereat*, and so as to avoid, if possible, a repugnancy; thus words in one incorporating another count will be restrained, so as to limit their meaning to apply to so much only as will make the count

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(*y*) 4 Bla. Com. 375.

(*z*) *Ibid.*; 3 Bla. Com. 407.

(*a*) *Reg.* v. *Goddard*, Ld. Raym. 920. A person was indicted for a misdemeanour in fixing a lighted candle in a closet, under certain wooden stairs in the house of J. R., of which house he the prisoner was then *possessed* for a certain unexpired term, and for putting matches about and against the said lighted candle, with a wicked and malicious intention, by means thereof then and there *feloniously* to set fire to the aforesaid house of the said J. R., and to burn and consume the same. It was objected in arrest of judgment, that alleging the act to be done *feloniously*, made it necessary to prove a felony; which the possession of the house by the prisoner prevented. But Lord *Mansfield* and the court rejected the word *feloniously* as surplusage, and repugnant to the legal import of the offence charged, and gave judgment against the defendant for the misdemeanour of which he had been in fact convicted; *R.* v. *Scofield*, East's P. C. 1028; *R.* v. *Holmes*, *id.* 1023.

(*b*) *Reg.* v. *Larkin*, Dears. C. C. 365; 23 L. J., M. C. 125.

(*c*) *Reg.* v. *Holloway*, 2 Den. C. C. 287.

Arrest of Judgment.

containing the words of reference good (*e*). An irregularity in the trial may be made the ground for quashing the verdict and ordering a *venire de novo:* thus, where the record at the quarter sessions, after stating that the defendants were indicted for stealing oats, to which they pleaded not guilty, and a verdict of guilty thereon, added, "that because it appeared to the justices that after the jury had retired one of them had separated from the other jurors and conversed respecting the verdict with a stranger, it was considered that the verdict was bad," and it was therefore quashed, and a *venire de novo* awarded to the next sessions, and it then proceeded to set out the appearance of the parties at such sessions, and the trial and conviction by the second jury, whereupon all and singular the premises being seen and considered judgment was given, it was held on a writ of error that such judgment was right (*f*).

Of postponing sentence.

Sentence is usually passed immediately, or at all events during the sessions, but if at the end of the sessions the court has still doubt respecting the application of the law to the fact, or of the fact to the indictment, or wishes time to examine the circumstances of the offence and the character of the offender, the sessions should be adjourned to some future day, before or not later than that on which the next sessions would be held, in order to give opportunity for consultation and more matured advice or inquiry, as the case may require (*g*). A witness being indicted for perjury is not a reason for postponing sentence (*h*). An improper prayer of judgment in any criminal pleading subsequent to the indictment, as, that the defendant may answer over, where it should have been a prayer of final judgment against him, shall not bind the court, but it will give such judgment as by law ought to be given (*i*). Upon an adjournment, however, the prisoner will either be recommitted to custody or, if he has been out on bail, be allowed to enter into a new recognizance to appear at the period of adjournment, or when called on to receive judgment, according to the discretion of the justices. It is scarcely necessary to add, that this delay of sentence being a forbearance in favour of the prisoner, whether it be in compliance with his solicitation, or emanate immediately from the court, it would not be compatible with the claims of justice to place the security of his person for receiving the judgment of the law upon a *more* precarious foundation *after* verdict, than it was *before;* and that, in the circumstances under contemplation, some reference is due to the application of the prosecutor, as well as to the opinion of the court, respecting the

(*e*) *Reg.* v. *Craddock,* 2 Den. C. C. 31; 20 L. J., M. C. 1; *Reg.* v. *Huntley,* 29 L. J., M. C. 70; Bell, C. C. 239.
(*f*) *R.* v. *Fowler,* 4 B. & A. 273.
(*g*) *Ante,* p. 74; *post,* Chap. XII. Sect. 4.
(*h*) *R.* v. *Haydon,* 1 W. Bl. 404; 3 Burr. 1387.
(*i*) *R.* v. *Josiah Taylor,* 3 B. & C. 512. See *Street* v. *Hopkinson,* Stra. 1055; Cas. t. Hard. 345.

recognizances by which the liberation of his person may be justified.

Of the Sentence.

In cases of felony, the prisoner is placed at the bar, and the sentence is pronounced by the chairman. Every sentence pronounced by any court of general or quarter sessions or adjourned sessions of the peace takes effect from the time of the same being pronounced, unless the court otherwise direct (*k*).

Improper judgment may be corrected on a writ of error.

Formerly if a judgment of quarter sessions were bad for excess of punishment, or inflicting hard labour where such punishment is not justified by statute, *e.g.*, for sentencing a convict to imprisonment or penal servitude for a longer time than is allowed by law, was bad *in toto*, and would not operate as a good judgment for the proper period, and would be reversed in error (*l*). But now by 11 & 12 Vict. c. 78, s. 15, whenever any writ of error shall be brought upon any judgment, upon any indictment, information, presentment or inquisition in any criminal case and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, &c. But in practice the occurrence of such a mistake as an excess of punishment would be corrected by the Home Secretary, upon an application to him stating the circumstances.

Punishment in cases of felony.

The punishment of a felony is, in all cases, that prescribed by the statute or statutes specially relating to it (*m*); and is awarded in terms by sentence passed by the court after conviction. The benefit of clergy was abolished in 1827 (*n*); as was also the distinction between grand and petty larceny: and every larceny is now subject to the same incidents as grand larceny (*o*).

In felonies where no punishment specially provided.

Persons convicted of "any felony, for which no punishment is specially provided by any act," are punishable by penal servitude for seven years or imprisonment for any term not exceeding two years, and in the case of a male offender, with one, two, or three public or private whippings, if the court thinks fit, in addition to the imprisonment (*p*). Hard labour may also be added to the imprisonment in the common gaol or house of correction (*q*).

Where penal servitude may

By 9 & 10 Vict. c. 24, s. 1, in all cases where the court was

(*k*) 21 & 22 Vict. c. 73, s. 12.
(*l*) *R.* v. *West Riding of Yorkshire*, 7 T. R. 467; *R.* v. *Ellis*, 5 B. & C. 393; *Bourne* v. *Rex*, in error, 7 A. & E. 58; *Reg.* v. *Silversides*, 3 Q. B. 406.
(*m*) 7 & 8 Geo. 4, c. 28, s. 8.
(*n*) *Ibid.* s. 6.
(*o*) *Ibid.* c. 29, s. 2.
(*p*) *Ibid.* c. 28, s. 8; 20 & 21 Vict. c. 3, s. 2.
(*q*) 7 & 8 Geo. 4, c. 28, s. 9.

be given, imprisonment with or without hard labour may be substituted.

then by law empowered or required to award a sentence of transportation exceeding seven years, it was made lawful for such court at its discretion to award a sentence of transportation for a term of years not less than seven, or to award such sentence of imprisonment for any period not exceeding two years, with or without hard labour, as shall to the court in its discretion appear just under all the circumstances. But now by 20 & 21 Vict. c. 3, s. 2, no person shall be sentenced to transportation; and any who, if this act had not been passed, might have been sentenced to transportation shall be liable to be sentenced to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if this act had not been passed; and in every case where, at the discretion of the court, one of any two or more terms of transportation might have been awarded, the court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorized to be awarded instead of such terms of transportation: Provided always, that any person who might at the discretion of the court have been sentenced either to transportation for any term or to any period of imprisonment, shall be liable, at the discretion of the court, to be sentenced either to penal servitude for the same term or to the same period of imprisonment; and in any case in which before the passing of the said act sentence to seven years' transportation might have been passed, it shall be lawful for the court in its discretion to pass a sentence of penal servitude of not less than three years.

Transportation abolished.

Penal servitude substituted.

Penal servitude to be for not less than five years.

Since the passing of the Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), no person can be sentenced to penal servitude in respect to any offence for a period of less than five years; and where, under any act then in force, a period of less than five years is the utmost sentence of penal servitude that can be awarded, a period of five years shall, in respect of any offence committed after that act in such act, be substituted for the less period. And where, under any act then in force, a period of either less or more than five years may be awarded as a sentence of penal servitude, the least sentence of penal servitude that can be awarded under that act shall, in respect to any offence committed after that act, be a period of five years. And where any person shall on indictment be convicted of any crime or offence punishable with penal servitude after having been previously convicted of felony, or in Scotland of any crime (whether such previous conviction shall have taken place upon an indictment or under the provisions of the 18 & 19 Vict. c. 126), the least sentence of penal servitude that can be awarded in such a case shall be a period of seven years.

After previous conviction for felony, not less than seven years.

Under that act, it has been decided that the previous conviction must be charged in the indictment and duly proved in evidence against the prisoner, who is entitled to have the verdict of the jury upon the question of his identity, in order

to render the passing of a sentence of seven years' penal servitude obligatory (*r*). *After previous Conviction.*

By 7 Will. 4 & 1 Vict. c. 90, it was recited that, by the laws then in force, it was lawful for the court before whom any person should be convicted of certain offences, for which imprisonment, or imprisonment with hard labour, may be awarded, to direct that the offender should be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to such court in its discretion should seem meet, and it was enacted, that it should not be lawful for any court to direct that any offender should be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of one year. As to solitary confinement.

Whenever solitary confinement may be awarded for any indictable offence under the 24 & 25 Vict. c. 96, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year (*s*).

And as to offences against the act, relating to malicious injuries to property, a similar enactment is contained in 24 & 25 Vict. c. 97, s. 75.

And as to coinage offences see 24 & 25 Vict. c. 99, s. 40.

So as to offences against the act, relating to offences against the person, there is a similar enactment in 24 & 25 Vict. c. 100, s. 70.

By 34 & 35 Vict. c. 112, s. 8, where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, the court having cognizance of such indictment may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or such less period as the court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes. Police supervision.

By sect. 9, the rules contained in the 24 & 25 Vict. c. 96, s. 116, in relation to the form of and the proceedings upon an indictment for any offence punishable under that act, committed after previous conviction shall, with the necessary variations, apply to any indictment for committing a crime under this act, after previous conviction for a crime, whether the crime charged in such indictment or the crime to which such previous conviction relates be or be not punishable under the said act of 24 & 25 Vict. c. 96.

By sect. 20, the expression crime means in England or Ireland any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the

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(*r*) *Reg.* v. *Willis*, L. R., 1 C. C. R. 363; 41 L. J., M. C. 102; *Reg.* v. *Summers*, 38 L. J., M. C. 62; L. R, 1 C. C. R. 182.

(*s*) 24 & 25 Vict. c. 96, s. 119.

Of the Sentence.

offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under 24 & 25 Vict. c. 96, s. 58.

Commitment to certified reformatory school.

Whenever any offender who, in the judgment of the court or justices before whom he is charged is under the age of sixteen years, is convicted on indictment of an offence punishable with penal servitude or imprisonment, and is sentenced to be imprisoned for the term of ten days or a longer term, the court or justices may also sentence him to be sent at the expiration of his period of imprisonment to a certified reformatory school, and to be there detained for a period not less than two years and not more than five years: Provided always, that a youthful offender under the age of ten years shall not be so directed to be sent to a reformatory school, unless he has been previously charged with some crime or offence punishable with penal servitude or imprisonment, and is sentenced in England by a judge of assize or court of general or quarter sessions.

The particular school to which the youthful offender is to be sent may be named either at the time of his sentence being passed, or within seven days thereafter by the court or justices who sentenced him, or in default thereof at any time before the expiration of his imprisonment by any visiting justice of the prison to which he is committed.

In choosing a certified reformatory school the court or justices or visiting justice shall endeavour to ascertain the religious persuasion to which the youthful offender belongs, and so far as possible a selection shall be made of a school conducted in accordance with the religious persuasion to which the youthful offender appears to the court or justices or visiting justice to belong, which persuasion shall be specified by the court and justices or visiting justice (*t*). In case the offender is ordered to be sent to a school not conducted in accordance with the religious persuasion of the offender, the parent, step-parent or guardian, or if there be none such, the god-parent or nearest adult relative may apply to the court who passed sentence to send or remove the offender to a certified reformatory school conducted in accordance with the religious persuasion of the offender, and the court shall comply with such request upon proof of such religious persuasion, and that the application was made before the offender was sent to the school, or within thirty days after his arrival at such school; and secondly, that the applicant should show to the satisfaction of the court or visiting justice that the managers of the school named by him are willing to receive the offender (*u*).

Order of detention of children in a certified industrial school.

By 34 & 35 Vict. c. 112, s. 14, where any woman is convicted of a crime (for the meaning of crime, see sect. 20, *ante*), and a previous conviction of a crime is proved against her, any children of such woman under the age of fourteen years who

(*t*) 29 & 30 Vict. c. 117, s. 14.
(*u*) *Ibid.*

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may be under her care and control at the time of her conviction for the last of such crimes, and who have no visible means of subsistence, or are without proper guardianship shall be deemed to be children to whom in Great Britain the provisions of the Industrial Schools Act, 1866, apply, and the court by whom such woman is convicted, or two justices, or a magistrate shall have the same power of ordering such children to be sent to a certified industrial school as is vested in two justices or a magistrate by the 14th section of the Industrial Schools Act, 1866, in respect of the children in the said section described.

Detention in certified industrial school of children of a convicted mother.

By 29 & 30 Vict. c. 118, s. 18 (The Industrial Schools Act, 1866), the order of justices or a magistrate sending a child to a school (in this act referred to as the order of detention in a school) shall be in writing signed by the justices or magistrate, and shall specify the name of the school.

The school shall be some specified industrial school (whether situate within the jurisdiction of the justices or magistrate making the order or not), the managers of which are willing to receive the child; and the reception of the child by the managers of the school shall be deemed to be an undertaking by them to teach, train, clothe, lodge and feed him during the whole period for which he is liable to be detained in the school, or until the withdrawal or resignation of the certificate of the school takes effect, or until the contribution out of money provided by parliament towards the custody and maintenance of the children detained in the school is discontinued, whichever shall first happen.

In determining on the school the justices or magistrates shall endeavour to ascertain the religious persuasion to which the child belongs, and shall, if possible, select a school conducted in accordance with such religious persuasion, and the order shall specify such religious persuasion.

The order shall specify the time for which the child is to be detained in the school, being such time as to the justices or magistrate seems proper for the teaching and training of the child, but not in any case extending beyond the time when the child will attain the age of sixteen years.

By sect. 19, two justices or a magistrate, while inquiry is being made respecting a child or respecting a school to which he may be sent, may by order signed by them or him, order the child to be taken to the workhouse, or poorshouse of the union, parish or combination in which he is found or resident, or where (in Scotland) there is no such poorshouse, or the poorshouse is at an inconvenient distance, to such other place, not being a prison, as the magistrate thinks fit, the occupier whereof is willing to receive him, and to be detained therein at the cost of the union, parish or combination for any time not exceeding seven days, or until an order is sooner made for his discharge, or for his being sent to a certified industrial school; and the guardians of the poor for the union or parish, or the keeper of the poorshouse, or other person to whom the order is

Condemning Prisoner to pay the Costs of Prosecution or make Compensation to Party aggrieved.

addressed, are and is hereby empowered and required to detain him accordingly.

By sect. 22, the order of detention in a school shall be forwarded to the managers of the school with the child, and shall be a sufficient warrant for the conveyance of the child thither and his detention there.

By sect. 23, the expense of conveying to a certified industrial school a child ordered to be sent there shall be defrayed by the police authorities by whom he is conveyed, and shall be deemed part of the current expenses of those police authorities.

Condemning prisoner in the costs of the prosecution.

By 33 & 34 Vict. c. 23, s. 3, any court by which judgment shall be pronounced or recorded upon the conviction of any person for treason or felony, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, if to such court it shall seem fit so to do; and the payment of such costs and expenses or any part thereof may be ordered by the court to be made out of any moneys taken from such person on his apprehension, or may be enforced at the instance of any person liable to pay or who may have paid the same, in such and the same manner (subject to the provisions of this act) as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time be enforced: Provided that in the meantime and until the recovery of such costs and expenses from the person so convicted as aforesaid or from his estate, the same shall be paid and provided for in the same manner as if this act had not passed; and any money which may be recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses may have been paid or defrayed.

Order for compensation for loss of property lost through a felony.

By sect. 4, it shall be lawful for any such court as aforesaid (*i. e.* any court recording a conviction for felony or treason), if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding 100*l.*, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under the last preceding section of this act.

Quære, whether this is a forfeiture or penalty so as to make person aggrieved include body corporate under 7 & 8 Geo. 4, c. 28, s. 14.

The punish-

The punishments in ordinary cases of misdemeanour, where

Of the Sentence—Punishment of Imprisonment in Misdemeanours.

they are not specially apportioned by any act of parliament, are fine or imprisonment, or both, in the discretion of the court; with a further requisition of security (if the court shall deem fit) for the good behaviour of the party convicted, during a reasonable period.

On conviction of any indictment of any assault with or without battery or wounding, or either of them, the defendant may, in addition to any other sentence, be adjudged to pay to the prosecutor his actual necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall, by affidavit or other inquiry and examination, ascertain to be reasonable; and unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment, if any, to which the offender may be sentenced for the offence (*x*).

Punishments for misdemeanours.

Order for payment of prosecutor's costs by the defendant in assaults.

In cases of misdemeanour, the court were formerly not authorized to sentence parties to be kept to hard labour in addition to imprisonment, and their confinement in idleness often became a cause of their increased depravity. But by 3 Geo. 4, c. 114 the court may sentence to imprisonment with *hard labour* for not exceeding the term for which they might previously imprison, either in addition to or in lieu of any other punishment which might then be inflicted, in the following cases:—

Hard labour.

Attempt to commit felony.

Riot.

Keeping a common gaming-house, a common bawdy-house, or a common disorderly house.

Receiving stolen goods, the stealing whereof is a misdemeanour, knowing them to have been stolen (*y*).

Knowingly uttering counterfeit money (*z*), and other misdemeanours under 24 & 25 Vict. c. 99.

Obtaining money, &c. by false pretences with intent to defraud (*a*).

By 9 Geo. 4, c. 69, s. 107, for having entered ground by night with intent there illegally to take or kill game or rabbits, with any instrument for the purpose of taking game, after two summary convictions for the same offence; see *post*, Chap. IX.

By 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any one of the offences following, that is to say:

Any cheat or fraud punishable at common law;

Any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice;

(*x*) 24 & 25 Vict. c. 100, s. 74.
(*y*) *Ibid.* c. 96, s. 95. See *post*, Chap. IX.
(*z*) *Ibid.* c. 99, s. 9. See *post*, Chap. IX.
(*a*) *Ibid.* c. 96, s. 88. See *post*, Chap. IX.

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Hard labour in misdemeanours.

Any escape or rescue from lawful custody on a criminal charge;

Any public and indecent exposure of the person;

Any indecent assault, or any assault occasioning actual bodily harm;

Any attempt to have carnal knowledge of a girl under twelve years of age;

Any public selling or exposing for public sale or to public view of any obscene book, print, picture, or other indecent exhibition;

it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

Hard labour and fines in assaults.

By 24 & 25 Vict. c. 100, s. 38, the court may sentence the offender to be imprisoned with or without *hard labour*, for any term not exceeding two years, and also to fine such offender, and require him to find sureties for keeping the peace, in the following cases of *assault*, some of which, it will be seen, are, and others are not, included in the former statute:—

Assault with intent to commit felony.

Assault upon any peace officer, or revenue officer, in the due execution of his duty, or upon any person acting in aid of such officer.

Assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person for an offence for which he or they may be liable by law to be apprehended or detained.

And by 34 & 35 Vict. c. 32, s. 1, for offences against the Criminal Law Amendment Act, 1871.

And by 24 & 25 Vict. c. 100, s. 47, in cases of *common* assaults.

Imprisonment in gaol or house of correction, when.

The place of imprisonment was formerly always the common gaol (*b*) or house of correction (*c*) of the county in which the prisoner is convicted. By 5 & 6 Will. 4, c. 38, s. 4, whenever any person shall be convicted at any sessions of any offence for which he or she shall be liable either to the punishment of transportation or imprisonment, it shall be lawful for the court, if it shall so think fit, to commit such person to any house of correction for such county in execution of his or her judgment; and in case of the commitment of any person sentenced to transportation, all the powers, provisions, and authorities for removal of offenders sentenced to transportation, given by any former act to sheriffs or gaolers, shall be, and the same are hereby extended and given to the keepers of houses of correction in whose custody such last-mentioned offenders shall be in.

(*b*) 5 Hen. 4, c. 10.

(*c*) 5 Ann. c. 6, s. 2, at least for larceny. See *Ex parte Brownsell*, 2 East's P. C. 738.

[The rest of the section applies to capital offences.] And now every prison to which the Prisons Act, 1865 (28 & 29 Vict. c. 126) applies, shall be deemed to be a gaol and house of correction. *Place of Imprisonment.*

By 31 Car. 2, c. 3, s. 9, the custody of prisoners could not be changed after trial even to a place within the same county, except by habeas corpus or other legal writ; but see now the provisions of the Prisons Act, 1865, 28 & 29 Vict. c. 126, ss. 64, 65. But now a secretary of state may direct any convict under sentence or order of transportation, who appears to be free from any putrid or infectious distemper, to be removed from the gaol, &c. in which he shall be confined to the Millbank prison, there to continue till transported, conditionally pardoned, entitled to freedom, or removed to another prison, there to be imprisoned for the terms of their sentences (*d*). Eight hundred male and four hundred female prisoners may be confined at one time in the Millbank Penitentiary (*e*). One pentagon is set apart for soldiers and marines (*f*).

Whenever whipping may be awarded for any indictable offence under 24 & 25 Vict. c. 96, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence (*g*); and a similar provision, enacted with respect to the act consolidating the law relating to malicious injuries to property, is contained in 24 & 25 Vict. c. 97, s. 75; and as to offences against the person, there is a similar enactment in 24 & 25 Vict. c. 100, s. 70. No offender shall be whipped more than once for the same offence (*h*). Whipping.

The apportionment of punishment, which, in almost all instances cognizable at sessions, is now left to the discretion of the court, is the most important duty cast on the justices. It is scarcely necessary to observe, that it should not only be proportioned to the offence in degree, but adapted to it in kind; measured not only by the abstract enormity of the offence, but by the age, sex, and circumstances of the offender; and regulated by the balance of public benefit to be derived from the exposure of the criminal and the notoriety of his punishment, or from the silence dictated by a decent regard to the nature of his offence. In many cases of assaults, &c. the additional re- Considerations as to the inflicting of punishment.

(*d*) 6 & 7 Vict. c. 26, ss. 12, 14, 20; section 1 repeals several prior enactments.

(*e*) *Id.* s. 15; 59 Geo. 3, c. 136.

(*f*) 2 & 3 Vict. c. 56, ss. 20, 21. As to the prison for juvenile offenders at Parkhurst, in the Isle of Wight, see 2 & 3 Vict. c. 82. The power of changing places of confinement is applied to persons undergoing sentence of penal servitude under 16 & 17 Vict. c. 99, s. 7.

(*g*) 24 & 25 Vict. c. 96, s. 119.

(*h*) 25 Vict. c. 18.

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quisition of security for the good behaviour of the offender, when he leaves his confinement, is proper; and especially where the evidence shows a temper likely to endanger the public peace, or habits which tend to subvert the public morals.

As to awarding imprisonment, &c., to commence at the expiration of a sentence then being undergone.

Where a party was actually in custody, under sentence of imprisonment, for one *misdemeanour*, and was afterwards tried for another like offence before the original term is expired, sentence of further imprisonment might always be given, to commence from the termination of the first (*i*); and it is now enacted (*k*), that wherever sentence shall be passed for *felony* on a person already imprisoned under sentence for *another crime*, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which the party shall have been previously sentenced; and where such person is already under sentence, either of imprisonment or transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation, to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded.

Fine and sureties for keeping the peace —in what cases.

By the 24 & 25 Vict. c. 96, s. 117, whenever any person shall be convicted of any indictable misdemeanour under that act, the court may, if it shall think fit, in addition to, or in lieu of, any of the punishments by this act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour.

Indictable misdemeanours against Larceny Act (24 & 25 Vict. c. 96).

And in case of any felony punishable under this act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized.

Felonies punishable under same act.

Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

As to misdemeanours and felonies punishable under the act relating to malicious injuries to property.

As to indictable misdemeanours punishable under the 24 & 25 Vict. c. 97, and felonies punishable under the same act, a similar enactment to the above is contained in sect. 73 of that act.

Coinage offences.

So in the act relating to coinage offences, a similar enactment is contained with respect to indictable misdemeanours and felonies punishable under that act (*l*).

With respect to indictable misdemeanours and felonies punish-

(*i*) *R.* v. *Wilkes*, 4 Burr. 2577; *R.* v. *Williams*, 1 Lea. 536.
(*k*) 7 & 8 Geo. 4, c. 28, s. 10.
(*l*) 24 & 25 Vict. c. 99, s. 38.

able under the act relating to offences against the person, a similar enactment is provided by 24 & 25 Vict. c. 100, s. 71.

Where a party is to receive any corporal punishment, judgment cannot be given against him in his absence (*m*). We have seen that a party charged with an offence less than felony need not be present at his trial at the quarter sessions, after he has once appeared and pleaded on that or a previous occasion (*n*). It is said that a defendant indicted for a misdemeanour in the Queen's Bench, may submit to a fine in his absence, if he has a clerk in court who will undertake for it (*o*). It seems, however, that a defendant so indicted at sessions cannot do so by his attorney, as that court has no jurisdiction over the latter by attachment (*p*). *Hawkins*, however, lays it down that that court may assess a fine without the actual presence of the defendant (*q*). In the Queen's Bench a *capias ad satisfaciendum domino regi pro fine* may be issued to bring him in to receive judgment (*r*); and so in indictments removed there by *certiorari* (*s*); but it is doubtful whether the court of quarter sessions can issue a *capias* to the sheriff for any other purpose than answering an indictment found (*t*).

However, *Lambard* says (*u*), that where the conviction is for breach of the peace, riot, contempt, or other offence, for which no certain fine is appointed, the judgment is that the party shall be taken (that is, if absent) to satisfy the queen for her fine; and, thereupon, the *capias pro fine* may issue (*x*); and if the party cannot be found, other judicial process (*viz.* one *capias utlagatum* only if after judgment) (*y*), issues till he is outlawed (*z*).

But if he is brought in (continues *Lambard*), then is he a prisoner, and the justices of peace are then by their discretion to assess the fine, estreat it, and deliver him. "For" (adds this ancient writer) "in no case, as I take it, can they of themselves levy any fine or forfeiture due to the queen, inasmuch as not they, but the sheriff, is accountant for all such matters."

(*m*) *R.* v. *Hann*, 3 Burr. 1786; *Duke's case*, Salk. 400; *R.* v. *Templeman*, *id.* 55; Skinner, 684; 2 Hawk. c. 48, s. 17; other cases collected, 1 Chit. Crim. L. 695.

(*n*) *Ante*, p. 200; 4 Bla. Com. 375; 1 Chit. Crim. L. 1st ed. 411, 532.

(*o*) *R.* v. *Templeman*, Salk. 55; *Anon.*, 6 Mod. 16.

(*p*) See *Reg.* v. *Birmingham and Gloucester Railway Company*, 9 C. & P. 469.

(*q*) Hawk. b. 2, c. 48, s. 17, citing Salk. 56, *ut supra*, and Skinn. Rep. 684, *S. C.*; also Salk. 400.

(*r*) *R.* v. *Templeman*, Salk. 55; *Duke's case*, Salk. 400.

(*s*) 2 Hale, 193.

(*t*) Dalton's Just. c. 193; 2 Hawk. c. 27, s. 8, citing Lambard, b. 4, c. 8, and Precedents at end of that work; 1 Chit. Cr. L. 338, 1st ed.

(*u*) Eiren. Chap. XVI.

(*x*) 2 Hawk. c. 27, s. 1; 1 Chit. Cr. L. 721, 1st ed.

(*y*) 2 Hawk. c. 27, s. 113.

(*z*) It seems from some authorities, that process of outlawry may issue from the court of quarter sessions itself. See 2 Hale, 199; 12 Co. 133; but see next page.

Of Fines.

A joint award of one fine against several defendants is erroneous; for otherwise one who had paid his part might be imprisoned till the others paid theirs (*a*).

Fines, how levied.

Fines imposed by quarter sessions and not paid are copied on a roll by the clerk of the peace, and sent to the sheriff, being his authority to levy the amount on the goods of the party in his own bailiwick (*b*), and under a later act to obtain a like levy in another county (*c*), or to take the defendant into custody, if there are no sufficient goods in either. The sheriff returns what has been done thereon to the next sessions; which return, with the above roll, is sent by the clerk of the peace to the commissioners of the treasury. The sheriff also sends there an annual account of those on whom fines which have been sent to him to levy have been imposed, and of the causes of non-payment, if not so levied. That account is in due course transmitted to the exchequer, so as to be ready to be enforced in the usual manner at suit of the crown (*d*). The same process is applied to the estreat of forfeited recognizances, and both subjects are treated hereafter, in Part II., On the Appellate Jurisdiction (*e*).

Outlawry after judgment in misdemeanours.

Proceedings to outlawry after judgment in misdemeanours are rare; but where the defendant who is sentenced to imprisonment for a misdemeanour does not surrender himself accordingly, and the regular steps to outlawry, of *capias utlagatum exigent*, &c. are taken, it seems that a judge of the Court of Queen's Bench, on certificate from the clerk of the peace that the outlawry is complete, will grant his warrant to apprehend him (*f*). Though it has been laid down that justices in sessions may issue process of outlawry on indictments found before them there, it seems the better opinion that it should issue from the court above, on the return of the record there from the quarter sessions on *certiorari* (*g*).

Fees.

The 55 Geo. 3, c. 50, is extended by the 8 Vict. c. 114, which enacts, that the provisions of 55 Geo. 3, c. 50, respecting the discharge of certain prisoners without payment of any fee, shall extend to all persons who now are or hereafter shall be charged with or indicted for any felony, or as accessory thereto, or with or for any misdemeanour, before any court of criminal jurisdiction in England, against whom no bill of indictment shall be found by the grand jury, or who on his, her or their trial shall be acquitted, or who shall be discharged by proclamation for want of prosecution; and that it is not and shall not be lawful to demand or take from any such persons any fee for

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(*a*) 2 Hawk. c. 48, s. 23, p. 635; 11 Co. 42 a, *Godfrey's case.*
(*b*) 3 Geo. 4, c. 46, s. 58. See *ante*, p. 59.
(*c*) 4 Geo. 4, c. 37.
(*d*) See the above statutes, *ante*, p. 59.
(*e*) See 16 & 17 Vict. c. 30, s. 2.
(*f*) 1 Chit. Cr. L. 352, 358; 2 Hawk. c. 27, s. 11; 5 T. R. 204.
(*g*) See authorities collected, 1 Chit. Cr. L. 348, 1st ed.; Bac. Ab. tit. *Outlawry* (B).

their appearance to the indictment or information, or for allowing them to plead thereto, or for recording their appearance or plea, or for discharging any recognizance.

Orders for payment of Money, &c.

Aid to discharged prisoners.

The court of quarter sessions, upon the application of a member of a prisoners' aid society, may, in the manner appointed, signify their approval of the society, and upon such certificate being granted, and so long as it is in force the society is to be deemed to be a certified prisoners' aid society; and upon the discharge of a prisoner the visiting justices may, instead of directing a sum of money to be paid by the governor of the gaol to the prisoner, direct such sum, not exceeding 2*l.*, to be paid to the treasurer of a certified prisoners' aid society on their receiving an undertaking that such sum shall be applied by the society for the benefit of the prisoner (*h*).

Order for delivery to owner of property unlawfully pawned.

Under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 30, if any person is convicted in any court of feloniously taking or fraudulently obtaining any goods or chattels, and it appears to the court that the same have been pawned with a pawnbroker, the court on proof of the ownership of the goods and chattels may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan, or of any part thereof, or without payment thereof, or any part thereof, as to the court according to the conduct of the owner and the other circumstances of the case seems just and fitting. Writs of restitution or orders for restitution of property stolen or obtained contrary to the Larceny Consolidation Act (24 & 25 Vict. c. 96), to the owner, may be granted under s. 100 of that act, for which see *post*, Chap. VIII. Sect. 1, p. 386.

Section 14.

Of Costs of Prosecutions and Defence.

Costs of prosecution in cases of felony, whether a bill be preferred or not.

The right to costs or expenses of a prosecutor and the witnesses in criminal cases depends upon statute.

By 7 Geo. 4, c. 64, s. 22, the court before which any person shall be prosecuted or tried for any felony is hereby authorized and required at the request of the prosecutor, or of any other person who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sums of money as shall seem reasonable and sufficient to reimburse

(*h*) 25 & 26 Vict. c. 44. And see the Prisons Act, 1865, 28 & 29 Vict. c. 126, ss. 42, 43.

Costs in Felonies.

such prosecutor and witnesses for the expenses they shall severally have incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein. And although no bill of indictment shall be preferred, it shall be lawful for the court, where any person shall, in the opinion of the court, *bonâ fide* have attended the court in obedience to any recognizance or subpœna, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expense which he or she shall have *bonâ fide* incurred by reason of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein shall be ascertained by the certificate of such magistrate or magistrates granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensations shall be ascertained by the proper officers of the court, subject nevertheless to the regulations to be established in the manner thereinafter mentioned.

Costs and expenses—what.

The costs and expenses of the prosecutor in preferring the indictment do not include an attorney's bill of costs for subpœnaing a witness, or for his own (the attorney's) travelling expenses to get information in support of the charge (*o*). The court has no power to allow the expenses of witnesses attending before the coroner upon an inquiry previous to the indictment (*p*). A party who is bound over to prosecute in the Central Criminal Court, or at the Assizes by the Court of Quarter Sessions, is entitled to his expenses under the statute (*q*); and so also to the costs of the argument on behalf of a prosecutor in the Court for Crown Cases Reserved (*r*), which should be ascertained by the officer of the latter court, and be by him certified to the clerk of the peace, who will act upon such certificate (*s*).

The costs of the prosecutor and of his witnesses in a case of felony, on his application, have been allowed where a bill was preferred, though neither the prosecutor or his witnesses were under recognizance, and only one witness was subpœnaed, on the ground of the difference in language between the 22nd and 23rd sections (*t*). When the prosecutor and his witnesses were bound over to appear on a charge of felony, but, by advice of counsel, a charge of misdemeanour at common law, for which costs could not be allowed alone, was preferred, a judge

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(*o*) *Reg.* v. *Savage and Venn*, Oxford Spring Ass. 1842, *Patteson*, J. Bill not found, MSS. Tyrwhitt; Dick. Q. S., 6th ed. by Talfourd, 974.

(*p*) *R.* v. *Rees*, 5 C. & P. 302; *R.* v. *Taylor*, *id.* 301.

(*q*) *R.* v. *Paine*, 7 C. & P. 135.

(*r*) *Reg.* v. *Cluderoy*, 3 C. & K. 205.

(*s*) *Reg.* v. *Lewis*, 1 D. & B. 326.

(*t*) *R.* v. *Butterwick*, 2 Moo. & R. 196, acted upon by *Lush*, J., in *Reg.* v. *Haines and others*, tried at Worcester Summer Assizes, 1874.—T.S.P.

made an order for the expenses of the prosecutrix and witnesses (*u*). *Of the order for Costs.*

The real prosecutor is entitled to his costs though his name may not appear on the back of the indictment (*x*). The person bound over by the magistrates to prosecute is the person to instruct the attorney for the prosecution, so as to enable the costs of the attorney engaged to be included in the order for costs; but in such a case as burglary, the person whose house is broken into is the person really interested in the prosecution, who ought to be bound over to prosecute (*y*). If the trial be postponed, the order for costs is postponed also till after the trial (*z*).

Since the 14 & 15 Vict. c. 55, s. 8, when any person shall appear to have been active in or towards the apprehension of any person charged *inter alia* with feloniously housebreaking, or with robbery from the person, or with horse stealing, bullock stealing, *i. e.*, ox, cow, heifer, &c. (*a*), or sheep stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, the court is hereby authorized and empowered in any of the cases aforesaid to order the sheriff of the county in which the offences shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her or their expenses, exertions and loss of time in or towards such apprehension; provided that nothing herein contained shall prevent the said court from also allowing to any such persons if prosecutors or witnesses, such costs, expenses and compensation as such court may be empowered to do. These rewards are not confined to cases where the person apprehending, &c. has had an actual loss of time, or been at an actual expense (*b*). Rewards for activity in apprehending felons.

By sect. 29 of the above statute, the sheriff of the county for the time being is hereby authorized and required upon sight of such order, forthwith to pay to such person or to any one duly authorized on his or her behalf the money, in such order mentioned, and every such sheriff may immediately apply for repayment of the same to the commissioners of the treasury, who, upon inspecting such order together with the acquittance of the person entitled to receive the money thereon, shall

(*u*) *Reg.* v. *Hanson*, 2 C. & K. 912.
(*x*) See *R.* v. *Sharpness*, 2 T. R. 47; *Reg.* v. *Kettleworth*, 5 T. R. 33.
(*y*) *Reg.* v. *Cook*, 1 F. & F. 389; *Reg.* v. *Yates*, 7 Cox, C. C. 363.
(*z*) *R.* v. *Hunter*, 3 C. & P. 591; *Re Young*, 2 Cox, C. C. 280. See, however, *R.* v. *Dwerryhouse*, 2 Cox, C. C. 446.
(*a*) *R.* v. *Gilbrass*, 7 C. & P. 444.
(*b*) *R.* v. *Barnes*, 7 C. & P. 166.

Costs in Misdemeanours.

forthwith order repayment to the sheriff of the money so by him paid without any fee or reward.

The 23rd section of 7 Geo. 4, c. 64, empowering the court to grant the costs of the prosecutor and witnesses in certain cases of misdemeanour, was, when passed, wholly new. It enacts, "That where any prosecutor or other person shall appear before any court on recognizance or subpœna, to prosecute or give evidence against any person indicted of any—

assault with intent to commit felony;
attempt to commit felony;
riot;
misdemeanour for receiving any stolen property, knowing the same to have been stolen;
assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer;
neglect or breach of duty as a peace officer;
assault committed in pursuance of any conspiracy to raise the rate of wages;
knowingly and designedly obtaining any property by false pretences (*c*);
wilful and indecent exposure of the person (*d*);
wilful and corrupt perjury, or of subornation of perjury;—
every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony;—
and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have *bonâ fide* attended the court in obedience to any recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony, provided that, in cases of misdemeanour, the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate." This last proviso is repealed by 14 & 15 Vict. c. 55, s. 1.

All the provisions of 7 Geo. 4, c. 64, s. 23, and of any other act concerning or applicable to the payment of such costs,

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(*c*) An indictment on 8 & 9 Vict. c. 100, for fraudulently winning money at cards, with intent to cheat, is within this provision; *Reg.* v. *Gardner*, 5 Cox, C. C. 201.

(*d*) This does not apply where the exposure is charged as done wilfully, &c. (without adding *publicly*) with a view to incite another man to commit with the defendant an unnatural crime; *Reg.* v. ——, 8 A. & E. 589; 3 N. & P. 637.

expenses and compensation in cases of the said misdemeanours, shall be applicable to the cases *inter alia* of— *Costs in Misdemeanours.*

unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years;

conspiring to charge any person with any felony, or to indict any person of any felony, and of conspiring to commit any felony (*e*).

Where an indictment for a misdemeanour is removed by *certiorari*, and tried at *nisi prius*, the prosecutor and witnesses are not entitled to costs under this statute (*f*).

In cases of assault determinable summarily under 9 Geo. 4, c. 31, ss. 27, 28, 29, now repealed, but re-enacted by 24 & 25 Vict. c. 100, and brought before justices for summary decision, in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witness in recognizance to prosecute and give evidence at the assizes or sessions of the peace, every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such court under such recognizance, together with compensation for their trouble and loss of time, in the same manner as courts are authorized and empowered to order the same in cases of felony (*g*). And now it is further provided that, where any complaint shall be made of neglect by a master or mistress to provide apprentices or servants with necessary food, clothing or lodging, and in cases of bodily harm done by them to any such apprentices or servants, so that the life shall be endangered or health be permanently injured, contrary to the 26th section of 24 & 25 Vict. c. 100, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony; and two justices of the peace before whom such complaint is heard, shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or where there are no guardians, by the overseers of the poor of the place in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate, or a duplicate thereof, upon the clerk of such guardians, or upon any one of such overseers, shall

Costs in cases of assault.

Neglect of master, &c. to provide apprentices or servants with necessary food, &c.

Prosecution by guardians of the poor.

Costs to be paid out of common fund of union.

(*e*) 14 & 15 Vict. c. 55, s. 2.

(*f*) *R.* v. *Johnson*, 1 Mood. C. C. 713. See *R.* v. *Richards*, 8 B. & C. 420; *R.* v. *Jeyes*, 3 A. & E. 416; *R.* v. *Kelsey*, 1 Dowl. P. C. 481. See, however, as to road prosecutions on 5 & 6 Will. 4, c. 56, s. 89, *R.* v. *Papworth* (*Inh.*), and *R.* v. *Preston* (*Inh.*). See also *post*, "Highways," Chap. IX. s. 17.

(*g*) 14 & 15 Vict. c. 55, s. 3.

Costs in Cases of Assault.

conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court), out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and where there is a board of guardians, the clerk or some other officer of the union or place, and where there is no board of guardians, one of the overseers of the poor may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute (*h*). And as to adjudging the person convicted to pay the costs of a conviction for assault, see sect. 74, *post*, p. 490.

Under Larceny Act.

The court, before which any indictable misdemeanour against 24 & 25 Vict. c. 96 (the Larceny Consolidation Act), shall be prosecuted or tried, may allow the costs of the prosecution, as in cases of felony, and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony (*i*). A corresponding section in identical language is to be found in the Malicious Injuries to Property Act (24 & 25 Vict. c. 97), s. 77, and, again, in the Forgery Act (24 & 25 Vict. c. 98), s. 54, and in the act relating to Offences against the Person (24 & 25 Vict. c. 100, s. 77).

Malicious Injuries to Property Act.

Forgery Act.

Offences against the Person Act.

In coinage offences.

With reference to coinage offences, however, it is enacted that, in all prosecutions for any offence against this act (*k*) in England, which shall be conducted under the directions of the solicitors of her Majesty's treasury, the court, before which such offence shall be prosecuted or tried, shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England, which shall not be so conducted, it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

In bankruptcy offences.

With respect to bankruptcy offences under 24 & 25 Vict. c. 134, upon the production by the creditors' assignee of the certificate directing him to prosecute, the costs of such prosecution are to be allowed by the court before whom any person shall be prosecuted or tried, in pursuance of such direction, unless such last-mentioned court shall specially otherwise direct, and such sum so allowed shall be paid and borne in all respects as costs in cases of felonies (*l*).

Orders for costs—how made out.

The manner in which orders granted by the court under

(*h*) 24 & 25 Vict. c. 100, s. 73.
(*i*) 24 & 25 Vict. c. 96, s. 121.
(*k*) 24 & 25 Vict. c. 99, s. 42.
(*l*) 24 & 25 Vict. c. 134, s. 223.

Orders for Costs—how made out.

these provisions are to be made out, is regulated by 7 Geo. 4, c. 64, which enacts by sect. 24, "That every order for payment to any prosecutor, or other person as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such prosecutor or other person, upon being paid for the same the sum of 1*s.* for the prosecutor, and 6*d.* for each other person, and no more; and, except in the cases hereinafter provided for, shall be made upon the treasurer of the county, riding, or division in which the offence shall have been committed, or shall be supposed to have been committed, who is hereby authorized and required, upon sight of every such order, forthwith to pay to the person named therein, or to any one duly authorized to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts."

Service of order for costs on county treasurer.

The *entire* order of a court for paying the costs of a prosecution (*m*) must be served on the county treasurer. Thus, where the attorney had torn off that part of the order which contained the detail, the treasurer was justified in refusing to pay, though that part of the same sheet of paper which ordered the payment of *an aggregate sum* was shown him (*n*).

Remedy against county treasurer for disobeying order for costs.

Where a treasurer on whom an order had been made to pay the expenses of a prosecution for a riot (being a misdemeanour within 7 Geo. 4, c. 64, s. 23), refused to do so on the ground that the party, though bound over to prosecute at the *sessions*, yet obtained circuit subpœnas for the witnesses, and preferred his bill at the assizes; it was held that a *mandamus* would not lie to compel him, and that the remedy was by indictment for disobeying the order (*o*). In the same case, it was doubted whether the expenses of a prosecutor can be awarded under that section, unless he has been bound over to prosecute; but it was held, that witnesses attending at assizes on subpœna were clearly entitled to theirs (*p*).

Costs payable by prosecutor in felonies under Vexatious Indictments Act.

A prisoner convicted of felony may be condemned to the payment of the whole or any part of the costs of a prosecutor (*q*); and whenever any bill of indictment shall be preferred to a grand jury under 22 & 23 Vict. c. 17, against any person who has not been committed to or detained in custody or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court, before which such indictment shall be tried, in its discretion to order and direct the prosecutor or other person by or at whose instance such indictment shall have been preferred, to pay to the accused person the just and reasonable costs, charges

(*m*) 7 Geo. 4, c. 64, s. 24.

(*n*) *Reg.* v. *Jones*, 2 Mood. C. C. 171; 8 C. & P. 405.

(*o*) *R.* v. *Jeyes*, 3 A. & E. 416; *R.* v. *Treasurer of Surrey*, 1 Chitt. 650. See *R.* v. *Bristow*, 4 M. & S. 515; 2 M. & S. 80; 2 B. & Ald. 646. See as to mandamus lying, *Reg.* v. *Clark*, 5 Q. B. 887.

(*p*) But see as to this *R.* v. *Butterwick*, 2 Moo. & R. 196, *ante*, p. 340.

(*q*) 33 & 34 Vict. c. 23, s. 3, *ante*, p. 332.

Costs of Prosecutions.

and expenses of such accused person and his witnesses, if any, caused and occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court, and upon non-payment of such costs, &c. within one calendar month after the date of such direction or order, it shall be lawful for any of the superior courts at Westminster to issue such process as may be issued to enforce judgments (*q*).

In boroughs.

Where offences are committed in jurisdictions which do not contribute to the county rate, they are, by 7 Geo. 4, c. 64, s. 25, made payable either out of the local fund applicable to the purposes of the county rate; or, if there be no such fund, out of the poor-rates. In the former case, the order is to be directed to the treasurer of the fund; in the latter, to the parish officers.

Sums ordered to be paid under the above enactment in respect of offences committed in a borough in which a court of separate quarter session is holden, are paid out of the borough fund (*r*).

Rate or scales of payment of costs.

For the regulation of the rate of allowance, it is enacted by 14 & 15 Vict. c. 55, s. 5, that it shall be lawful for one of the principal secretaries of state to make regulations as to the rate or scales of payment of all or any costs, expenses, and compensations to be allowed or ordered to be paid under 7 Geo. 4, c. 64, or any other act, or this act, to prosecutors and witnesses, and to persons attending the court in obedience to any recognizance or subpœna in cases of criminal prosecutions, and, except as hereinafter mentioned, to persons who have been active in or towards the apprehension of persons charged with offences; and also regulations as to the scales or rates of payment according to which certificates may be granted by the examining magistrate or magistrates in respect of the expenses of any prosecutor or witness or witnesses for the prosecution, or other person, of attending before such magistrate or magistrates, and of any compensation for trouble and loss of time therein in any case where any court or judge is empowered, under the said act of 7 Geo. 4, or any other act, or this act, to order payment of such expenses or compensation, and concerning the forms of such certificates and the details or particulars to be inserted therein, of the expenses, trouble and loss of time to which such certificates relate. And it shall be lawful for one of the principal secretaries of state from time to time to alter such regulations, or make new regulations in relation to any of the matters aforesaid, and such regulations, for the time being, shall be binding on all courts and persons whomsoever.

By 14 & 15 Vict. c. 55, s. 6, where any such order is made under the 7 Geo. 4, c. 64, or any other act, or this act, the amount of such costs, expenses or compensation shall be ascertained by the proper officer of the court, according to the

(*q*) 30 & 31 Vict. c. 35, s. 2.
(*r*) 5 & 6 Will. 4, c. 76, ss. 113, 117.

Rate or Scale of payment of Costs.

regulations made under this act. And when the expenses and compensation in respect of attending before any examining magistrate or magistrates are so ordered to be paid, such expenses and compensation shall also be ascertained by the proper officer of the court, according to such regulations, but the amount thereof, as so ascertained, shall not exceed the amount mentioned in the certificate of the examining magistrate or magistrates; and, save as aforesaid, the certificate of any examining magistrate or magistrates shall not be conclusive as to the amount to be allowed for expenses of attendance before him or them, or for compensation for trouble or loss of time therein.

By the same act, sect. 7, provided always, that nothing in this act, or any of the regulations under this act, shall interfere with or affect the power of any court to order payment to any person who shall appear to such court to have shown extraordinary courage, diligence or exertion in or towards any such apprehension as hereinbefore mentioned of such sum as such court shall think reasonable and adjudge to be paid in respect of such extraordinary courage, diligence or exertion. And such regulations, having received the approbation and signature of one justice of gaol delivery, or of great sessions for the county wherein any such regulations shall have been established, shall be binding on all persons whatsoever.

Costs of witnesses for the accused.

And by a recent act the court before which any accused person shall be prosecuted or tried, or for trial, before which he may be committed or bailed to appear for any felony or misdemeanour, is hereby authorized and empowered, in its discretion, at the request of any person who shall appear before such court on recognizance to give evidence on behalf of the person accused, to order payment unto such witnesses so appearing, such sum of money as to the court shall seem reasonable and sufficient to compensate such witness for the expenses, trouble and loss of time he shall have incurred or sustained in attending before the examining magistrate, and at or before such court, and the amount of such expenses of attending before the examining magistrate, and compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate, granted before the attendance in court, and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, who shall, upon receipt of the sum of sixpence for each witness, make out and deliver to the person entitled an order for such expenses and compensation, together with the said fee of sixpence upon such and the same treasurers and officers as would now by law be liable to payment of an order for the expenses of the prosecutor or witnesses against such accused person; and if the accusation be of such kind that the court shall have no power to order the expenses of the prosecutor, thereupon the treasurer or other officer in the capacity of a treasurer of the county, riding, division, city, borough or place where the offence of such accused person may be alleged

Costs of Witnesses for the Accused.

to have been committed, which treasurer or other officer is hereby required to pay the same orders upon sight thereof, and shall be allowed the same in his accounts: provided always, that in no case shall any such allowances or compensation exceed the amount now by law permitted to be made to prosecutors and witnesses for the prosecution; and provided always, that such allowances and compensation shall be allowed and paid as part of the expenses of the prosecution (*s*).

The fee of sixpence for the order for the witnesses' expenses is abolished when the officer of the court is paid by salary, or is allowed, by the table of fees relating to his office, one fee only of a fixed amount in respect of his duties relating to a prosecution of an offender (*t*).

(*s*) 30 & 31 Vict. c. 35, s. 5.
(*t*) 32 & 33 Vict. c. 89, s. 10.

CHAPTER VII.

OF PROCEEDINGS AFTER JUDGMENT BY WAY OF APPEAL—OF CASES RESERVED—OF WRIT OF ERROR—OF CERTIORARI.

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SECTION 1.

WRITS OF ERROR.

A WRIT of error lies after judgment, either to reverse it for a defect in its proceedings (*a*), or after outlawry to reverse it. When it lies.

With reference, however, to writs of error to reverse a judgment on an indictment, formerly, if the indictment contained several counts, some of them good and some or one of them bad, and judgment passed generally, the judgment must have been reversed, because the court of error had no power to pronounce the proper judgment in such a case, or to remit the case for judgment to the court below; but now, by the 11 & 12 Vict. c. 78, s. 5, should the court below have pronounced judgment generally, the court of error may now order judgment to be arrested on the bad counts and pronounce the proper judgment on all the good counts; or the court of error in such a case may remit the record to the court below to pronounce the proper judgment which, in such a case, would be to arrest the judgment on the bad counts and pass sentence on the good counts (*b*).

Where there is an issue on which there is an imperfect finding in the case of a misdemeanour, or none at all as to part, the course is to award a *venire de novo* as to that if it be demanded, but whether this can be done in a case of felony is doubtful; but the finding on the issue on one count of an indictment is not vitiated or affected by an omission to find on the issue on another count or by reason of imperfect findings on such other count (*c*). Recording verdict.

(*a*) See *R.* v. *Wildey*, 1 M. & S. 183.

(*b*) *Reg.* v. *Holloway*, 2 Den. C. C. 295.

(*c*) See *Latham* v. *Reg.*, 33 L. J., M. C. 199; 5 B. & S. 635, per *Blackburn*, J.; *R.* v. *Hayes*, 2 Ld. Raym. 1578. And if judgment is given upon such a verdict, it may be reversed; *Id.* Where there has been a juryman sworn in a wrong name, see *Reg.* v. *Mellor*, D. & B. 468; 27 L. J., M. C. 121, *ante*, p. 218, "Swearing of Jury."

Writ of Error.

The defendant in all cases, as well of misdemeanour as of treason or felony where imprisonment was ordered, remained in custody during the pendency of a writ of error being in execution on the judgment, till by 8 & 9 Vict. c. 68, reciting, that it was expedient to make provision for staying the execution of a judgment upon prosecution for misdemeanour while a writ of error is depending to reverse such judgment, it is enacted, that

In misdemeanours the writ is a stay of execution.

in every case of judgment for a misdemeanour, where the defendant or defendants shall have obtained a writ of error to reverse such judgment, execution thereupon shall be stayed until such writ of error shall be finally determined; and in case the defendant or defendants shall be imprisoned under such execution, or any fine shall have been levied either in whole or in part in pursuance of such judgment, the said defendant or defendants shall be entitled to be discharged from imprisonment, and to receive back any money levied on account of such fine from the person or persons in whose possession the same shall be, until such final determination as aforesaid: provided always, that no execution upon any such judgment shall be stayed unless and until the defendant or defendants shall become bound by recog-

Recognizance.

nizance to be acknowledged before one of the judges of her Majesty's Court of Queen's Bench or one of the commissioners appointed to take special bail in actions depending in the superior court, with two sufficient sureties to be approved of by such judge or commissioner, in such sum as such judge or commissioner shall direct, to prosecute the writ of error with effect; and, in case the judgment shall be affirmed, forthwith to render the said defendant or defendants to prison, according to the said judgment, where imprisonment shall have been adjudged. And every such recognizance shall, after justification of bail, be filed of record in the said Court of Queen's Bench in like manner and upon payment of the like fees as in the case of other recognizances filed in the Crown Office in that court. And the judge of the said Court of Queen's Bench and the said commissioner shall have the like powers in respect of the justifying such bail in error and the examination of the sureties, and the like rules shall apply as in respect of special bail in actions depending in such court: provided always, that in the case of any defendant under legal disability, it shall be sufficient if two persons, to be approved of by such judge or commissioner, shall become bound by recognizance on the behalf of such defendant, to be acknowledged and conditioned as aforesaid.

By sect. 2 of the same act, the clerk of the crown in the said Court of Queen's Bench shall, for the purposes hereinafter mentioned, make out and deliver to the defendant or defendants, or his or their lawful attorney, certificates in writing under his hand that such recognizance is duly filed of record in such court, upon payment of the like fee as for other certificates delivered at the Crown Office. And by 9 & 10 Vict. c. 24, s. 4, "Any such certificate as aforesaid under the hand either of the said

clerk of the crown, or of the master or assistant master on the crown side of the said court, and sealed with the seal of the Crown Office in the said court, shall be a sufficient warrant for the discharge of any such defendant or defendants, and for the repayment of any such fine." The defendant and fine referred to is the defendant in the custody of any gaoler or other person having custody of such defendant in execution of such judgment; and, as to the fine, is to be a warrant to "every person having in his possession the whole or any part of any fine levied in execution of such judgment, to authorize and require the repayment thereof to the defendant or defendants, but no person who shall have received any such money and have paid it over to any other person, according to the course of the Exchequer, shall be liable to repay to the defendant or defendants any part of the money so paid over" (*c*).

In Misdemeanours, stay of Execution obtained by a Writ of Error.

By sect. 3 of the same act, where judgment upon such writ of error shall be affirmed, and imprisonment shall have been adjudged, the period for its continuance in pursuance of such judgment, if such imprisonment shall not have commenced under such execution, shall be reckoned to begin from the day when such defendant or defendants shall be in actual custody under such judgment; and if the defendant or defendants shall have been discharged from imprisonment in manner hereinbefore provided, such defendant or defendants shall be liable to be imprisoned for such further period as, with the time during which such defendant or defendants may already have been imprisoned under such execution, shall be equal to the period for which such defendant or defendants was or were so adjudged to be imprisoned as aforesaid.

As to continuance of imprisonment if judgment affirmed.

By sect. 4 of the same act, when the judgment shall have been the payment of a fine, and imprisonment until such fine be paid, either with or without imprisonment for a certain time, and the defendant or defendants shall have paid the fine, or the same or any part thereof shall have been levied and shall have been received back under the provisions hereinbefore contained, and the judgment upon writ of error brought shall be affirmed, the defendant or defendants shall not be entitled by reason of such payment as aforesaid to be discharged from imprisonment, notwithstanding the expiration of any certain time of imprisonment for which the original judgment shall have been given until the fine shall be again paid.

If imprisonment ordered till fine paid, and fine has been returned on affirmance of judgment, it must be paid again.

By sect. 5 of the same act, if the court in which any such writ of error shall be pending shall, upon motion in that behalf, decide that the defendant or defendants by whom it shall be brought has or have wilfully delayed or neglected to prosecute the same with effect, it shall be lawful for such court to order the writ of error to be quashed, and therefore the defendant or defendants who brought such writ of error shall be liable to

As to quashing writ of error.

(*c*) 8 & 9 Vict. c. 68, s. 2.

execution upon the judgment; and further provision was made for securing the render of a defendant to prison according to the judgment given against him when such judgment has been affirmed or writ of error quashed by 16 & 17 Vict. c. 32. But it is beyond the province of this work to pursue this subject further.

Section 2.

Case reserved for the Court of Crown Cases Reserved.

No new trial in felonies.

No new trial can be granted in cases of felony on the merits as in civil causes for the purpose of impeaching the verdict, *e. g.* by reason of its being against the weight of evidence, or on account of the misreception or rejection of evidence, or by reason of there being no sufficient evidence to be left to the jury; but a writ of *venire de novo* may be awarded by the Court of Queen's Bench on a writ of error, or the verdict be quashed by the sessions and a fresh trial ordered at the next sessions, in case of a mistrial, on a ground impeaching the due constitution of the court before which the trial took place, or the regularity of the proceedings there, as on the ground of a defect in the jury process; or a mistake in the swearing of the jury, such as swearing one of them in a wrong name, whereby the prisoner lost the opportunity of his challenge (*d*), or swearing one not on the panel (*e*), or misconduct in one juryman who after the jury had retired to consider their verdict, and before the verdict, separated from the rest of the jurors and conversed with a stranger concerning the verdict to be given (*f*); but where a trial was adjourned over a night, and the jury on retiring for the night obtained newspapers with comments on the case, it was not deemed to render their verdict a nullity, and therefore no *venire de novo* was issuable (*g*); nor where the irregularity was reading the evidence of the witnesses to the jury from the notes of the evidence on a former trial (*h*), or a mistake in the chairman in entering a verdict, as where the jury delivered a lawful verdict which the chairman refuses to receive, and misdirected them, whereupon they returned a different verdict (*i*). In the place of the old proceeding of the judges who met at the house of the Lord Chief Justice or at Serjeants' Inn, to consider any cases referred to them, upon which convictions had taken place on the circuit, with a view of recommending a pardon, if any of them were in their opinion wrong, a tribunal has been constituted by the legislature, to

A writ of venire de novo may be awarded either by Queen's Bench or Quarter Sessions for a mistrial.

(*d*) *Reg.* v. *Mellor*, D. & B. 468, where the judges were evenly divided on this point.
(*e*) *Norman* v. *Beamont*, Willes, 484.
(*f*) *R.* v. *Fowler*, 4 B. & A. 273.
(*g*) *Reg.* v. *Murphy*, 38 L. J., P. C. 53; L. R., 2 P. C. 535.
(*h*) *Reg.* v. *Bertrand*, 36 L. J., P. C. 51; L. R., 1 P. C. 520.
(*i*) *Reg.* v. *Yeadon*, 31 L. J., M. C. 70; L. & C. 81.

which judges, recorders, and quarter sessions may refer after conviction any questions of law which have arisen on the trial, and this tribunal is called the Court of Crown Cases Reserved, and is empowered to affirm or quash or amend the conviction, or make such order thereon as justice may require.

Jurisdiction of the Court.

This court consists of not less than five judges of the superior courts, presided over by a chief justice or the chief baron (*k*), who appoint a day in term, usually the second Saturday, for hearing any cases which may be reserved for them. They sit under the powers conferred by the 11 & 12 Vict. c. 78, which by sect. 1, enacts, "that when any person shall have been convicted of any treason, felony or misdemeanour before any court of oyer and terminer or gaol delivery or court of quarter sessions, the judge, commissioner, or justices of the peace, before whom the case shall have been tried, may in his or their discretion reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer, and thereupon they shall have authority to respite execution of the judgment on such conviction or postpone the judgment until such question shall have been considered and decided as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison or shall take a recognizance of bail with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be."

Constitution of the court.

Execution may be respited or judgment postponed.

Prisoner may be committed to prison or bailed.

A recorder of a borough within the Municipal Corporations Act is within the above section (*l*), and so is a court sitting under a special commission at the Old Bailey (*m*).

Who may reserve question.

The power to reserve questions of law is not intended to interfere with the right to raise questions on the record as by demurrer, or to deprive the party of his writ of error, so that if there has been a demurrer and judgment on that demurrer, that judgment cannot be reviewed upon a case reserved by this court (*n*); but objections for defects on the face of the indictment which might be the subject of demurrer, but are not made so, may also be taken in arrest of judgment after verdict if not cured by verdict, and the judgment of the court, on such motion in arrest of judgment, may be reserved by the court (*o*); as where a count in an indictment for receiving stolen goods failed to allege a scienter (*p*); or where the count of an indictment on which the conviction took place showed on its face the offence to have been com-

What questions to be reserved.

(*k*) 11 & 12 Vict. c. 78, s. 3.
(*l*) *Reg.* v. *Masters*, 1 Den. C. C. 232; 18 L. J., M. C. 2.
(*m*) *Reg.* v. *Bernard*, 1 F. & F. 240.
(*n*) *Reg.* v. *Faderman*, 1 Den. C. C. 565; 19 L. J., M. C. 147.
(*o*) *Reg.* v. *Webb*, 1 Den. C. C. 340; 18 L. J., M. C. 39; *Reg.* v. *Ryland*, 47 L. J., M. C. 10; L. R., 1 C. C. R. 99.
(*p*) *Reg.* v. *Larkin*, Dears. C. C. 365; 23 L. J., M. C. 125.

Of reserving Cases for the Opinion of the Court.

mitted out of the jurisdiction of the court (*q*); or where the count of an indictment against a receiver upon which the conviction took place contained the words "goods stolen as aforesaid," thereby incorporating the first count alleging the stealing; and the court, in order to prevent a repugnancy, construed the words after verdict on a case reserved upon the point raised in arrest of judgment as "goods stolen" (*r*).

The question reserved must arise on the trial.

If the prisoner pleads guilty, the question whether he has been rightly indicted or not, upon a reference to the depositions, cannot be reserved (*s*); and it is doubtful whether a fact which has occurred during the trial, *e. g.*, the calling and swearing of a juryman in a wrong name, which is not discovered till the following day, can be made the subject of a case to this court (*t*); and it is also doubtful whether a question as to whether the depositions of an absent witness were properly allowed to be sent before the grand jury to enable them to find a bill can be reserved for this court (*u*); and it was said in one case, that a conviction was a condition precedent to a case for the court, and that a conviction meant a conviction after verdict and trial, and trial meant a trial before a jury (*x*).

The proper course to adopt to raise a question touching the direction to a jury is for the chairman or recorder to direct the jury on any doubtful point of law, and take a general verdict from them on such direction, and take the opinion of the court as to whether such direction was right, and not to put questions to the jury and record the verdict upon their answers (*y*). The question whether the prisoner has been tried within the proper jurisdiction may be reserved (*z*). As a general rule, if a jury find a direct verdict, what they may afterwards add is not to affect their finding; as where, on a charge of stealing and receiving, the verdict was not guilty of stealing the watch, but guilty of keeping possession of it, in the hope of reward from the time he first had the watch, it was held to be a verdict of not guilty (*a*). So, on an indictment for keeping a lottery, a verdict of guilty, with a recommendation to mercy on the ground that perhaps he did not know that he was acting contrary to law, was held a verdict of guilty (*b*); and, in general, what a jury may say in recommending a prisoner to mercy is not a matter for reserving a case for this court (*c*); but the language

(*q*) *Reg.* v. *Martin*, 1 Den. C. C. 398; 18 L. J., M. C. 137.
(*r*) *Reg.* v. *Craddock*, 2 Den. C. C. 31; 20 L. J., M. C. 31; *Reg.* v. *Huntly*, Bell, C. C. 239; 29 L. J., M. C. 70.
(*s*) *Reg.* v. *Clark*, 36 L. J., M. C. 16; 1 L. R., C. C. 54.
(*t*) *Reg.* v. *Mellor*, D. & B. 468; 27 L. J., M. C. 121.
(*u*) *Reg.* v. *Clements*, 2 Den. C. C. 251.
(*x*) *Reg.* v. *Faderman*, 1 Den. C. C. 565; 19 L. J., M. C. 147.
(*y*) *Reg.* v. *Sleep*, L. & C. 47, per *Pollock*, C. B.
(*z*) *Reg.* v. *Stanbury*, 31 L. J., M. C. 88.
(*a*) *Reg.* v. *York*, 1 Den. C. C. 335.
(*b*) *Reg.* v. *Crawshaw*, Bell, C. C. 303.
(*c*) *Reg.* v. *Trebilcock*, D. & B. 460; 27 L. J., M. C. 103.

used by the jury must be construed, by looking at the circumstances under which the verdict was returned (*d*). Where an indictment is amended at the trial, this court can only consider it in its amended form (*e*). *What Question may be reserved.*

The chairman or recorder having determined to reserve a case, it is their duty to state the case, and transmit it, when stated, to the clerk of the Court of Crown Cases Reserved at the Exchequer Chamber, Westminster, as soon as conveniently may be, and not later than four days at least before the day appointed for the sitting of the court. Time for transmitting the case.

The 2nd section of the 11 & 12 Vict. c. 78, enacts, that "the judge or commissioner or court of quarter sessions shall thereupon (*i. e.* on having reserved the question of law for the court) state in a case, signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons."

By the Rules of Court of the 1st of June, 1850, it is ordered, "that when any case shall be transmitted by a court of oyer and terminer, or gaol delivery or court of quarter sessions, for the consideration of this court, the original case, signed by the judge or commissioner or chairman of sessions, reserving the question of law, and seventeen copies of each case—one for each judge and one for each party (now twenty copies)—shall be delivered to the clerk of this court at the Exchequer Chamber, Westminster, at least four days before the day appointed for the sitting of the said court.

"That every case transmitted for the consideration of this court briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted. If the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment on the particular count. Mode of stating the case.

"That no case be heard upon any demurrer to the pleading.

"That every case state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison, or has been discharged on recognizance of bail to appear, and receive judgment, or to render himself in execution.

"That with every case delivered to the judges the fee payable to the clerks of the said judges shall not exceed the fee payable on a demurrer and other paper books, &c. under 1 Vict. c. 30.

"Where any case is intended to be argued by counsel or by the parties, notice thereof be given to the clerk of this court at least two days previously to the sitting of the said court."

(*d*) *Reg.* v. *Glass*, 1 Den. C. C. 215; *Reg.* v. *Sparrow*, Bell, C. C. 298.
(*e*) *Reg.* v. *Webster*, L. & C. 77; 31 L. J., M. C. 17; *Reg.* v. *Pritchard*, L. & C. 36; 30 L. J., M. C. 169; *Reg.* v. *Barnes*, 35 L. J., M. C. 204; L. R., 1 C. C. R. 45.

Case may be sent back.

By the 11 & 12 Vict. c. 78, s. 4, the court, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it has been amended.

The court will not, however, send back the case upon the motion of counsel before the argument, but will wait to see whether upon the argument it becomes necessary so to do, *e. g.* for the purpose of having omitted facts or evidence inserted (*f*); but then it will not be sent back to have facts inserted, in order to raise a purely technical objection beside the merits (*g*). It is always well, even in cases where it is not absolutely required by the rule, to set forth a copy of the indictment. But it seems to be a proper course for counsel, if, on perusing the case, it appears that a point reserved at the trial has been omitted, to communicate with the judge who reserved the case, who will doubtless insert it if requisite (*h*).

Counsel cannot appear to argue in this court upon the brief delivered at the trial, but must have fresh briefs delivered, though the court will hear as *amicus curiæ* any reference to authorities cited by the counsel for the prisoner who appeared for him on his trial (*i*).

Counsel, on the argument, cannot travel out of the case as stated, either as to the facts (*k*) or as to the questions of law (*l*).

Counsel for the prisoner begins on the argument, and has a reply.

Counsel will be heard for the crown, though no counsel appear for the prisoner (*m*).

Costs of the case and argument.

The court of quarter sessions has power to order the payment of the costs of the argument as part of the costs of the prosecution in cases where they have power over the costs (*n*); and the convenient practice is for the officer of the court to tax and ascertain such costs, and certify the amount to the clerk of the peace or the officer of the court below, who will act upon it (*o*).

Jurisdiction of the court over the judgment below.

It is beside the purpose of this work to discuss the powers of the court to deal with the cases reserved, which are to be found in the 11 & 12 Vict. c. 78, s. 2, which enacts, "that the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions,

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(*f*) *Reg.* v. *Hilton*, Bell, C. C. 20; 28 L. J., M. C. 28; *Reg.* v. *Perkins*, 2 Den. C. C. 459; 21 L. J., M. C. 152.
(*g*) *Reg.* v. *Brummitt*, L. & C. 9.
(*h*) *Reg.* v. *Smith*, 1 Den. C. C. 512, per *Wilde*, C. J.
(*i*) *Reg.* v. *Thomas*, L. & C. 313; 33 L. J., M. C. 22.
(*k*) *Reg.* v. *Smith*, 1 Den. C. C. 512.
(*l*) *Reg.* v. *Blakemore*, 2 Den. C. C. 410; 21 L. J., M. C. 60.
(*m*) *Reg.* v. *Masters*, 1 Den. C. C. 332; 18 L. J., M. C. 2; *Reg.* v. *Gunner*, 1 Den. C. C. 329; 18 L. J., M. C. 1.
(*n*) *Reg.* v. *Cluderoy*, 3 C. & K. 205.
(*o*) *Reg.* v. *Lewis*, 1 D. & B. 326.

and thereupon to reverse, affirm or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or avoid such judgment, or to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other sessions of oyer and terminer or gaol delivery or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such order as justice may require."

Power of court to reverse, amend, arrest or affirm the judgment.

Section 3.

OF CERTIORARI TO REMOVE INDICTMENTS.

What the writ is.

The certiorari is a writ issuing out of the Crown Office in the name of the Queen, and tested by the chief justice, which the Court of Queen's Bench, by virtue of its superintending authority over the courts of inferior criminal jurisdictions in the kingdom, directs to the judges or officers of those courts, or to justices at sessions or out of sessions, commanding them to certify or return the records or proceedings in a judicial matter pending before them, to the end that the party may have the more sure and speedy justice before the Queen, or such justices as she shall assign to determine the cause (*p*). Since the establishment of the Court for Crown Cases Reserved the frequency of this writ in proceedings by indictment has much diminished.

When it lies.

The writ of certiorari, except when applied for by the law officers of the crown (*q*), is not a writ of course, but is granted or refused at the discretion of the court (*r*); but it always lies, unless expressly taken away by statute (*s*). And if a new offence be created, and it be directed to be tried by a court established according to the course of common law, the indictment in respect of it is removable by certiorari (*t*); thus, an indictment for non-repair of a highway ordered under 5 & 6 Will. 4, c. 50, s. 95, is removable, notwithstanding the certiorari is taken away in respect of any matter or thing done or transacted in or relative to the execution of the act (*u*). So, although a statute prohibits the removal of an indictment by certiorari into a superior court, if a subsequent statute gives

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(*p*) 1 Bac. Abr. Certiorari, A.; Com. Dig. Certiorari.
(*q*) 4 Burr. 2458; *R.* v. *Eaton*, 2 T. R. 89; 1 East, 303, n. (*d*).
(*r*) *Reg.* v. *JJ. of Surrey*, 39 L. J., M. C. 145; *Foster* v. *Forster*, 4 B. & S. 199; 32 L. J., Q. B. 314.
(*s*) *Reg.* v. *Gillyard*, 12 Q. B. 527; *R.* v. *Hanson*, 4 B. & A. 521.
(*t*) *R.* v. *Wordley*, 4 M. & S. 508; *R.* v. *Hube*, 5 T. R. 542.
(*u*) *Reg.* v. *Inhabs. of Sandon*, 3 E. & B. 547; 23 L. J., M. C. 129.

Writ of Certiorari.

permission for its removal into a court of peculiar jurisdiction where no such prohibition exists, the restriction on the certiorari is gone altogether as against the Queen's Bench (*x*).

It is a discretionary writ.

Formerly the writ went to private prosecutors as a matter of course, but by 5 & 6 Will. 4, c. 33, no writ of certiorari shall issue from the Court of Queen's Bench at Westminster, for removing into that court any indictment or presentment from any court of session, assize, oyer and terminer or gaol delivery, or any other court, at the instance of the prosecutor or any other person, except his majesty's attorney-general, without motion first made in the Court of Queen's Bench, or before some judge of that court, and leave obtained to remove such indictment or presentment, in the same manner as similar motions may be made and leave given where such application is made on the part of the defendants.

In felonies the rule is only to show cause, whereas in misdemeanours, unless the case is doubtful, it is absolute in the first instance to remove the indictment, &c. (*y*). In vacation the writ is obtained by obtaining an order at chambers, which is nisi in the first instance (*z*).

Inasmuch as, by reason of the establishment of the Court of Criminal Appeal, the removal of indictments by writs of certiorari is seldom necessary for the decision of questions of law; but it is, nevertheless, sometimes resorted to for purposes of expense and delay; it is enacted that no indictment, except indictments against bodies corporate, not authorized to appear by attorney in the court in which the indictment is preferred, shall be removed into the Court of Queen's Bench, or into the Central Criminal Court, by writ of certiorari, either at the instance of the prosecutor or of the defendant (other than the attorney-general acting on behalf of the crown), unless it be made to appear to the court from which the writ is to issue, by the party applying for the same, that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty or importance is likely to arise upon the trial, or that a view of the premises in respect whereof any indictment preferred, or a special jury, may be required for the satisfactory trial of the same (*a*).

Grounds for the issuing of the writ.

The mere circumstance of a defendant, in an indictment for an assault found at quarter sessions, being a magistrate of the county is not sufficient ground for presuming that the bench would not fairly try the case, which was a question purely of fact (*b*); but it might be otherwise, when he had been circulating among the magistrates of the county a printed statement

(*x*) *Reg.* v. *Brier*, 14 Q. B. 568; 19 L. J., M. C. 121.

(*y*) *Reg.* v. *Spencer*, 8 D. P. C. 127; *Reg.* v. *Deane and others*, 2 Q. B. 96; Dick. Q. S. 956.

(*z*) *R.* v. *Chipping Sodbury*, 3 N. & M. 104; Dick. Q. S. 956.

(*a*) 16 & 17 Vict. c. 30, s. 4. The affidavit must set out the particular points of law which are likely to arise; *R.* v. *Joule*, 5 A. & E. 539.

(*b*) *R.* v. *Fellowes*, 4 Dowl. 607; *Clark* v. *Wellington*, 7 Jur. 44.

of the charges against him (*c*). Nor is it a ground for the writ to remove an indictment, found at quarter sessions for an assault on a girl, that the chairman of the quarter sessions was very intimate with the father of the prosecutrix, and they both held farms under the same landlord, and that the prosecution had been the subject of much discussion in the neighbourhood (*d*). *The Grounds for the Writ.*

The smallness of the number of jurymen in a borough, and that the defendant was intimate with many of them, may be a ground for removing the indictment (*e*).

To obtain the writ on the ground that a difficult or important question of law is likely to arise on the trial, the affidavit must show the specific grounds on which the legal difficulties will arise (*f*); but since the Court of Crown Cases has been established the court is reluctant to grant the writ on this ground.

On an indictment for a nuisance, where it is necessary to have a view of the premises, the writ will be granted upon the affidavit that he cannot otherwise obtain it (*g*).

The court will, on good ground being shown, issue a certiorari after the sessions have quashed an indictment, to bring up the indictment and the order to see whether the order was a valid order or not, where there is no regular judgment of the sessions quashing the indictment which the prosecutor could bring error on (*h*).

It may issue to remove a record that shall come within its description before the time of its return, though there were no such record in esse at the time of its teste, nor at the time when it was first delivered to the court below (*i*). What it may remove.

By 60 Geo. 3, c. 4, s. 3, where any person shall be prosecuted for any misdemeanour by indictment at any session of the peace having been committed to custody or held to bail to appear for such offence within twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and the trial shall thereupon proceed, unless a writ of certiorari for removing such indictment into the Court of King's Bench at Westminster shall be delivered at such session before the jury shall be sworn for such trial. And At what time it may issue.

(*c*) *Reg.* v. *Grover*, 8 Dowl. 325; *Reban* v. *Trevor*, 4 Jur. 292.

(*d*) *Reg.* v. *Renshaw*, 5 Jur. 801; *Reg.* v. *Jacobs*, 3 Jur. 999. See also *R.* v. *Chipping Norton*, 1 Barnard, 7.

(*e*) *Reg.* v. *Oulsley*, 6 Jur. 62; *Garbett* v. *Oulsley*, *id.* 193. See also *Reban* v. *Trevor*, 4 Jur. 292; *Reg.* v. *Reynolds*, 13 W. R. 925; 12 L. T., N. S. 580.

(*f*) *R.* v. *Joule*, 5 A. & E. 532; *R.* v. *Hodges*, 9 Jur. 665; *R.* v. *Morton*, 1 Dowl., N. S. 543; *Clark* v. *Willington*, 7 Jur. 44.

(*g*) *Anon.*, 2 Barnard, 214; sub nom. *R.* v. *Hatchley Tradgeley*, 1 Sess. Cas. 180.

(*h*) *Reg.* v. *Wilson*, 1 N. S. C. 190; 8 Jur. 1069.

(*i*) 2 Hawk. P. C. c. 27, 323; 1 Burn's J., tit. *Certiorari*, 30th ed.; *Reg.* v. *Palmer*, 5 E. & B. 1024.

Certiorari may issue before Indictment found.

by sect. 4, such writ of certiorari may be applied for and issued before such indictment has been found in the like cases, in the same manner and upon the same terms and conditions as if such writ of certiorari had been applied for after such indictment had been found.

A certiorari will not be granted after verdict, and before judgment (*j*).

Mode of obtaining the writ.

The mode of obtaining this writ and the proceedings thereupon do not come within the scope of this work; but the reader is referred to Burn's Justice of the Peace, tit. CERTIORARI, 30th ed., for information on that subject. But by 16 & 17 Vict. c. 30, s. 5, whenever any writ of certiorari to remove an indictment into the Court of Queen's Bench shall be awarded at the instance of the defendant or defendants, the recognizance now by law required (*i. e.*, under 5 & 6 Will. 4, c. 33, s. 2) to be entered into before the allowance of such writ shall contain the further provisions following: that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment, and whenever any such writ of certiorari shall be awarded at the instance of the prosecutor, the said prosecutor shall enter into a recognizance (to be acknowledged in like manner as is now required in cases of writs of certiorari awarded at the instance of a defendant), with the conditions following: that is to say, that the said prosecutor shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs incurred subsequent to such removal. Upon the application of one of several defendants to remove an indictment, the judge may order him to enter into a recognizance to pay the costs, not only if he but if either of the other defendants be convicted (*k*).

Of certiorari at the instance of defendant or prosecutor.

By sect. 7, if the person or persons, at whose instance any writ of certiorari shall be awarded, shall not before the allowance thereof enter into such recognizance as is hereinbefore provided, the court to which such writ may be directed shall and may proceed to the trial of the indictment as if such writ of certiorari had not been awarded.

The allowance there referred to is the allowance by the persons to whom the certiorari is directed (*l*).

This section does not apply to indictments against corporations (*m*).

Where the prosecutor removed an indictment against the defendants for non-repair of a highway, upon the trial of which

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(*j*) *R.* v. *Inhabs. of Oxfordshire*, 13 East, 411; *R.* v. *Jackson*, 6 T. R. 145; *Reg.* v. *Unwin*, 7 Dowl. 578; *R.* v. *Gwynne*, 2 Burr. 749.

(*k*) *Reg.* v. *Jewell*, 7 E. & B. 140; 26 L. J., Q. B. 177.

(*l*) Per *Patteson*, J., in *R.* v. *Inhabs. of Abergele*, 5 A. & E. 795; *R.* v. *Dunn*, 8 T. R. 217; *R.* v. *Jones*, 9 Dowl. P. C. 504.

(*m*) *Reg.* v. *Mayor, &c. of Manchester*, 7 E. & B. 453; 26 L. J., M. C. 65.

a verdict of not guilty was returned, and merely entered into a recognizance to prosecute with effect and perform such things as the court might direct; it was held, that the defendants could not recover their costs against him (*n*). Recognizance to prosecute with effect, when satisfied.

The writ must not materially vary in its description of the record which it is intended to remove (*o*).

The writ ought to be directed to the magistrates or judge of the court of quarter sessions before whom the proceedings were originally taken (*p*). In some cases it may be directed to the proper officer known to have the actual custody of the record (*q*). The writ does not operate till it has reached the hands of the officer to whom it is directed (*r*). To whom the writ is directed.

When intended to remove an indictment or other matter from sessions, it is directed either to the justices generally, or to some of them in particular, and not to the custos rotulorum (*s*). It should be delivered to the chairman in open court, though if it appear that it came in any manner to the knowledge of the justices it must be obeyed by them (*t*). The 21 Jac. 1, c. 8, s. 8, requires that in cases of riot, forcible entry, or assault and battery, the certiorari for the removal of the indictment from quarter sessions should be delivered at the quarter sessions in open court.

After an indictment has been removed by certiorari into the Court of Queen's Bench, it is in the discretion of a judge, if the proceedings are not continued, or upon all the facts, to order a writ of procedendo, under which the indictment may be sent back to the quarter sessions (*u*).

When issued and delivered to the quarter sessions for removing any record, indictment, or other proceeding, it supersedes the jurisdiction of that court, and renders all subsequent proceedings there illegal; unless the Court of Queen's Bench by procedure remands the record to them to be tried and determined.

The justices in session are bound to obey this writ on its production, even though they may suspect it to have been issued irregularly and improperly (*v*); but if it be for the removal of an indictment pending before them in session, and is not delivered till after the jury has been sworn for the trial of it, the sessions may proceed with it, and may set a fine to complete their judgment (*x*).

(*n*) *Reg.* v. *Inhabs. of East Stoke*, 6 B. & S. 536; 34 L. J., M. C. 190.
(*o*) 2 Hawk. c. 27, s. 75; *Reg.* v. *Turk*, 10 Q. B. 540; 16 L. J., M. C. 114.
(*p*) 2 Hawk. c. 27, s. 38.
(*q*) *Ibid.*
(*r*) *Reg.* v. *Chasemore*, 12 Jur. 11.
(*s*) 2 Hawk. c. 27, s. 40.
(*t*) 2 Hawk. c. 27, s. 57; *R.* v. *Battams*, 1 East, 299.
(*u*) *Reg.* v. *Scaife*, 21 L. J., M. C. 221; 18 Q. B. 773.
(*v*) *R.* v. *Battams*, 1 East, 299.
(*x*) *R.* v. *Elwell*, 2 Ld. Raym. 1515. The *certiorari* was there delivered *after* conviction; but *semb.* the text is right by analogy to 43 Eliz. c. 5; and see 2 Burr. 759; and 2 Hawk. c. 27, s. 59. See also *R.* v. *Pennegoes*, 1 B. & C. 142.

Of the Writ of Certiorari.

A party indicted at sessions for obstructing a highway obtained a certiorari, but, without informing the prosecutor that he had done so, gave notice of trial for a subsequent session. The prosecutor attended with his witnesses, and on the last day of the session, before the case was called on, the defendant lodged his certiorari. That writ was quashed, and a procedendo awarded under the circumstances; but the court declared they had no jurisdiction to give the prosecutor the costs of any proceedings out of their own court, *e. g.*, at the sessions after the certiorari had *issued* (*y*).

Affidavit in support of an Application by Defendant, for Certiorari to remove from Sessions an Indictment found for not Repairing a Highway.

Form of affidavit in support of application for writ.

In the Queen's Bench (*z*).

A. B. of, &c. gentleman, maketh oath and saith, that at the last general quarter sessions of the peace, holden in and for the county of L., a bill of indictment was preferred and found against the inhabitants of the parish of W. in the said county, for a nuisance in not repairing a certain common queen's highway, leading from ——— in the said county of L. towards and unto the town of H. in the county aforesaid, from a place called ——— opposite, &c. containing in length three quarters of a mile, and in breadth thirty feet, extending from thence in a northern direction as far as W. church, in which said indictment it is alleged that the inhabitants of the parish of W. aforesaid ought to repair and amend the said queen's common highway, when and so often as it shall be necessary; and the deponent saith that the *right or title to repair* the said highway will come in question upon the trial of the said indictment, as this deponent is advised and verily believes; and the determination of the said indictment may materially affect four other parishes similarly circumstanced, by reason of an act of parliament passed in the ——— year of the reign of his late majesty king ——— intituled, "An Act," &c. (*a*). And this deponent further saith, he is advised and believes that it will be proper to have the said indictment tried by a special jury, and absolutely necessary that the jury before whom the said indictment is tried should, previous to the trial thereof, view the said highway, which special jury or view the defendants cannot have the benefit of at the quarter session of the peace.

Form of Certiorari to remove an Indictment from the Quarter Sessions into the Queen's Bench.

Form of writ of certiorari.

Victoria, by the grace of God of Great Britain and Ireland Queen, defender of the faith, and so forth, To the keepers of our peace and to our justices to hear and determine divers felonies, trespasses, and other misdemeanours committed within our county of ———, and to every of them, greeting: We being willing for certain reasons, that all and singular indictments of whatsoever trespasses, contempts, and assaults, whereof

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(*y*) *R.* v. *Higgins*, 5 A. & E. 554; *R.* v. *Passman*, 1 A. & E. 643, *sed contra; Jones* v. *Davies*, 1 B. & C. 143; *Stacey* v. *Evans*, 13 Pri. 449.

(*z*) Must not be entitled in any cause; *R.* v. *Nohro*, 1 B. & C. 267; *R.* v. *Lewis*, Stra. 704; *R.* v. *Jones*, 8 D. P. C. 80; but where the cause is in court by the proceeding being returned on *certiorari*, other affidavits must be entitled in the cause; *Ibid.*

(*a*) See *R.* v. *Joule*, 5 A. & E. 539. As to trial in the same county, see *ante*, p. 359.

Writ of Certiorari.

G. A. and M. O. [gentlemen], are indicted before you (as it is said), be determined before us, and not elsewhere, do command you and every of you, that you or one of you do send, under your seals, or the seal of one of you, before us immediately after the receipt of this our writ at Westminster, all and singular the said indictments, with all things touching the same, by whatsoever name the said G. A. and M. O. are therein called, together with this our writ, that we may further cause to be done therein what of right and according to the law and custom of England we shall see fit to be done. Witness, Sir Alexander James Edmund Cockburn, baronet, at Westminster, the ——— day of ———, in the ——— year of our reign.

By the Court.

First on the back of the form write the following words.

The prosecution of this writ appears in a schedule hereunto annexed.

The answer of W. esq., and the justices assigned to keep the peace in and for the county of ———.

County of ———, to wit. } I, J. P., chairman of the quarter sessions of the peace for the said county of ———, and one of the justices of our sovereign lady the Queen Victoria, assigned to keep the peace in and for the said county, and also to hear and determine divers felonies, trespasses, and misdemeanours in the said county committed, by virtue of this writ to me delivered, do, under my seal for myself, and other the justices assigned to keep the peace in and for the said county, humbly certify unto her majesty, in her Court of Queen's Bench, the indictment of which mention is made in the said writ, together with all things touching the same. Given at ———, the ——— day of ———, in the ——— year of the reign of Queen Victoria.

J. P. (L.S.)

CHAPTER VIII.

OF PARTICULAR FELONIES TRIABLE AT SESSIONS.

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Of felonies.

ANY discussion on the etymology or history of the name felony, as indicative of a large class of crimes, would be out of place in this work. In practice it now applies to all offences ranging between treason and misdemeanours, whether capital or punishable with penal servitude, fine, whipping, or imprisonment with hard labour.

What felonies prosecuted at sessions.

The felonies prosecuted at the sessions must not be capital, or, when committed by a person not previously convicted of felony, be punishable with penal servitude for life; or forgery, or unlawfully and maliciously setting fire to corn, grain or pulse, or to any part of a wood, &c, or any heath, gorse, furze, or fern, or bigamy, and offences against the marriage laws, or abduction of women and girls, or libels, or bribery, or stealing public documents or wills, or title deeds, 5 & 6 Vict. c. 38.

The court of quarter sessions now try every case of simple larceny not prohibited by statute 5 & 6 Vict. c. 38, or the particular statute creating the offence.

Section 1.

of larceny.

Larceny at common law is the fraudulent and wrongful taking and carrying away from the actual or constructive possession of another, and against his will, his personal and moveable goods, without any claim or pretence of right, and with intent wholly to deprive the owner of them, and to appropriate them to the use or advantage of the taker (*a*). To constitute the crime, then, seven circumstances must occur:—1. The goods must be personal; 2. A taking; 3. A carrying away; 4. The goods when taken must be actually or constructively in the possession of another; 5. They must be the property of another; 6. The taking must be against the will of the owner; and, 7. There must be a felonious intent in the taker. Larceny, what.

The goods must be *personal* goods, and must be things of intrinsic value in which some one has a property; and they must not be connected with lands or buildings at the time of the taking. *They must be things of some intrinsic value;* and, therefore, if they are valuable only as evidence of claims or demands, or title to land, as notes, orders, bills, or deeds, they are not, at common law, the subject of larceny, although under the description of valuable securities such documents are the subject of various provisions of the Larceny Consolidation Act (*b*); but if a cheque is void, as being contrary to 55 Geo. 3, c. 184, it may be described as a piece of paper (*c*). A building agreement, whether stamped or not, is evidence of a right, and cannot be described as goods or chattels in an indictment for larceny (*d*), and cannot be described as a lease; so neither can an open mortgage deed (*e*). It was no larceny at common law, to take animals which are regarded as of a base nature, as dogs (*f*), cats, foxes, monkeys, and ferrets, although domesticated, which do not directly or indirectly serve for food, and the value of which is merely accidental or imaginary (*g*); and, accordingly, it has been held, that an indictment for stealing "five live tame ferrets confined in a hutch," could not be supported, although it was proved that the animals were tame, and had been sold by the Must be of personal goods.

No larceny at common law of animals of a base nature.

(*a*) *Reg.* v. *Middleton*, per *Bovill*, C. J., 42 L. J., M. C. 78; L. R., 2 C. C. R. 38; *Reg.* v. *Holloway*, 1 Den. C. C. 375. See Bracton, lib. 3, c. 32, De coronâ. "Furtum est *contrectatio* (handling, dallying with) rei alienæ fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerit; cum *animo*, dico, quia, sine animo furandi, non committitur." And see cases collected, 2 Marsh. R. 573.

By the civil law, Justinian's Inst. lib. 4, tit. 1, s. 7, De affectu furandi. "Furtum sine *affectu* furandi non committitur."

(*b*) 24 & 25 Vict. c. 96. See *post*, p. 386.

(*c*) *Reg.* v. *Perry*, 1 Den. C. C. 69.

(*d*) *Reg.* v. *Watts*, Dears. C. C. 326; 23 L. J., M. C. 56.

(*e*) *Reg.* v. *Powell*, 21 L. J., M. C. 78; 2 Den. C. C. 403.

(*f*) *Reg.* v. *Robinson*, 28 L. J., M. C. 58.

(*g*) Hawk. b. 1, c. 33, s. 36.

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prisoner for nine shillings (*h*); but as to dogs, statutory provision is now made by 24 & 25 Vict. c. 96, s. 19, *post*, and as to the other animals by sect. 21 of the same statute. The personal estate of a dead man is the subject of larceny (*i*).

Of animals *feræ naturæ*.

They must be things in which some one has a property; and, therefore, animals *feræ naturæ and unreclaimed*, as deer in a forest, conies in a warren, fish in the sea or in rivers, game, and wild fowl, unless domesticated, are not the subjects of larceny (*k*). But when appropriated and confined (*l*), or so tamed as to be habituated to return to a place provided by the owner, these animals being "under propriety" become the subject of larceny; and the flesh and skin of such as, when killed, are fit for food, are, in like manner, the property of the lawful possessor (*m*). So the produce of domestic animals, as milk of a cow, or the wool of sheep, is the subject of larceny (*n*).

Eggs of birds *feræ naturæ* are not the subject of larceny, but it seems a stock of bees is. Young partridges or pheasants hatched under a common hen as her brood, may be the subject of larceny (*o*). The property taken must be of some value, but its amount as regards its being the subject of larceny is no longer of importance, since the abolition of the distinction between grand and petty larceny (*p*); but it is not an immaterial matter in considering whether the property alleged to be stolen has been taken out of a thoughtless frolic from its trifling value, without any felonious design or not. The question, therefore, whether felony or not must depend on the circumstances denoting the intention; on the quantity of property taken, and on the behaviour of the party at the time; and if a wicked disposition be discovered, (une disposition a faire un mal chose, as it is described by Britton,) it may be evidence of felony, notwithstanding the trifling quality of the thing taken.

Of trifling value of property.

Things must not be part of the land at common law.

They must be things unconnected with land or buildings at the time of the taking, or no larceny will be committed at

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(*h*) *R.* v. *Searing*, R. & Ry. 350.

(*i*) 1 Hale, 514; see *R.* v. *Smith*, 7 C. & P. 147, *ante*, p. 160, *post*, p. 388.

(*k*) 1 Hale, 510. A reclaimed hawk is the subject of larceny, if known to be so; 1 Hale, 512. So are swans, though at large in a public river, if lawfully marked; or whether marked or not, if in a private water; Dalton, c. 156.

(*l*) *E. g.*, fish in a trunk or net, partridges or pheasants in a mew, deer so inclosed in a park as to be taken at pleasure; 1 Hale, 511; 1 Hawk. c. 33, s. 39.

(*m*) 1 Hale, 512. Taking pigeons at night out of boxes hung on the owner's house is larceny, if they roost there always, though unconfined; *Reg.* v. *Cheafor*, 2 Den. C. C. 361; 21 L. J., M. C. 43; *R.* v. *Brooks*, 4 C. & P. 131. See Bac. Ab. tit. *Execution* (H. 3); *Reg.* v. *Shickle*, 38 L. J., M. C. 21; L. R., C. C. R. 158.

(*n*) 2 East, P. C. 617; *R.* v. *Martin*, 1 Lea. 171.

(*o*) *Reg.* v. *Shickle*, 38 L. J., M. C. 21; L. R., 1 C. C. R. 158; *Reg* v. *Head*, 1 F. & F. 350.

(*p*) See 24 & 25 Vict. c. 96, s. 22.

common law by their being severed and immediately removed. Thus, it was no larceny to dig and carry away minerals from the earth; to pull down and carry away any part of a building; to cut, gather, and take corn and fruit, or to fell trees (*q*), although most of these acts have been made punishable by statutes to be noticed hereafter. But if any of these things be at one time severed by the offender from the land, and removed by him at another time, though the severance was by the offender himself, so that the severance and the removal cannot be regarded as one continued act, the removal will be a larceny. Thus, if coal, &c. be raised from a mine in the day time, and laid on the surface of the ground at the mouth of the pit, and be carried away at night by the same party; or if corn be cut, or fruit gathered, or timber felled, at one time, and after an interval be carried away, without such a continued presence of the thief as to make the taking and carrying away one continued act (*r*); or if a copper be severed from the brickwork in which it is set during the day-time, and carried off at night by the same party (*s*); these will be larcenies; but if a person steal fixtures in one county, and carry them into another county, he cannot be indicted for simple larceny in the county to which he carried them (*t*). And the taking of animals *feræ naturæ* must stand on the same principle; and, therefore, where poachers killed rabbits, put some in bags, and some in bundles, strapped them together by the legs, and concealed them in a ditch on the land where taken, as a place of deposit, without any intention to abandon the possession of them, and about three hours afterwards went to the ditch, and began to remove the rabbits, when they were apprehended, it was held, that the original act of taking the rabbits not being larceny, the tying them together, placing them in the ditch, and subsequently removing them, constituted one inseverable act of taking and carrying away, and therefore it was no larceny (*u*). So, if the poachers had taken the rabbits to the house of one of their number at the place of deposit, or left them at a public-house till they called for them, and subsequently fetched them away, it would have been the same (*v*).

Things taken must not be part of the Land.

There must be a *taking*. As every larceny includes a trespass, no abstraction of property, with the express consent of the owner, can under any circumstances be larceny; and if a person projects a robbery for purposes of his own, and facilitates the execution, the parties who join with him, however criminal, cannot be held guilty of this offence (*x*). But if the

What constitutes a taking.

(*q*) 1 Hale, 509, 510.
(*r*) *Ibid.* 510.
(*s*) *Lee* v. *Risdon*, 7 Taunt. 191.
(*t*) *Reg.* v. *Millar*, 7 C. & P. 665.
(*u*) *Reg.* v. *Townley*, 40 L. J., M. C. 144; L. R., 1 C. C. R. 315.
(*v*) *Ibid.*
(*x*) Foster, 122.

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owner, suspecting a design to rob him, and wishing to detect the offenders, directs a servant to appear to join in the scheme, and assist it till it be completed, yet if the original intent to rob existed independent of the owner, and he assisted only in its development, the crime will remain unaltered (*y*). And if thieves break into a house, and a servant, by his master's desire, show them the place where the plate is deposited, they will be guilty of larceny in removing it (*z*). A servant taking his master's beans from a granary, by means of false keys, may be guilty of larceny, though he gives it to his master's horses, in addition to their usual allowance; for it is done fraudulently and with intent wholly to deprive the owner of his property without his consent; and the purpose to which the beans were intended to be applied did not alter the case (*a*); but this particular case is now met by a special enactment, making it punishable on summary conviction before justices (*b*).

Of the taking.

As there must be a taking, it follows that to render a party a principal felon, he must be present at the act, or so near as to be able to assist in the execution of the purpose; and, therefore, it has been held that going towards a place where a felony is to be committed in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal in larceny, if he was at such a distance at the time of the taking that he could render no assistance in that act (*c*), but the circumstances may be such as to enable him to be convicted as being an accessory before the fact, since the statute which enables the accessory before the fact to be indicted as a principal offender (*d*); though if he keeps watch while another takes, he will be deemed to join in the taking. If several, by acting in concert, induce by fraud a man to trust one of them with the possession of his money in the presence of the others, and that one hand over the money to another, and then entices the owner to leave the place, and goes off with him in order that the one who then has the money may carry it off, and he do so, he that went out with the prosecutor and did not return, is a principal in the larceny (*e*). And if a man employ an innocent and unconscious agent, as a child or a lunatic, to take goods, he will be considered as taking by the hand of the agent, and will be guilty of larceny as a principal (*f*).

(*y*) *R.* v. *Egginton*, 2 B. & P. 508; 2 Lea. 913.

(*z*) Per *Thompson*, B., 2 Lea. 922.

(*a*) By eight judges against three in *R.* v. *Morfit*, R. & Ry. 307; *Reg.* v. *Usborne*, 5 Jurist, 200, *Parke*, B. *Erskine*, J., held, that if a servant takes his master's property and hands it over to another as a gift, it is as much a felony as if he sold it or took it to a pawnbroker's and pledged it; *Reg.* v. *White*, 9 C. & P. 344.

(*b*) 26 & 27 Vict. c. 103, *ante*, p. 316.

(*c*) *R.* v. *Kelly*, R. & Ry. 421.

(*d*) *Reg.* v. *Manning*, Den. C. C. 21; *Reg.* v. *Hughes*, Bell, C. C. 242, 29 L. J., M. C. 71. See *post*, p. 436.

(*e*) *R.* v. *Handley*, R. & R. 305.

(*f*) Hawk. b. 2, c. 33, s. 12. See *Reg.* v. *Michael*, 9 C. & P. 356. "If one person makes use of another, who is a mere instrument, to do an act,

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What constitutes a carrying away.

There must be *a carrying away*. That is, there must be a complete severance, and *some* such removal "from the place where they were, that the felon had for the instant at least the entire and absolute possession" (*g*). Thus, where a man had in his pocket keys tied to the strings of his purse, which last the prisoner snatched, and held in his hand, but was detected before he had obtained the keys or severed the purse from them, this was holden not to be larceny (*h*). So, where a card of lace lay in a shop window, one half being unwrapped from the card and hung across the window for the purpose of exhibition, and the other half remaining on the card which was lying near a block in the window, and the prisoner, by means of a hook fastened to the end of a stick, drew through a cotterhole in the window-frame all the lace which was unwrapped, and shook the block, with which the remainder became entangled, but not so as actually to remove it with the lace upon it from its place, nor severing the portion of the lace which had been drawn through the hole from the residue, it was holden that he had not completed a larceny (*i*). But if the severance be complete, and the felonious intention clear, the slightest removal will render the offence complete. Thus, if a horse (in a close) is taken with intent to steal him, but the thief is taken before he gets out of the close (*k*), or if a diamond is snatched from a lady's ear, and is dropped among the curls of her hair (*l*); if porter in a barrel is tapped by means of a hole in the cask, and flows into a can on the floor, but the can is snatched away by a stranger and carried off before the prisoner has got possession of it (*m*); or if goods are removed from one part of a waggon to another, with intent to carry them away (*n*); these will be larcenies. But the mere alteration of position of a moveable article without entire change of place will not suffice: so that, if instead of removing a package from one part of a waggon to another, the party merely turn it from endways to lengthways for the convenient abstracting of its contents, after cutting open the covering, but before taking out any of the contents, he will not be guilty of larceny (*o*). He

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the thing done is the act, not of him who is merely the instrument, but of the person who uses him as an instrument;" per *Holroyd*, J., *Ilott* v. *Wilks*, 3 B. & A. 513. Relied on by *Alderson*, B., 1 Moo. C. C. 446.

(*g*) *Cherry's case*, 1 Lea. C. C. 236 (*n.*); 2 East, P. C. C. 16, s. 4.

(*h*) *Wilkinson's case*, 1 Hale, P. C. 508, cited 1 Leach, 321, *in notis*, for *cepit sed non asportavit*, it still remaining fastened as before. So in the case of goods in a shop fastened by a string to the counter, and carried off as far as the string would permit; 2 East, P. C. 556.

(*i*) *Newman's case*, Dick. Q. S. 216; Anon. 2 East, P. C. c. 16, s. 4.

(*k*) 1 Hale, 508; 3 Inst. 108.

(*l*) *R.* v. *Lapier*, 1 Leach, 321. See also *Reg.* v. *Simpson*, Dears. C. C. 421; 24 L. J., M. C. 7.

(*m*) *Reg.* v. *Wallis*, 3 Cox, C. C. 67.

(*n*) *R.* v. *Coslet*, 1 Leach, 236; *Reg.* v. *Poynton*, L. & C. 247; 32 L. J., M. C. 29; *Reg.* v. *Samways*, Dears. C. C. 371. See also *Reg.* v. *Wynn*, 1 Den. C. C. 365; 18 L. J., M. C. 51.

(*o*) 1 Leach, 271, *notis*. Raising an article up from the boot of a coach

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might, however, now be found guilty of the misdemeanour of attempting to commit the larceny.

It is not larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them, and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owner (*p*). But where a potato dealer and dealer in bags was regularly supplied with bags by the prisoner, who when he had finished a lot used to take them and put them down at the warehouse door of the prosecutor, outside the warehouse, and then come afterwards to receive payment of them. The prosecutor having a quantity of bags in his warehouse, the prisoner procured the warehouseman to remove a quantity of bags from the warehouse, and put them outside the door, and shortly after stated that he had brought the bags there, and claimed to be paid for them, this was held to be larceny, though it is difficult to distinguish the case from *Reg.* v. *Poole* (*q*), except in the fact that a re-sale of the bags was intended (*r*).

To abstract gas from an entrance pipe between the main and the meter, by means of a connecting pipe between the entrance pipe into the exit pipe from the meter, by means of a stop-cock in the connecting pipe, is a sufficient *asportavit* of the gas, though the entrance pipe may be the property of the prisoner, and be filled with the gas without any act of the prisoner (*s*).

The things must be taken from the possession of another; not always, indeed, from the actual possession, but from the *legal and constructive* possession; for if a party acquire the possession of goods lawfully in the first instance, and without any intention at the time of stealing it, and *afterwards* fraudulently appropriates them to his own use, he will not be guilty of felony (*t*); or if he keeps possession of them in the hope of reward from the time he first had them (*u*). As where a watch-

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so far as to move every part from the space before occupied, and with intent to carry it away, is a complete asportation of the bag; *R.* v. *Walsh*, 1 Mood. C. C. 14. Lifting a book entirely out of a pocket, which, owing to resistance, dropped into it again, is a simple larceny, but does not amount to a stealing from the person; by six to three judges, *R.* v. *Thompson*, *id.* 78.

(*p*) *R.* v. *Webb*, 1 Moo. C. C. 431. See *Reg.* v. *Poole*, D. & B. 345. In consequence of the decision of *R.* v. *Webb*, it is said that the Stannaries Act, 2 & 3 Vict. c. 58, s. 10, was passed (Russ on Cr., ed. Greaves, vol. 2, p. 151), but that section is now repealed, and the 24 & 25 Vict. c. 96, s. 39, *post*, p. 413, is enacted in its stead.

(*q*) D. & B. 345.

(*r*) *Reg.* v. *Manning*, Dears. C. C. 21. See also *Reg.* v. *Hall*, 1 Den. C. C. 381; 18 L. J., M. C. 62, where a resale of the fat removed was intended.

(*s*) *Reg.* v. *White*, Dears. C. C. 203; 22 L. J., M. C. 123; *Reg.* v. *Firth*, L. R., 1 C. C. R. 172; 38 L. J., M. C. 54.

(*t*) *R.* v. *Bazeley*, 2 Leach, 835; see 3 Inst. 69; 4 Com. Dig. 464; Stra. 1015; *Reg.* v. *Glass*, 1 Den. C. C. 215.

(*u*) *Reg.* v. *York*, 1 Den. C. C. 335; 18 L. J., M. C. 38.

maker has a watch left with him to regulate, and he afterwards disposed of it for his own benefit (*x*). So, the subsequent appropriation, feloniously, of property, which has come into possession in the first instance without such intention, is not larceny; as where a letter containing a post office order is delivered by mistake, and on reading the letter the mistake is discovered, notwithstanding application is made at the post office by the person to whom the letter was mis-delivered, and the order is cashed, it is not larceny of the order (*y*); but it seems that if there had been, in the above case, a felonious intention in the receiver at the time when the letter or the post office order was delivered, though delivered by mistake, it would have been larceny (*z*).

If the sheep of A. stray into the flock of B., and B., not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it might be otherwise if he did any act for the purpose of concealing them, for that might indicate his knowledge of their being the sheep of another (*a*); but if A. in driving a flock of sheep from a field in which the flock of B. is agisting, drive, without being aware of it, one of B.'s lambs, and afterwards on its being pointed out to him, denied having done so, and sold it, and appropriated the money to his use, this is a felony, because in driving away the lamb he committed a trespass, which continued until the lamb was pointed out to him, when he sold it, and then it became felonious (*b*).

Of things lost or abandoned.

Thus, if a man *loses goods and another finds* and converts them to his own use, being ignorant of their owner, and *bonâ fide* supposing that they had been lost or abandoned, or even that they were his own by right of the finding, he will not be guilty of larceny (*c*), unless they are in some place where the owner might be presumed to have deposited them: in which case, or if the true owner is known to him (*d*), or from some name, mark, or circumstance may be reasonably expected to be discovered (*e*), or if any artifice is employed to conceal them from his search, an original *animus furandi* is to be inferred.

(*x*) *Reg.* v. *Thristle*, 1 Den. C. C. 502.

(*y*) *Reg.* v. *Davies*, Dears. C. C. 640; 25 L. J., M. C. 91; *Reg.* v. *Mucklow*, 1 Moo. 160; *Reg.* v. *Christopher*, 28 L. J., M. C. 35; Bell, C. C. 27.

(*z*) *Reg.* v. *Middleton*, 42 L. J., M. C. 73; L. R., 2 C. C. R. 38.

(*a*) 1 Hale, 506.

(*b*) *Reg.* v. *Riley*, Dears. C. C. 149.

(*c*) In *Reg.* v. *Peters*, C. & K. 245, *Rolfe*, B., puts the case of an apple lost and found, as distinguished from 500*l.* in like circumstances. See 1 Hawk. ch. 33, s. 2; *Reg.* v. *Reed*, 1 C. & Mar. 306.

(*d*) Thus where a carpenter to whom plaintiff sent a bureau to be mended, and by unnecessarily breaking it, found money secreted in it, and kept it, it was held to be larceny; *Cartwright* v. *Green*, 8 Vesey, 405; 2 Leach, 952; see *Merry* v. *Green*, 7 M. & W. 623.

(*e*) As by a mark on the property by which the owner may be traced, if the finder takes no step to restore it, and converts it to his own use; *R.* v. *James*, 2 R., C. & M. 102; see *Reg.* v. *Kerr*, 8 C. & P. 176.

At the time of finding them, there must be the felonious intent to appropriate.

If property is found under such circumstances as, or if from its nature, it would appear to be abandoned by the owner, or that the owner did not know where to find it, the question is, whether the prisoner at the time of finding had reasonable ground for believing that the owner could be found, and would come forward if he had notice of the finding, and at the same time determined to appropriate it notwithstanding, he is guilty of larceny, if not, he would not be (*f*); but a ten pound note found in a hairdresser's shop by the hairdresser after a customer had left the shop, cannot be treated as abandoned within the above rule (*g*). So, a purse left on a stall in a market by a purchaser, who had been making purchases, is not lost or abandoned within the above rule, for there is a clear distinction between property lost and property merely mislaid, put down and left by mistake, as in this case, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it (*h*). If the taking away was with intent to steal, the restoring because a reward is offered does not prevent the taking from being larcenous (*i*). So a tailor concealing money found in clothes sent him to repair is guilty of larceny (*k*).

Again, the driver of a hackney carriage taking a parcel left in it, and *unpacking* it with a view to appropriate its contents, is guilty of larceny, if he knows the owner, or took up or set him down at any place where he might have inquired for him (*l*).

With regard to the application of the rule that there must be a taking from the actual or constructive possession of another, there are two classes of cases in which the question of larceny, or no larceny, may arise. *First*, where the owner or lawful possessor has been induced voluntarily to part with the actual *custody* of property to the wrong doer; in which case the offence of depriving him of it altogether may be, according to circumstances, either larceny or false pretence. *Second*, where property has been delivered to a bailee for a special purpose, who afterwards appropriates it to his own use, in which case the offence may be either larceny, or breach of trust made punishable as embezzlement by statute.

When property in goods parted with.

On the *first* class of cases, the principal question always is,

(*f*) *Reg.* v. *Glyde*, 37 L. J., M. C. 107; L. R., 1 C. C. R. 139; *Reg.* v. *Thurborn*, Den. C. C. 387; 18 L. J., M. C. 160; *Reg.* v. *Dixon*, Dears. C. C. 580; 25 L. J., M. C. 39.

(*g*) *Reg.* v. *Moore*, L. & C. 1; 30 L. J., M. C. 77.

(*h*) *Reg.* v. *West*, Dears. C. C. 402.

(*i*) Per *Rolfe*, B., *Reg.* v. *Peters*, C. & K. 245; but see *R.* v. *Wynne*, 2 East's P. C. 664; 1 Lea. 414.

(*k*) *R.* v. *Lamb*, 2 East, P. C. 664, c. 16, s. 99; *R.* v. *Sear*, 1 Leach, 415; *Cartwright* v. *Green*, *supra*.

(*l*) *R.* v. *Wynne*, 2 East, P. C. 664; 1 Leach, 413, cited in 7 M. & W. 632; the case of a coachman opening a box, intending to be honest, but afterwards altering his mind; and see *Reg.* v. *Jenkins*, 9 C. & P. 28. *post*.

whether the party from whose lawful custody the goods were obtained, was induced to relinquish the *property* in the goods, or merely the temporary *possession* of them. If he parted with the *property*, or even the possession of the goods, under representations however fraudulent, a conversion by the party defrauding him is not larceny, unless *when* he got the possession he intended to steal them (*m*); but if he merely relinquish the *custody* of, or *physical* command over, the goods, the party first contriving to obtain such custody, and then converting them to his own use, is guilty of that offence, as they still remain, constructively, in the possession of the true owner (*n*), even though he may have laid a trap by marking money and directing his servant to part with it to the criminal in the way suggested to him (*o*). So, if a general bailee of goods, *e. g.*, a warehouseman, who has a special property in the goods, part with the goods of one bailor instead of another under a mistake the property in the goods does not pass, and the party obtaining the goods and having the *animus furandi* at the time may be indicted for stealing the goods of the warehouseman or of the right bailor (*p*). Again, if a man, designing to obtain a horse without paying its price, bargains with the owner for ready money, upon which the owner improvidently delivers possession of the animal, expecting immediate payment, and the pretended purchaser immediately mounts the horse and rides away without paying anything, this is no felony, because the owner delivered the horse in performance of his part of the contract, expecting a correspondent performance from the vendee, and the property passed with the transfer (*q*). But there can be no doubt that, if instead of delivering the horse on the completion of the bargain, the owner had allowed the party to ride him by way of *trial*, and he had immediately ridden away, in pursuance of an original intention to defraud, the property would have remained unchanged, and the felony have been complete (*r*). So, if a horse be hired for the day by a party intending *at the time of hiring* to appropriate it, and is accordingly taken away and sold, a felony will be committed, because the owner did not intend to relinquish his property in the horse,

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(*m*) See *Reg.* v. *Jones*, 1 C. & M. 611, 612, *Cresswell*, J.; *Reg.* v. *Thompson*, L. & C. 233; 32 L. J., M. C. 57.

(*n*) *Reg.* v. *Robins*, Dears. C. C. 418.

(*o*) *Reg.* v. *Williams*, 1 C. & K. 195.

(*p*) *Reg.* v. *Vincent*, 2 Den. C. C. 464.

(*q*) *R.* v. *Harvey*, 1 Lea. 521. The custom at a fair was to mark beasts when sold, but not to deliver them till paid for. Some beasts were sold there to the prisoner, who refused to mark them, but said he would pay for them at a place near. The prosecutor never consented to their being taken away without payment, but while he was gone to the place fixed, they were taken away by prisoner. Indictment for larceny held right, as the jury found that the prisoner *never at any time* meant to pay for the beasts. *R.* v. *Gilbert*, 1 Moo. C. C. 185.

(*r*) *R.* v. *Tunnard*, East, P. C. 687, 694; cited from Foster's MSS. See *post*, *R.* v. *Banks*, p. 378.

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but only the temporary possession (*s*). So, if a carriage be hired for an indefinite time, but with a then present intent to appropriate it, and it is so appropriated, the fraudulent hirer will be guilty of larceny (*t*). The intent to steal and defraud, existing *at the time* (*u*) when the possession was obtained, is common to both conditions—without this there is neither larceny nor indictable false pretence—but a mere failure to perform a contract, which is the subject of a civil action.

The distinction in these cases of selling, hiring, or lending on trial, is sufficiently obvious; there are many rendered more complicated by the machinery employed to effectuate the fraud; but they will all be determined by the careful application of the same principle. Thus, where a shopkeeper, having agreed to sell goods for ready money, sent them with a bill of parcels by his servant, who delivered them, and received from the vendee, instead of money, two bills of exchange which proved to be worthless, his fraud, although contemplated at the time of the purchase, was holden to be no felony, as the tradesman had parted with the property in the goods, by the act of his servant who delivered them (*x*). But where goods were brought by a tradesman to the house of a party on his request that he might inspect them, and being left there while the owner went to obtain others for the pretended customer to choose from, were taken away, in pursuance of an original intention to obtain tortious possession of them, this was holden larceny (*y*). So, where goods sold in a ready money transaction were allowed to be placed by the pretended purchaser in his gig, who then drove off with them, having had the fraudulent intention when he took them to the gig, it was larceny (*z*). So, if a party be induced to deposit money in the hands of one of several confederates, on a pretended wager, and they carry it away, under colour that the depositor has lost, they will be guilty of larceny, because by depositing the money he did not part with the property in it; but if he had originally paid it, as on the loss of the wager, however fraudulent the conduct of the parties might be—or if the prosecutor parted with his money to buy the prisoner's share of a dropped ring, intending to part with it for ever, and not with its temporary possession only—they could not be indicted for stealing it (*a*).

Where custody or temporary possession parted with by owner.

Where goods are delivered by their owner to a person who has merely the care and oversight of them, the possession in

Where custody parted with and right to

(*s*) *R.* v. *Pear*, 1 Lea. 213; *R.* v. *Patch*, 1 Lea. 238; *R.* v. *Pratt*, 1 Moo. C. C. 250.

(*t*) *R.* v. *Semple*, 1 Lea. 420.

(*u*) The law looks to the beginnings of acts; Plowden's Comm. 260, 474a, *ante*, p. 370.

(*x*) *R.* v. *Parkes*, 2 East's P. C. c. 16, p. 671.

(*y*) *R.* v. *Sharpless*, 2 East, P. C. c. 16, p. 671. See *Reg.* v. *Bramley*, L. & C. 21.

(*z*) *Reg.* v. *Cohen*, 2 Den. C. C. 249.

(*a*) *R.* v. *Robson*, R. & Ry. 413; *R.* v. *Wilson*, 8 C. & P. 111.

law remains in the owner. Thus, if a butler, a shepherd, a carter, a porter, employed to deliver goods, or even a person employed for the special purpose of driving cattle to a fair without authority to dispose of them, sells, or converts the plate, goods or animals with which he is intrusted, it is larceny (*b*); and so it is in the case of money in the keeping of the treasurer of a friendly society, where the property in the money in his keeping is vested in the trustees (*c*); for he had only the custody, without any right to the possession. So, a postmaster has only the custody, and no independent possession of the letter bags or letters, or property sent through the post (*d*). And it seems a post office clerk is only intrusted with the money of the postmaster-general, for the purpose of paying money orders or savings' bank deposits to the proper persons and in the proper sums (*e*). So, where goods are delivered by the owner to a party to be merely used by him; as where a piece of plate is set before a guest at an inn, or sheets are put on his bed, the host has not parted with the possession, and the guest who steals them is guilty of larceny (*f*).

possession retained by owner.

(*b*) 1 Hale, 506; *R.* v. *M'Namee*, 1 Moo. C. C. R. 368; *R.* v. *Bass*, 2 East, P. C. 566; 1 Lea, 251. See *Reg.* v. *Sheppard*, 9 C. & P. 120, case of a horse ridden in a fair by a servant having no authority to sell, but, in fact, exchanging for another with one who had offered to buy: held larceny in the latter. In *Reg.* v. *Goodbody*, 8 C. & P. 665, a driver was employed by a grazier in the country to drive eight oxen to London:—his instructions were, that if he could sell them on the road he might, and was to take those he did not so sell to a particular salesman in Smithfield Market, who was to sell them for the grazier. The drover sold two on the road, and instead of taking the other six to the salesman, drove them himself to Smithfield Market—sold them there, and received the money, and applied it to his own use. Indictment was for stealing:—

Held, 1st, no felonious taking *in first instance*, as prosecutor had given prisoner a legal ownership for a particular purpose; and

2nd. There being no proof that prisoner was *servant of prosecutor* in the first instance—held that he must be acquitted. And per *Parke*, B., *semble*, a man cannot be servant of *several at one time*, notwithstanding *R.* v. *Carr*, R. & Ry. 198, where it was held otherwise on indictment for embezzlement, by a *clerk* who travelled for various houses; but it is held that he may be now, *Reg.* v. *Tite*, L. & C. 29; 30 L. J., M. C. 142; *Reg.* v. *Negus*, 42 L. J., M. C. 62; L. R., 2 C. C. 34, see *post*. For the same reason, where a prosecutor delivered his horse to the prisoner to agist, who agisted it a week, and then sold it, the judges held that he could not be convicted of larceny, as the prosecutor had parted with the possession. *R.* v. *Smith*, 1 Moo. C. C. 473.

In *Reg.* v. *Jackson*, 2 Moo. C. C. 32, a person was hired to drive a heifer in two days to a place named, at 2*s.* a day. He received 2*s.* in hand, sold the heifer, and absconded with the money. This was held larceny, the prisoner's possession being that of a servant only, though the intent to sell was not conceived till after he had taken possession of the cattle.

(*c*) *Reg.* v. *Loose*, 29 L. J., M. C. 132; Bell, C. C. 259.

(*d*) *Reg.* v. *Pearce*, 2 East, P. C. 603, 673; *Reg.* v. *Kay*, D. & B. 231.

(*e*) *Reg.* v. *Middleton*, 42 L. J., M. C. 73; L. R., 2 C. C. R. 38.

(*f*) 1 Hale, 506, 508; 1 Hawk. c. 33, s. 6. See as to this distinction, *R.* v. *Palmer*, 2 Leach, 680, in the case of lodgers stealing furniture from furnished lodgings, now provided against by 24 & 25 Vict. c. 96, s. 74, *post*, p. 418.

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Another instance of the legal possession of goods remaining in the owner, though in point of fact they are out of his hands, is where he is present all the time they are in another's possession, and never intended to relinquish the dominion over them by delivering them over; *e. g.* if he accompany a man to whom he has given them to carry, and the man run away with them, he is guilty of larceny (*g*). Thus, where a passenger by railway about to take a ticket, but unable for the crowd to get close to the pay place, gave one who was close to it a sovereign to get the ticket, and he ran away with the money, it was larceny (*h*). An article may be said to be in a party's possession if in his presence, and intended to be kept in his possession by such presence (*i*).

The principle of the numerous cases in which this doctrine has been acted on is, that the offenders had the custody of the goods merely in the capacity of servants, or in situations analogous to it, and had not therefore the legal possession (*k*); but the manager of a co-operative industrial society's shop or stores is not in such a situation, and has a sufficient possession to justify the laying the property of the society in an indictment for stealing it in him (*l*). So, if a master employ a foreman, with authority to sell goods to a customer, who did so and received the money from the customer, but concealed the whole transaction and held the money, the offence of the foreman is embezzlement and not larceny (*m*). The reverse is the case where a servant receives into his possession, for his master's use, money, or goods, of which the master has never had possession, and converts them to his own use. There he is not guilty of larceny at common law, for want of actual possession by the master at any time of the thing converted (*n*); but the original exclusive possession in the first instance in the servant may be determined by his appropriation of the money or goods to his master's purpose, and from that time his possession would be the possession of his master; as for instance, if he were sent by his master, with the master's cart, to a coal wharf for coals which he was to bring back with him

Possession of servant—possession of owner.

(*g*) *Reg.* v. *Johnson*, 21 L. J., M. C. 32.

(*h*) *Reg.* v. *Thompson*, L. & C. 225; 32 L. J., M. C. 53.

(*i*) *Muspratt* v. *Gregory*, Tyr. & Gr. 1095, per *Parke*, B. See *ante*, p. 241. "If the true man had cast off his surcote, or other upper garment, and the same lying *in his presence*, a thief assault him, &c., and take the surcote, this is robbery: for that which is taken in his presence is in law taken from his person; and so it is of the horse of a true man which stands by him," &c., 3 Co. Inst. 69. See 2 East, P. C. 683; 1 Hawk. P. C. c. 63, s. 2; *R.* v. *Thomas*, Carrington's Suppl. 295; *Reg.* v. *Thompson*, *ubi sup.*; *Reg.* v. *Smith*, 21 L. J., M. C. 111.

(*k*) *R.* v. *Eastall*, 2 R. C. & M. 197; *Reg.* v. *Simpson*, 2 Cox, C. C. 235. See *Reg.* v. *Harvey*, 9 C. & P. 353.

(*l*) *Reg.* v. *Webster*, L. & C. 77; 31 L. J., M. C. 17; *Reg.* v. *Burgess*, L. & C. 299; 32 L. J., M. C. 185.

(*m*) *Reg.* v. *Betts*, Bell, C. C. 90; 28 L. J., M. C. 69.

(*n*) 2 East, P. C. 568, and cases collected, Arch. Cr. Pl. 17th ed., at p. 344.

and he obtain the coals in sacks, if, having so obtained them, he put the sacks on his back and walked off with them and appropriated them to his own use, he would not be guilty of larceny at common law; but if instead of that he placed the sacks in his master's cart and then on his way home appropriated them, it would be larceny, and they would at the time of conversion have been in the master's actual possession (*o*).

Possession of Servant when Possession of Master.

So, whilst a transaction is inchoate, if the owner about to part with property under a mistake discovers the mistake, the consent ceases from that moment, and the taking of the property becomes felonious (*p*).

Next, there is a taking against the will of the owner, or, *domino invito*, as the phrase is, if the owner is induced to part with it upon the unfounded assertions of two men, who prevented his leaving a shop, that the owner had bid for and bought goods at a mock auction (*q*).

The taking must be against the will of the owner.

And this doctrine gives rise to the cases which turn upon the authority of an agent or clerk consenting to part with money or goods to a third person, whose consent when clothed with only a special authority does not extend to the master or owner, whilst if clothed with a general authority, operates as the consent of the master or owner.

If a man obtains unlawfully and fraudulently the possession of money or goods from the clerk or agent of the owner, clothed with a particular authority to part with them, which special authority the clerk or agent did not pursue, he is guilty of taking it, though the clerk or agent intentionally delivered it over into his possession. As the obtaining the mail bags from a post office by pretending to be the mail guard (*r*), the obtaining a watch from the postmaster by pretending to be the person for whom it was intended (*s*), and the obtaining letters from the postmaster under pretence of being the servant of the party to whom they were addressed, as in *Jones's case* (*t*). And so the obtaining, *animo furandi*, monies from a post office clerk in payment of a post office order, to a larger amount than authorized by the post office order under a mistake of the clerk that he was paying a different order made out to a different person (*u*); but if the clerk or agent has the full authority of the owner to part with the goods, and he intends to part with the property, though induced to do so by the fraud, deceit, forgery, or false pretences, there is no larcenous taking. So where the

Authority of clerk or servant to part with property.

(*o*) *Reg.* v. *Reed*, Dears. C. C. 257, and see under bailee statute, *Reg.* v. *Bunkall*, L. & C. 371; 33 L. J., M. C. 75, *post*, p. 380.
(*p*) *Reg.* v. *M'Kale*, L. R., 1 C. C. R. 125; 37 L. J., M. C. 97; *Reg.* v. *Johnson*, 21 L. J., M. C. 32.
(*q*) *Reg.* v. *Macgrath*, 39 L. J., M. C. 7; L. R., 1 C. C. R. 205. See *Reg.* v. *Morgan*, Dears. C. C. 395.
(*r*) *R.* v. *Pearse*, 2 East, P. C. 603.
(*s*) *Reg.* v. *Kay*, Dears. & B. 231.
(*t*) 1 Den. C. C. 198; *Reg.* v. *Gillings*, 1 F. & F. 36.
(*u*) *Reg.* v. *Middleton*, 42 L. J., M. C. 73; L. R., 2 C. C. R. 38.

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owner of goods delivered them up upon an order which was forged (*x*); or where the cashier of a bank paid money on a cheque which turned out to be a forgery (*y*); or where the pawnbroker's manager delivered up pledges by a mistake and through fraud (*z*); or where money was given by the owner to his chief clerk to pay for kitchen stuff brought for sale, who was induced to part with it to an under servant by a deceit (*a*).

The same principle is acted upon where the possession only of goods is given to an agent or servant without any power to part with the property in them, except to a particular person, or in a particular manner, and he is induced to part with them to one who has obtained them animo furandi; for instance, such obtaining of a parcel from a carrier's servant by pretending to be the person to whom it was directed (*b*); or obtaining goods through the mis-delivery of them by a carman's servant through mistake to a wrong person, who appropriated them animo furandi (*c*).

Where bailment.

Formerly, where there was a bailment, unless such bailment or temporary right of possession was determined before the act charged as a felonious taking, the appropriation of goods was not, at common law, larcenous. Thus, if a carrier receives goods to convey, a tailor cloth to make clothes with, a watchmaker a watch to repair, or a friend property to keep secure, and while the trust continues, they convert them to their own use, they will not be guilty of felony at Common Law (*d*). So, if a man hire or borrow a horse for a particular purpose, real or pretended, and *after* that purpose is over, and before his possession of the animal is interrupted, sells it, such withholding and disposing will not constitute a *new* felonious taking, unless, at the time when he originally took it into his possession, he had a felonious intent to steal it (*e*).

(*x*) *Reg.* v. *Adams*, 1 Den. C. C. 38.
(*y*) *Reg.* v. *Prince*, 38 L. J., M. C. 8; L. R., 1 C. C. R. 150.
(*z*) *R.* v. *Jackson*, 1 Moo. C. C. 119.
(*a*) *Reg* v. *Barnes*, 2 Den. C. C. 59; 20 L. J., M. C. 34.
(*b*) *R.* v. *Longstreet*, 1 Ry. & M. 137.
(*c*) *Reg.* v. *Little*, 10 Cox, C. C. 559; and see *Reg.* v. *Middleton*, *ante*, p. 377.
(*d*) Hawk. b. 1, c. 33, s. 2; *R.* v. *Leary*, 4 C. & P. 241. See *R.* v. *Smith*, 1 Moo. C. C. s. 473.
(*e*) *R.* v. *Banks*, R. & Ry. C. C. R. 441; *R.* v. *Tunnard*, cited from Foster's MSS.; East's P. C. 687, and 694, *ante*, p. 373. There must not only be an original intention to convert to the hirer's own use, but a subsequent actual conversion; thus, his merely agreeing to take a sum offered for the goods is not enough, if the buyer does not mean to do so, till his suspicion respecting the hirer's right to sell is removed; *R.* v. *Brooks*, 8 C. & P. 295. Again, where a person employed to drive sheep to a fair, without authority to do anything else, drove them in a different direction, and sold them the morning he took charge of them, and the jury found, that at the time he received them he intended to convert them to his own use, it was held larceny; *R.* v. *Stock*, 1 Moo. C. C. 87. Another reason for a similar decision, in *R.* v. *M'Namee*, *id.* 368, was, that the person employed to drive the sheep had the custody merely, and not the right to the possession, which in law remained in the owner; though the other was a general drover, or at least paid by the day. See *ante*, p. 375.

And formerly, if the lawful possession of the bailee were first determined, as if its term or object had ceased, a subsequent new taking would have been larcenous (*f*). But now, by statute, whosoever being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction (*g*).

Where there is a bailment.

Statutory enactment.

If a carrier take a parcel with which he is intrusted to the place appointed, and there delivers, or lays it down, and afterwards removes it with intent to steal, such removal will be felony as a new taking (*h*). Or if a carrier during the conveyance of goods open the package containing them and take out part, he will be guilty of larceny (*i*). So that, where the master and owner of a vessel had disposed of parcels committed to him for conveyance, he is now guilty of larceny, though it did not appear that he took the goods out of their packages, though before the statute the contrary was held (*k*). And where a man, not a common carrier, but employed to carry thirty trusses of hay for hire, appropriated one truss, without breaking its bulk, he was before the statute, though now it would be otherwise, held not guilty of larceny (*l*).

The bailment contemplated by the statute must be such as to require the return of the article received, or of something into which the article received has been converted in pursuance of the terms of the bailment; thus, the treasurer of a money club, who received small weekly payments from the members, and fines for the failure to make such payments, with authority to lend out the club money on loan, subject to certain conditions, such club money to be distributed at the end of the year among the members, was held not to be a bailee within the act of the weekly sums received, as his obligation was not to return the identical coin, but only an equal amount (*m*); but a man who was intrusted with money to go and purchase some coals, and to bring them home to the prosecutor in his (the man's) cart, who,

Bailment under the statute.

(*f*) Whether a mere withholding and disposal of property bailed after the lawful possession of it is ended, with the term or object for which it was delivered over, but without a break in the actual possession, or any fresh taking afterwards, ever amounted to larceny in itself, *without original intent* to steal, is very doubtful since *Banks's case*, R. & Ry. 441, and 2 East, P. C. 690, 694; *Reg.* v. *Steer*, 1 Den. C. C. 349; 18 L. J., M. C. 30.

(*g*) 24 & 25 Vict. c. 96, s. 3.

(*h*) 1 Hale, 505. See 2 East, P. C. 696; 3 Inst. 107.

(*i*) 3 Inst. 107.

(*k*) *R.* v. *Maddox*, R. & Ry. 92; *R.* v. *Fletcher*, 4 C. & P. 545.

(*l*) *Reg.* v. *Cornish*, Dears. C. C. 425; *R.* v. *Pratley*, 5 C. & P. 533; *Parke*, J., Oxford Lent Ass. 1833.

(*m*) *Reg.* v. *Hassall*, L. & C. 58; 30 L. J., M. C. 175.

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having purchased the coals, and loaded them into his cart, afterwards abstracted a portion of the coals with intent to appropriate them to himself, and to deprive the prosecutor of them, was held to be rightly convicted as a bailee (*n*). With reference to the point in that case, that, after the purchase of the coals, there ought, in order to constitute a bailment, to have been an appropriation of the coals to the prosecutor, and that there was no evidence of such appropriation. *Cockburn*, C. J., delivering the judgment of the court, says :—"Some of us are of opinion that even if there had been no evidence of a specific appropriation of the coals to the prosecutor, yet the coals having been purchased with the money of the prosecutor, given for the express purpose, the property in the coals on the purchase ipso facto vested in the prosecutor, and that there was then a bailment within the terms of the statutory enactment, and that, therefore, the prisoner is guilty. Other members of the court think, that in order to support the conviction there must have been a specific appropriation of the coals to the prosecutor, and that there was evidence of such specific appropriation, from the facts that the prisoner bought the coals with the prosecutor's money and put them into his cart, and after taking a portion of them delivered the rest to the prosecutor, pretending that he had brought the coals which the prosecutor had required. We are all of opinion that there was evidence of such an appropriation, if an appropriation were necessary" (*o*).

Larceny as bailee.

Though the question has arisen whether a married woman can be a bailee within this section, it escaped decision, because there was a second count charging her with simple larceny, and there was evidence that she had broken bulk; but it would seem the better opinion that she can be.

Married woman bailee.

Where a married couple let lodgings, and the wife made the contracts with and received the money from the lodgers, and the husband interfered in no way. A lodger, upon leaving for a temporary absence, gave into the custody of the wife his clothes box, containing his money box, with money therein, which she promised to take care of for him, the husband had nothing to do with it. In the lodger's absence she stole the money, and was convicted upon an indictment, upon the 20 & 21 Vict. c. 54, s. 4, containing a count in larceny as bailee as well as one at common law. And the court held the conviction right (*p*).

A man may, in one case, be guilty of stealing goods which are, in some sense, his own :—*e. g.* when, having bailed them to another person, he takes them fraudulently, in order to charge the bailee in an action, or by force, in order to charge

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(*n*) *Reg.* v. *Bunkall*, 33 L. J., M. C. 75; L. & C. 371. See *ante*, p. 377.

(*o*) *Ibid.*

(*p*) *Reg.* v. *Robson*, 31 L. J., M. C. 22; L. & C. 93. See *R.* v. *Crofts*, 2 Str. 1120; but also *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex. 429.

the hundred (*q*). But if the goods have been taken from the owner, and wrongfully mingled with others so that they cannot be separated, as if a garment be taken and embroidered, or wood be sawed out into planks, the owner may retake the altered article without committing any offence, however it may be increased in value (*r*). *Of a Man stealing his own Goods.*

At common law joint tenants, or tenants in common, of a chattel, as partners in trade, cannot commit larceny by abstracting the goods which belong to both, because they have a common interest in them; but this is altered by 31 & 32 Vict. c. 116, s. 1, for which section in full see *post*, p. 426; nor can a wife be guilty of larceny in singly abstracting the goods of the husband (*s*); nor is a stranger who merely assists a wife to take and carry away her husband's goods, apart from any question of adultery (*t*); but it is said, that if the stranger acted as principal in the taking, and the wife merely assented, the stranger would be guilty of larceny if he had the felonious intention (*u*). Joint tenants or partners in trade.

A taking with the bare intent to use the goods, though unlawfully, and to return them, will be only a trespass, if the original intention to return the goods be clear; though if they were ever taken with intent to steal, no restitution will alter the legal aspect of the offence; and, in all such cases, the original intention is a question for the jury (*x*). Thus, where two persons took two horses from a stable, rode them to a place at a distance, and there left them, proceeding on foot, and the jury found that they took the horses merely to forward them on their journey, and not to make any further use of them, this was holden a trespass only, and not a larceny; as, though the horses were taken away against the consent of the owner, the intent to steal was negatived by the finding (*x*). The intention must be to deprive the owner wholly of his property, and not merely for a temporary purpose. Thus, where a workman was employed at a tannery to dress skins, and the skins, when dressed, were delivered to the foreman, and every workman was paid in proportion to and on account of the work done by himself. The skins were afterwards stored in a warehouse adjoining to the workshop, and the workman got skins already dressed by other workmen from the warehouse and took them to the place where he worked in his workshop, not with intent to sell or dispose of them, but to bring them in and charge them as his own work, and to get paid by his master for them, it was held Of the *animus furandi*.

(*q*) 1 Hale, 513; Cro. El. 537. In such cases they must be laid to be the bailee's goods. See *post*.

(*r*) 1 Hale, 513; *Mawman* v. *Tegg*, 2 Russ. 391.

(*s*) 1 Hale, 513. See *ante*, pp. 300, 303.

(*t*) *Reg.* v. *Avery*, 28 L. J., M. C. 185; Bell, C. C. 156.

(*u*) *Ibid.*; see also *Reg.* v. *Berry*, Bell, C. C. 95; 28 L. J., M. C. 70; for the cases where the goods are taken by the wife and her adulterer, *ante*, pp. 300—303, on defence of coverture.

(*x*) *R.* v. *Phillips*, 2 East, P. C. c. 16, s. 98.

Of Larceny.

Of the *animus furandi.*

not to be larceny (*y*). And so, where two men were employed as glove finishers, and the practice was to take the finished gloves into an upper room on the prosecutor's premises and lay them on a table, in order that the workmen might be paid according to the number they had finished; and they took a quantity of finished gloves out of a store-room on the same premises and laid them on the table in the upper room, with intent to obtain payment for them as so many gloves finished by them, it was not larceny (*z*). But where a person, with whom a a plate chest had been deposited for safe custody, broke it open and pawned its contents, and the jury found him guilty, but added to their verdict that they believed that he intended ultimately to return the property, the conviction for larceny was held good (*a*). Where it clearly appeared that the prisoner pledged a stolen article to raise money for a temporary purpose, with a reasonable expectation of being soon enabled by receipt of money to regain and restore it, the prisoner was held properly acquitted of larceny (*b*). And where a jury found a prisoner not guilty of stealing a watch, but guilty of keeping possession of it in the hope of reward from the time he first had the watch, it was deemed a verdict of not guilty (*c*). But it is enough if the taking be *lucri causa*, for the sake of gain, though that gain may only result collaterally from the possession of the chattel. As where a woman obtained possession of and destroyed a post letter, in the hope of suppressing enquiries made therein as to her character (*d*). Thus, it has been holden, that a servant clandestinely taking his master's beans to give to his master's horses, and thereby depriving his master of his property, and diminishing his own labour, is guilty of larceny (*e*); and the like in the case of oats (*f*). In one case, where the prisoner took and killed a horse, not for the purpose of deriving any pecuniary advantage from it, but to prevent the horse from being identified as previously stolen by another, this was holden by six judges against five to be larceny (*g*). But clandestinely removing articles belonging to

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(*y*) *Reg.* v. *Holloway*, 1 Den. C. C. 370.

(*z*) *Reg.* v. *Poole*, Dears. & B. 347; 27 L. J., M. C. 53.

(*a*) *Reg.* v. *Trebilcock*, D. & B. 453; 27 L. J., M. C. 103.

(*b*) *Reg.* v. *Phetheon*, 9 C. & P. 552; *Gurney*, B., confirmed by the other judges. See 1 Hale, 509, 533; 1 Hawk. c. 34, s. 2.

(*c*) *Reg.* v. *York*, 1 Den. C. C. 235; 18 L. J., M. C. 38.

(*d*) *Reg.* v. *Jones*, 1 Den. C. C. 188; 2 C. & K. 234.

(*e*) *R.* v. *Morfit*, R. & Ry. 387.

(*f*) *Reg.* v. *Privett*, 1 Den. C. C. 193; but see now 26 & 27 Vict. c. 103.

(*g*) *R.* v. *Cabbage*, R. & Ry. 292. A carter took into his master's cart two trusses of hay *above the quantity allowed* for the horses on a journey; at the end of it, an ostler assisted him in removing them into an inn stable. The larceny by the carter was held completed as soon as the hay was placed in the cart, *animo furandi;* and the ostler was held properly indicted for receiving it, knowing it to be stolen. *Reg.* v. *Gruncell*, 9 C. & P. 365.

a woman, in order that she may go to seek them in a particular place where the taker may have sexual intercourse with her, has been held not a felonious taking (*h*). *Of the Animus Furandi.*

And where a person having obtained the key of an uninhabited house belonging to a gentleman to whom he was domestic servant, entered it, and threw several articles of furniture into a river which ran near, in which they were destroyed, and the jury found that this was done in revenge for a supposed affront, and with no intention of converting the goods to his own use; the prisoner being tried for larceny was, under direction of the judge, acquitted (*i*). And even though there be a conversion of the goods, with a fraudulent and wrongful purpose, yet, if the *animus furandi* was wanting when they were originally acquired, the conversion may not amount to larceny. Thus, during a fire, the prisoner, with other neighbours of the owner of the house which was burning, took several articles in his presence with the alleged design of saving them from the flames; the prisoner, on being asked for the articles she had taken, denied that she had them, but they were found concealed in her possession; the jury found specially that she did not take the goods with a felonious intention, but with a laudable design, and that the design of fraud suggested itself to her mind afterwards; on which the judges were of opinion, that as the jury had negatived the *animus furandi* at the time of the taking, it was not a felonious taking, and the prisoner was discharged (*k*).

A *bonâ fide* claim of right will rebut the presumption of felonious intention, though it may turn out to be groundless. Thus, if the lord of a manor claiming a right of waif and estray, seize a horse as such estray, without any concealment or mark of fraud, this will be no felony (*l*). But the claim must have a colour of right, and not be set up against known law, as a claim to glean on the lands of another against his will (*m*); or to plunder a wreck (*n*); or in the inhabitants of a district, claiming a right to take from a close the produce of the soil, as grass, turves or trees (*o*); or for all the inhabitants of a parish to angle and catch fish in a close of a private person (*p*); for these will not be excused merely because custom has appeared to sanction such usages. Claim of right.

In general, however, a wrongful taking of property against

(*h*) *R.* v. *Dickinson*, R. & Ry. 420.
(*i*) *R.* v. *Blyton*, A.D. 1791. Dick. Q. S. 226.
(*k*) *R.* v. *Leigh*, 2 East, P. C. c. 16, p. 694. See *Reg.* v. *Hore*, 3 F. & F. 315.
(*l*) 1 Hale, 509.
(*m*) *Steel* v. *Houghton*, 1 Hen. Bla. 51, 63.
(*n*) *Hamilton* v. *Davies*, 5 Burr. 2932.
(*o*) *Race* v. *Ward*, 4 E. & B. 702, per Lord *Campbell*, p. 709.
(*p*) *Bland* v. *Lipscombe*, 4 E. & B. 713; note to *Race* v. *Ward*. See *Hudson* v. *M'Rae*, 33 L. J., M. C. 65; *Cornwell* v. *Sanders*, 32 L. J., M. C. 6.

Of Larceny.

Question of intent for the jury always.

the will of the owner must be considered as felonious, unless shown by circumstances to be otherwise. But the question of intent is to be gathered from circumstances, on which the jury are to decide; of which the most important is the presence or absence of concealment at the time of, and subsequent to, the taking. The question is always for the jury; and if they entertain any doubt whether the taking were with intent to steal, they ought to acquit the prisoner.

The following is the form of an indictment for larceny at common law:

Form of indictment.

Berkshire, to wit. The jurors for (*q*) our lady the Queen upon their oath present, that A. B., on the —— day of ——— A.D. ———, one coat, one waistcoat, and one pair of shoes, of the goods and chattels of C. D., feloniously did steal, take and carry away against the peace of our said lady the Queen, her crown and dignity.

Where distinct acts of stealing are charged other counts may be added.

2nd Count. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. afterwards, and within the space of six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the —— day of ——— A.D. ———, three silver tea spoons, of the goods and chattels of the said C. D. feloniously did steal, take and carry away against the form of the statute in such case made and provided.

Indictment for a subsequent Felony after previous Conviction (*r*).

Berkshire, to wit. And the jurors aforesaid, upon their oath aforesaid, present, that J. S., on the ——— day of ——— A.D. ———, three pairs of shoes, one shirt, and one waistcoat, of the goods and chattels of J. N. feloniously did steal, take and carry away against the form of the statute, &c. and against the peace, &c. And the jurors for our lady the Queen upon their oath further present, that heretofore, and before the commission of the felony hereinbefore charged, to wit, at, &c. [*describing the court where the defendant was tried and convicted*] on the ——— day of ———, in the year of our Lord ———, the said J. S. was convicted of felony, which said conviction is still in full force, strength and effect, and not in the least reversed, annulled or made void.

As to the mode of arraignment and proof of an indictment charging a previous conviction, see *ante*, pp. 182, 263.

Points relating to indictments for larceny.

Besides the points relating to the venue, to the name and addition of the party accused, and to the statement of time and place, all of which have been treated of already (*ante*, Chap. IV., p. 148), the following points are important in framing indictments for larceny.

The kind of goods stolen must be described specifically, by the name usually appropriated to it; for if the prisoner be charged with stealing one thing, and be proved to have stolen

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(*q*) As to "of," see *Broome* v. *The Queen*, 12 Q. B. 834; 17 L. J., M. C. 14; *Reg.* v. *Turner*, 2 M. & Rob. 214; *ante*, p. 133. This is quasi a suggestion on the roll.

(*r*) See Archb. Cr. Pl. & Ev. 16th ed. 892, *ante*, pp. 167, 168.

Of the Indictment.

Mode of description of goods stolen.

another, he must be acquitted, unless the description be amended according to the proof. Articles manufactured of iron should not be singly described in an indictment as so many pounds' weight of iron (*s*). So sovereigns or rods of iron should not be called "gold" or "lbs. of iron" (*t*); but tin in a manufactured state of lump or ingot may be stated as "lbs. of tin" (*u*). By 14 & 15 Vict. c. 100, s. 18 (*ante*, p. 165), bank notes were to be described as money, and that description was held to be proved by bank notes of a country bank out of circulation (*x*). If a statute makes it an offence to set fire to a stack of "pulse or corn," it is sufficient to state that the prisoner set fire to a stack of beans (*y*) or barley (*z*). If the party stole any one of the articles enumerated, or any part of the quantity alleged, the charge will be sustained; but restitution cannot in strictness be claimed of any other goods than those claimed on the record (*a*). It must appear on the face of the indictment that the thing taken is one in respect of which larceny may be committed; and, therefore, if it charge stealing *a pheasant*, without stating the bird to be *tame* or confined, it will be bad, although the pheasant taken should in proof be shown to be so reclaimed as to be the subject of a charge of larceny if properly laid (*b*). An indictment charged the stealing of "four *live* tame turkeys;" it appeared that they were stolen while alive in another county, and there killed, and that when dead they were brought into the county where the trial took place, the twelve judges held that the word "live" could not be rejected as surplusage, so that the charge not being proved as laid, the conviction was wrong (*c*). Mr. Justice *Holroyd* on that occasion observed, that an indictment for stealing a *dead* animal should state that it was dead: for on a general statement that a party stole the animal, it is to be intended that he stole it alive (*d*); but where the animal has the same name, whether dead or alive, and the offence and the punishment for it is the same in either case, it is unnecessary

(*s*) *R.* v. *Stott*, 2 East, P. C. 752.
(*t*) *Reg.* v. *Mansfield*, 1 C. & M. 143.
(*u*) *Ibid.*
(*x*) *Reg.* v. *West*, D. & B. 109; 25 L. J., M. C. 6.
(*y*) *R.* v. *Woodward*, 1 Moo. C. C. 323.
(*z*) *R.* v. *Swatkins*, 4 C. & P. 548.
(*a*) 2 Hale, 182; 1 Ch. Cr. L. 820; 3 *id.* 946.
(*b*) *R.* v. *Rough*, 2 East, P. C. c. 16, s. 41, p. 607.
(*c*) *R.* v. *Edwards*, R. & Ry. 497. In *R.* v. *Williams*, 1 Moo. C. C. 107, the first count of indictment was for stealing "three sheep." Proof was that they were killed and the carcases left in the gripe of a hedge in the field where when living they had been. *Littledale*, J., held that as there was no evidence of the removal of the sheep in a live state, the removal after their death would not support a count for stealing "sheep," which must be intended to be *live* sheep; and in Mich. T. 1825, the twelve judges concurred in his opinion as to that count, a removal while alive being essential to constitute the larceny charged.
(*d*) See *R.* v. *Halloway*, 1 C. & P. 128.

Indictment for Larceny.

Description of thing stolen.

to aver whether the animal be dead or alive (*e*). Where the indictment charged defendant with stealing one bushel of chaff, one bushel of oats, and one bushel of beans, and the evidence was, that the articles were mixed together, *Bayley*, J., held the description insufficient, and held that it should have been laid as "a certain mixture consisting of one bushel of chaff," &c. (*f*). A charge of setting fire to a stack of straw was held not supported by proof that it was part stubble and part coleseed straw (*g*). In an indictment for stealing monies, it is no longer necessary to specify any particular coin with which the evidence may consist and correspond (*h*); but if particular coins are specified the proof must show that some or one of the specific coins described was or were taken (*i*); and in indictments for stealing notes and other securities, they may be described in a general manner, as "certain valuable securities, to wit, &c., of the value of 9*l*."—and need not be set out or further individually particularized on the record (*k*). A piece of silk containing six handkerchiefs in number, not separated, though called a "piece of silk handkerchiefs," was held well described as "six handkerchiefs;" for they were charged for in the trade by the number of them, and a line of cotton marked the place for separating each (*l*).

In whom property should be laid.

Some workmen sent a fellow-workman to receive their wages for them from the cashier of their employers. The cashier paid him, and he appropriated it to his own use. The property in the money ought to have been laid in the workmen and not in the employers (*m*). If the real owner of stolen goods is known, and has had either actual, *viz.*, personal, or only constructive possession, *i. e.*, by his bailiff, agent, or servant, they must be stated to be his (*n*). Again, if goods are laid as belonging to one who is only servant to the true owner (*o*), or is

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(*e*) *R.* v. *Puckering*, 1 Moo. C. C. 242.

(*f*) 3 Ch. Cr. L. 947; but see per *Alderson*, B., in *Reg.* v. *Bond*, 1 Den. C. C. 517, who thought that though substances chemically mixed ought to be so described, yet that substances mechanically mixed ought to be described by the names applicable to them before the mixture.

(*g*) *R.* v. *Tottenham*, 1 Moo. C. C. 461; 7 C. & P. 237. The word "haulm" was not in the act decided on in that case.

(*h*) 14 & 15 Vict. c. 100, s. 18, *ante*, p. 165.

(*i*) *Reg.* v. *Bond*, 1 Den. C. C. 517; 19 L. J., M. C. 138; *Reg.* v. *Cooke*, 40 L. J., M. C. 68; *Reg.* v. *Thompson*, 32 L. J., M. C. 57; L. & C. 233.

(*k*) *R.* v. *Johnson*, 3 M. & S. 539; 14 & 15 Vict. c. 100, ss. 5, 7, *ante*, p. 164.

(*l*) *R.* v. *Nibbs*, 1 Moo. C. C. 25.

(*m*) *Reg.* v. *Barnes*, 35 L. J., M. C. 204; L. R., 1 C. C. R. 45.

(*n*) *R.* v. *Remnant*, R. & Ry. C. C. R. 136; *R.* v. *Wymer*, 4 C. & P. 391; *e. g.*, goods belonging to a guest and left at an inn; *Reg* v. *Rowe*, Bell, C. C. 95; 28 L. J., M. C. 128; *R.* v. *Todd*, 2 East's P. C. 653; or entrusted to a person for safe keeping; *R.* v. *Taylor*, 1 Leach, C. C. R. 356.

(*o*) 2 East's P. C. 652; *R.* v. *Hutchinson*, R. & Ry. 412; for the servant's possession is that of his master, and not special like a bailee's. See *ante*, p. 159.

Indictment.

In whom the property should be laid.

a married woman (*p*), the prisoner must be acquitted unless the indictment be amended. If the real owner steals his own goods from his bailee, they must be described as the bailee's (*q*). If the party in whom the ownership is laid be mistaken or misnamed, the prisoner will be entitled to an acquittal, unless an amendment be made (*r*). If the owner be unknown, they may be laid as "the goods of a person to the jurors unknown," for it is the queen's suit, and the felony must be punished (*s*). So, if in an indictment for receiving stolen goods, the principal felon be unknown, he may be described in like manner; but if the name of the owner or principal felon appear in evidence before the grand jury, and his name is on the back of the bill, such an indictment cannot be supported (*t*). But goods may be laid as belonging to any person who had a special property in them at the time of the theft, *e. g.*, a carrier to whom they were entrusted for conveyance (*u*); a pawnee with whom they were left in pledge (*x*); a laundress who received them to wash them; or the agister of cattle (*y*). Bailees of goods do not lose their special property in them by parting with the possession under a mistake (*z*). Clothes and necessaries provided for children under full age may be laid either as the property of the children (*a*), or of the father who provided them (*b*); but if the clothes be furnished by the father in pursuance of indentures of apprenticeship, by which his son is bound to him, they must be laid to belong to the son (*c*). Goods let with a ready furnished lodging, if stolen by any one except the lodger, must be described as the goods of the lodger, not as the goods of the landlady, who has parted with the right to the possession of them, and could not have maintained trespass if the taking had been other than felonious (*d*). As there

(*p*) For in law she is incapable of a separate ownership of chattels; 1 Hale, 513; and this even though she is living apart from her husband on an income arising from property vested in trustees for her separate use, for the goods are not her trustees', and cannot be her own; *R.* v. *French*, R. & Ry. 491; *R.* v. *Wilford*, *id.* 517. However, if after goods are stolen from a *feme sole* she marry before indictment, the goods may be described as hers by her maiden name; *R.* v. *Turner*, 1 Leach, 536. See further, *ante*, p. 160.

(*q*) *R.* v. *Wilkinson*, R. & Ry. 470; *R.* v. *Bramley*, *id.* 478; *Reg.* v. *Webster*, 31 L. J., M. C. 17; L. & C. 77. See *ante*, p. 160.

(*r*) 1 Hale, 512; *Reg.* v. *Barnes*, 35 L. J., M. C. 204; L. R., 1 C. C. R. 45.

(*s*) *Id.*, *ante*, p. 156.

(*t*) *R.* v. *Walker*, 3 Camp. 264; *R.* v. *Robinson*, Holt, 595.

(*u*) *R.* v. *Deakin*, 2 East's P. C. 658.

(*x*) 2 Hale, 181; 1 *id.* 513; 2 East's P. C. 652.

(*y*) *R.* v. *Woodward*, 2 East's P. C. 653.

(*z*) *Reg.* v. *Vincent*, 21 L. J., M. C. 109; 2 Den. C. C. 464. See *ante*, p. 373.

(*a*) This seems best; *R.* v. *Forsgate*, 1 Leach, 463.

(*b*) *R.* v. *Hayne*, 12 Co. 113; 2 East's P. C. 654.

(*c*) *R.* v. *Forsgate*, 1 Leach, 463; *Reg.* v. *Hughes*, 1 C. & M. 593, per *Patteson*, J.

(*d*) *R.* v. *Belstead*, R. & Ry. 411; *R.* v. *Brunswick*, 1 Moo. C. C. 26.

Larceny.

In whom the property should be laid.

is no property in a dead body, it is not larceny to remove it from the grave; but it is larceny to take the shroud or coffin, which, in such case, should in general be laid as the property of the executors, &c. of the deceased, or of those who were at the expense of the funeral (*e*). Money in an ancient poor's box fixed by screws at the back to the outside of a pew in the aisle of a church, may be described as of the vicar and churchwardens as individuals (*f*). At common law, where goods were the property of the partners, trustees, or a public body, it was necessary to state all the parties so interested correctly; but this was rendered unnecessary in various cases by several statutes, the provisions of which have been consolidated and extended by 7 Geo. 4, c. 64, ss. 14, 15, 16, 17, 18, the substance of which will be found in a former section (*g*). Goods seized under *fi. fa.* may be described as the property of the party against whom the writ issued; for though they are in custodia legis, the original owner's property in them continues till they are sold (*h*). So, if B.'s goods are stolen from him by A., and again from A. by C., the goods may be described as either of B. or of A.; of B., because his property as true owner is not divested by the tortious taking; or of A., because A. had a possession good against C. (*i*).

The following form of indictment for stealing goods, the owner of some being known, and the owner of others unknown, may be readily adapted to either occasion.

—— one pair of snuffers of the goods and chattels of C. D., and two plated tea spoons of the goods and chattels of some person or persons to the jurors aforesaid unknown, feloniously did steal, take and carry away, against the peace, &c.

Indictment for Larceny as Bailee.

The jurors for our lady the Queen upon their oath present that A. B., on the ——— day of ———, A.D. ——, was a bailee of one bale of cloth, one bale of silk, and one box of linen, of the goods and chattels of S. T., and feloniously did steal, take and carry away the said goods and chattels, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Punishment of simple larceny.

By 24 & 25 Vict. c. 96, s. 4, it is enacted, "whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases otherwise provided for) be liable, at the discretion of the court,

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If the larceny is committed by the lodger, they may *by statute* be described as the property of the owner or person letting to hire; 24 & 25 Vict. c. 96, s. 74, *post*, Sect. 11, p. 417.

(*e*) See further, *ante*, p. 160; 1 Hale, 515.

(*f*) *Reg.* v. *Wortley*, 1 Den. C. C. 162.

(*g*) *Ante*, pp. 157, 158. As to stating the property in goods of guardians of a union under the poor law act, 4 & 5 Will. 4, c. 76, see 5 & 6 Will. 4, c. 69, s. 7, *ante*, p. 158.

(*h*) *R.* v. *Eastall*, 2 Russ. on Cr. 291, 382.

(*i*) *R.* v. *Wilkins*, 1 Lea. 522, 523.

to be kept in penal servitude for the term of [five(*k*)] years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping." *Punishment.*

By section 118 of the same act, "whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned and kept to hard labour in the common gaol or house of correction." Gaol or house of correction—hard labour—

By section 119, "whenever solitary confinement may be awarded for any indictable offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time and not exceeding three months in any one year." solitary confinement—

By sect. 119, "whenever whipping may be awarded for any indictable offence under this act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence." whipping.

By sect. 117, "in the case of any felony punishable under this act the court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year." Finding sureties.

By sect. 7, "whosoever shall commit the offence of simple larceny after a previous conviction for felony, whether such conviction shall have taken place upon an indictment or under 18 & 19 Vict. c. 126, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years; or to be imprisoned for any term not exceeding two years, with or without hard labour and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping." After previous conviction penal servitude for not exceeding ten years,

"Where any person shall, on indictment, be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, whether upon an indictment or under 18 & 19 Vict. c. 126, the least sentence of penal servitude that can be awarded in such case shall be a period of [seven(*k*)] years." and not less than seven years.

By 24 & 25 Vict. c. 96, s. 8, "whosoever shall commit the offence of simple larceny, or any offence made punishable like simple larceny, after having been previously convicted of any indictable misdemeanour punishable under this act, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than After previous conviction for misdemeanour.

(*k*) 27 & 28 Vict. c. 47, s. 2.

Of Larceny.

Punishment of.

[five (*l*)] years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping."

After two previous convictions.

Whoever shall commit larceny, &c. after having been twice summarily convicted under 7 & 8 Geo. 4, cc. 29, 30; 9 Geo. 4, cc. 55, 56; 10 & 11 Vict. c. 82; 11 & 12 Vict. c. 59; 14 & 15 Vict. c. 92, ss. 3, 4, 5, 6; or in this act or 24 & 25 Vict. c. 97 (whether each of the convictions shall have been in respect of an offence of the same description or not, and whether such convictions, or either of them, shall have been or shall be before or after the passing of this act), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than [five (*m*)] years; or to be imprisoned for any term not exceeding two years, with or without hard labour and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping (*n*).

Re-delivery to owner of property stolen.

Under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 30, if any person is convicted, in any court, of feloniously taking or fraudulently obtaining any goods or chattels, and it appears to the court that the same have been pawned with a pawnbroker, the court on proof of the ownership of the goods and chattels may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan, or of any part thereof as to the court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting.

The owner of stolen property prosecuting thief or receiver to conviction shall have restitution of his property.

As to restitution of stolen property to the owner, it is provided by 24 & 25 Vict. c. 96, s. 100, "if any person guilty of any such felony or misdemeanour as is mentioned in this act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a

Provision as to valuable and negotiable securities.

(*l*) 27 & 28 Vict. c. 47, s. 2.
(*m*) *Ibid.*
(*n*) 24 & 25 Vict. c. 96, s. 9.

just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security: provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanour against this act." It is said to be imperative on the court to award restitution (*o*).

Restitution of stolen Property.

Not to apply to prosecutions of trustees, bankers, &c.

Section 2.

Of Larceny of Valuable Securities.

At common law the stealing of securities which had no *intrinsic* value was no larceny, at all events none beyond the value of the substance on which they were written (*p*); and the reason seems to be that they are evidence only of a right, and a right cannot be the subject of larceny, and, therefore, the paper which is only evidence of it is not (*q*); but when the security has ceased to be a security, *e. g.*, a cheque after it has been cashed, it may be the subject of larceny as a piece of paper (*r*). But as their protection has become of great importance, in consequence of the introduction of bills and paper currency, they have been protected by several statutes. These have been consolidated by 24 & 25 Vict. c. 96, s. 27, which enacts, "whosoever shall steal, or for any fraudulent purpose destroy, cancel or obliterate the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of the like value with the share, interest or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby, and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned or referred to in or by the security. "*Valuable security*" is defined by 24 & 25 Vict. c. 16, s. 1, by which enactment "the term 'valuable security' shall include any order, exchequer acquittance or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom or of Great Britain or

Larceny of securities.

Valuable security, what.

(*o*) *Reg.* v. ———, Gloucester Summer Assizes, 1861, per *Keating*, J., after consulting *Hill*, J. Davis's Crim. Stat., p. 100.

(*p*) See Stra. 1133, *R.* v. *Westbeer*, and p. 393, n. (*e*); but an unstamped agreement is nevertheless evidence of a right under it, and is a chose in action, and not the subject of larceny; *Reg.* v. *Watts*, Dears. C. C. 326.

(*q*) *Reg.* v. *Morrison*, Bell, C. C. 165, citing *Reg.* v. *Watts*, Dears. C. C. 326; 23 L. J., M. C. 56; and see *Reg.* v. *Lowrie*, 36 L. J., M. C. 24.

(*r*) *Reg.* v. *Watts*, 2 Den. C. C. 14.

By Statute.

Valuable security, what.

Ireland, or of any foreign state, or in any fund of any body corporate, company or society (whether within the United Kingdom or in any foreign state or country), or to any deposit in any bank; and shall also include any debenture, deed, bond, bill, note, warrant, order or other security whatsoever for money or for the payment of money (whether of the United Kingdom or of Great Britain or of Ireland or of any foreign state), and any document of title to lands or goods as hereinbefore defined."

The term document of title to goods shall include any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented, or therein mentioned or referred to.

Document of title to lands.

"The term 'document of title to lands' shall include any deed, map, paper or parchment written or printed, or partly written and partly printed, being or containing evidence of the title or any part of the title to any real estate, or to any interest in or out of any real estate" (*s*).

It is material in an indictment for this offence to show upon the face of it that the valuable security alleged to be stolen was a security of such a description as falls within the statute, and the evidence must prove it as laid (*t*).

A pawnbroker's ticket is within this section (*u*).

Indictment for stealing Securities for Money.

That A. B., on the ——— day of ———, A.D. ——, certain valuable securities other than documents of title to land, to wit, one bill of exchange for the payment of fifty pounds, and of the value of fifty pounds, and one promissory note for the payment of fifty pounds, and of the value of fifty pounds, and an agreement between C. D. and A. B., whereby C. D. was entitled to receive payment of a certain sum of money, to wit, ten pounds, which said sum was then due to C. D. and unsatisfied, the property of C. D., feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

It was held on the statutes in force before this act, that it was not necessary, in an indictment for stealing written instruments, to set them out as in an indictment for forgery; but that it was sufficient to bring them within the description of the statute (*x*), and now by 14 & 15 Vict. c. 100, ss. 5, 7, it is sufficient to describe the instrument by any name or designation by which it is usually known, or by the purport thereof, see *ante*, p. 164. And by the description employed the parties must be bound, and that description must be proved (*y*). It

(*s*) 24 & 25 Vict. c. 96, s. 1.
(*t*) *Reg.* v. *Lowrie*, 36 L. J., M. C. 24; L. R., 1 C. C. R. 61.
(*u*) See *Reg.* v. *Morrison*, Bell, C. C. 158; 28 L. J., M. C. 210.
(*x*) *R.* v. *Johnson*, 3 M. & S. 539.
(*y*) *Reg.* v. *Lowrie*, 36 L. J., M. C. 24; L. R., 1 C. C. R. 61.

seems that notes, bills, and other securities, ought not to be described as *goods and chattels*, but as the property of the *prosecutor;* where, however, they were laid to be "the property and chattels of C. D.," the word "chattels" was rejected as surplusage, and the indictment sustained (*z*); and if a cheque for a certain sum of money be described as of the monies of, the indictment may be read as if the words "of the monies" were not there (*a*); but if the indictment allege the larceny to be of "goods and chattels," and the proof be a subsisting mortgage deed, a conviction would be wrong (*b*). But halves of notes, if stolen, should be so described (*c*). An unnecessarily minute description of an instrument may be fatal, unless amended (*d*); and therefore it is best to describe it as simply as possible. Where there is any doubt of the genuineness or validity of a written instrument stolen, it is right to add a count, charging the prisoner with stealing the paper and the stamps, on which it seems he may be convicted (*e*); but describing a bank note as "a certain note,

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(*z*) *R.* v. *Sadi and Morris*, 2 East, P. C. 601; *Reg.* v. *Radley*, 1 Den. 450; 2 C. & K. 974; and see *R.* v. *Aslett*, 2 Lea. 954; and *R.* v. *Austin*, 2 East's P. C. 602.

(*a*) *Reg.* v. *Godfrey*, D. & B. 426.

(*b*) *Reg.* v. *Powell*, 2 Den. C. C. 403.

(*c*) *R.* v. *Mead*, 4 C. & P. 535; *Reg.* v. *Jones*, 1 Den. C. C. 551.

(*d*) See *ante*, p. 167.

(*e*) *R.* v. *Aslett*, 2 Leach, 958; *Reg.* v. *Perry*, 1 Den. C. C. 69; *Reg.* v. *Powell*, 2 Den. C. C. 403.

In *R.* v. *Clark*, 2 Leach, 1036; R. & Ry. 181, the fourth count charged that prisoner feloniously did steal 135 pieces of paper, each being stamped with a stamp of four shillings value, four shillings being the stamp directed by the statute in such case made and provided on every promissory note for payment to the bearer on demand of any sum of money not exceeding 1*l.* 1*s.*, all the said pieces of paper being so stamped as aforesaid, and *being the property of* —— (country bankers); and each and every of the said stamps being then available and of full force and effect, against the peace, &c. The facts were that the notes of certain country bankers which had been paid by their London correspondent, were stolen during their passage back, in order to be re-issued. Objection, that the notes stolen were of no value, being mere waste paper till their re-issue, and so were neither securities for money nor subjects of larceny at common law, and that the stamps having been used as such were not saleable as *stamps*, till they had reassumed that character by the re-issue of the notes on which they were impressed. The prisoner being found guilty, the question whether the paper and stamps were the property of, and of any value to, the prosecutors, who were unquestionably the owners of them, so as to be the subject of larceny at common law, was submitted to the judges. Judgment was delivered by *Grose*, J. "Their character and value as promissory notes were certainly extinct at the time they were stolen; but even in this state they bore about them a capability of being legally restored to their former character and pristine value. It was a capability in which these owners had a special interest and property. The act of re-issuing them would have immediately manifested their value as papers, for it would have saved their owners the expense of reprinting other notes, and of purchasing other stamps, to which expense it was proved they were put, on their being deprived of these papers by the crime of the prisoner. In what sense or meaning therefore can it be said that these stamped papers were not valuable property of their

Larceny of valuable Securities.

commonly called a bank note," will not suffice (*f*); but bank notes may now be described simply as money (*g*).

Punishment.

The punishment for stealing the above securities is the same with that of larceny of any chattel of like value with the share, interest or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security (*h*).

Section 3.

Offences against Fisheries.

Taking fish in water adjoining dwelling-house or where there is a right of fishery.

By 24 & 25 Vict. c. 96, s. 24, whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining to or belonging to the dwelling-

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owners? They were indeed only of value to those owners; but it is enough that they were of value to them; their value as to the rest of the world is immaterial. The judges therefore are of opinion that to the extent of the price of the paper, the printing, and the stamps, they were valuable property belonging to the prosecutors; and the prisoner has been legally convicted."

In *R.* v. *Vyse*, 1 Moo. C. C. R. 218, those judges who doubted whether re-issuable notes of a country banker which had been paid, and when stolen were in the owner's hands, in order to be re-issued, can be called valuable securities, all held that they were "goods and chattels," so as to be the subject-matter of an indictment for receiving *goods and chattels* of the prosecutors, well knowing them to have been feloniously stolen. In this case the notes had been paid, and though issuable were not, at the time of the larceny, securities for the payment of money, the paper and stamp upon which they were written were therefore properly described as goods and chattels.

A different principle had been acted on in 1812. Promissory notes issued by country bankers had been paid by their London agents to the holders, and were on their road back uncancelled, in order to be re-issued. Held, "*promissory notes*," within 7 Geo. 3, c. 50, s. 1, against secreting letters containing promissory notes, *R.* v. *Ranson*, R. & Ry. 232; 2 Leach, 1090, 1093. But a check on a banker, unstamped and made payable to D. F. J. and not to bearer, is not a "valuable security" within the above act. *R.* v. *Yates*, 1 Moo. C. C. 170. Yet it had been held that a bill need not be in a negotiable state, *e. g.*, by indorsement of payee, in order to a conviction under 22 Geo. 2, c. 25. *Anon.* 2 East's P. C. 598. It was held that a draft on a banker, drawn at a place twenty miles from the banker's house, and yet not stamped, being of no value, and not available (see 55 Geo. 3, c. 184, s. 13), is therefore not a "bill" or "draft" within 7 Geo. 3, c. 50; *R.* v. *Pooley*, 3 B. & P. 311; R. & Ry. 12.

Indictment for feloniously receiving nine pieces of paper, value 2*s.*, knowing, &c. They were certificates given by coal-meters to merchants; one only was traced to prisoner's possession. As it was proved to have cost above a farthing, there was a value assignable in coin to be left to the jury. But *Parke*, B., intimated that it would not have been necessary to show it to be of the value of any known coin, if some value, however small, was shown; *R.* v. *Morris*, 9 C. & P. 347. See *R.* v. *Bingley*, 5 C. & P. 602.

(*f*) *R.* v. *Craven*, R. & R. 14; 2 East, P. C. 601, 602.

(*g*) 14 & 15 Vict. c. 100, s. 18, *ante*, p. 165.

(*h*) 24 & 25 Vict. c. 96, s. 27; and see *ante*, p. 388.

house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanour; and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay over and above the value of the fish taken or destroyed, if any, such sum of money not exceeding 5*l.* as to the justice shall seem meet: provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise, and the expiration of the first hour after sunset: but whosoever shall by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding 5*l.*, and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding 2*l.* as to the justice shall seem meet; and if the boundary of any parish, township or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township or vill named in the indictment or information, or in any parish, township or vill adjoining thereto.

The word unlawfully means without any *bonâ fide* claim of a legal right (*i*). Unlawfully and wilfully have been held to mean intentionally, without having any legal right (*j*); and it is not competent to oust the jurisdiction of justices by asserting such a right as cannot exist in law (*k*), nor by a claim or right which is in the opinion of the justices not *bonâ fide* (*l*); the conviction should show that the spot in the water or stream where the fish was taken, was within the jurisdiction of the convicting justice, and it is not sufficient to state merely that the termini of the stream were within the jurisdiction (*m*); but the court will review, on a case stated, the decision of the justices, and say whether there was reasonable evidence upon which the justices ought to have come to a conclusion, that there was a *bonâ fide* claim of right (*n*).

The jurisdiction of the county justices extends to that part of the sea lying between high and low water mark, upon their being satisfied that there existed an exclusive right of fishery therein (*o*).

(*i*) *Taylor* v. *Newman*, 32 L. J., M. C. 186; 4 B. & S. 89.
(*j*) *Hudson* v. *M'Rae*, 33 L. J., M. C. 65.
(*k*) *Ibid.*
(*l*) *Paley* v. *Birch*, 8 B. & S. 337.
(*m*) *R.* v. *Edwards*, 1 East, 279.
(*n*) *Reg.* v. *Stimpson* and *Reg.* v. *Peek*, 32 L. J., M. C. 208.
(*o*) *Embleton* v. *Brown*, 30 L. J., M. C. 1.

Offences against Fisheries.

And the statute applies to a navigable tidal river in which there is a private right of fishery (*p*); but *primâ facie* the right of fishery in such a river is in the public, the soil so far as the tide flows and re-flows being *primâ facie* in the crown (*q*). See as to appeals, *tit.* Appeal, Part III., *post.*

As to the ouster of magistrates' jurisdiction generally by a claim of right, *tit.* Appeal, Part III., *post,*

Indictment.

County of ——, *to wit.* } The jurors for our lady the Queen upon their oath present that the river S. runs through certain fields and land in the parish of ——— in the county of ———, and that the said fields and land adjoin the dwelling-house of A. B., and that the said A. B. was then the owner of the said portion of the said river S., and the said water so being in the said parish and running through the said fields (or that the said A. B. had then a right of fishery in the said portion of the said river S.), and that C. D. on the ——— day of ——— A.D. ——— of and from the said portion of the said river, and the said water so being in the said fields and land, unlawfully and wilfully six salmon and five trout did take (or destroy) contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Oysters.

By sect. 26 of the same act, "Whosoever shall steal any oysters or oyster brood from any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny (see *ante*, p. 388); and whoever shall unlawfully and wilfully use any dredge, or any net, instrument or engine whatsoever within the limits of any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken; or shall unlawfully and wilfully, with any net, instrument or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement; and it shall be sufficient in any indictment to describe either by name or otherwise, the bed, laying or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township or vill; provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking floating fish only.

Form of Indictment for stealing Oysters from an Oyster Bed.

For that the said A. B., from a certain oyster bed called ———, the pro-

(*p*) *Paley* v. *Birch*, 8 B. & S. 337.

(*q*) *Malcolmson* v. *O'Dea*, 10 H. of L. Cas. 593; *Reg.* v. *Stimpson*, *Reg.* v. *Peck*, 32 L. J., M. C. 208.

perty of C. D., and sufficiently marked out, to wit, by being staked, &c. (*r*) as being the property of the said C. D., 2,000 oysters feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen.

Offences against Fisheries.

Indictment for Dredging.

For that the said A. B., within the limits of a certain oyster bed, the property of C. D., and sufficiently marked out as such property of the said C. D., by being (*s*), unlawfully and wilfully did use a certain dredge for the purpose of then and there taking oysters contrary to the form, &c.

Section 4.

Of Breaking into Houses, Shops, Warehouses, &c. and Stealing Therein.

What is a curtilage.

By 24 & 25 Vict. c. 96, s. 53, "No building, though within the same *curtilage* (*t*) with any dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a *covered and inclosed* passage, leading from the one to the other."

(*r*) The mode of marking out the bed should be stated, that the court may judge if it is sufficiently marked out.

(*s*) Staked, &c.

(*t*) "*Curtilage* is a garden, yard, field, or piece of void ground belonging to the messuage," *Termes de la ley, tit. id.* The *domus mansionalis* includes not only the dwelling-house, but also the out-houses, such as barns, stables, cow-houses, dairy-houses, and the like, if they be parcel of the messuage, though they are not under the same roof, or joining contiguous to it; 2 East's P. C. 492; *e. g.*, a back house eight or ten yards from the dwelling-house, only a pale reaching between them, *ibid.* See *R.* v. *Walters*, 1 Moo. C. C. 13. An out-house within the same curtilage or common fence as the mansion itself, *id.* 493. *Secus*, if such out-house be distant, or not parcel of the messuage, though very near, as if it is separated by an open passage from the dwelling-house.

But out-houses, if adjoining the dwelling-house and occupied as parcel of it, may still be considered as parts of it, though there is no common inclosure or curtilage. A dwelling-house in which a farmer lived, a stable, cottage, cow-house and barn, were all in one range of building in the order mentioned, and *under one roof*, but not inclosed by any wall or court-yard, and without communication from either to the other within. Stealing oats in the barn at night was held burglary, for the barn was *under the same roof*, and parcel of, and enjoyed with the dwelling-house; *R.* v. *Brown*, 2 East's P. C. 493. The prosecutor's house consisted of two long rooms, another room used as a cellar and wash-house on ground flour, and of three bedrooms upstairs, one of them over the wash-house: the bedroom over the house place communicated with the bedroom over the wash-house, but there was no internal communication between it and any of the other rooms in the house. The whole building was *under the same roof*. The wash-house door opened into a back yard. Prisoner broke into this wash-house, and was breaking through the partition wall between the wash-house and the house place, when he was alarmed and detected. Seven out of twelve judges held the wash-house part of the dwelling-house; *R* v. *Burrowes*, 1 Moo. C. C. 274.

Stealing in a Dwelling-house.

By sect. 54, "Whosoever shall enter any dwelling-house in the night with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than five years (*u*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Entering a dwelling-house by night with intent, &c.

Breaking and entering any building within the curtilage and committing felony, &c.

By sect. 55, "Whosoever shall break and enter any building and commit any felony therein, such building being within the curtilage of a dwelling-house and occupied therewith, but not being part thereof, according to the provisions hereinbefore mentioned, or being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than five years (*x*); or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." See as to solitary confinement and imprisonment, ss. 118, 119, *ante*, p. 389.

Breaking and entering a dwelling-house, &c., and committing a felony.

By sect. 56, "Whosoever shall break and enter any dwelling-house, school-house, shop, warehouse or counting-house, and commit any felony therein, or being in any dwelling-house, school-house, shop, warehouse or counting-house, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than five (*y*) years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Breaking and entering any dwelling-house, church, &c., with intent to commit any felony therein.

By sect. 57, "Whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse or counting-house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than five (*z*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." Upon an indictment under this section, the prisoner may be found guilty of an attempt to commit the felony charged (*a*).

Being by night armed with

By sect. 58, "Whosoever shall be found by night armed with

(*u*) 27 & 28 Vict. c. 47, s. 2.
(*x*) *Ibid.*
(*y*) *Ibid.*
(*z*) *Ibid.*
(*a*) *Reg.* v. *Baird*, 31 L. J., M. C. 88.

any dangerous or offensive weapon, or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession, without lawful excuse (the proof of which excuse shall lie on such person), any picklock key, crow, jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened or otherwise disguised, with intent to commit any felony, or shall be found by night in any dwelling-house or other building whatsoever, with intent to commit any felony therein, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of [five (*b*)] years, or to be imprisoned for any term not exceeding two years, with or without hard labour." weapon with intent to break into any dwelling-house, &c.

The ownership and situation of the premises ought to be alleged in an indictment under the 58th section, which should allege an intention to break into some particular and defined building, and to commit some definite felony therein, for an intent to break into a building generally is not sufficient (*c*).

Household keys may be used as implements of housebreaking, and are within the section, which should be read as if printed with a comma after picklock and before key (*d*).

The unlawful possession of implements of housebreaking by night is the offence, and it is unnecessary to allege or prove an intent to commit a felony (*e*).

By sect. 59, "Whosoever shall be convicted of any such misdemeanour, as in the last preceding section mentioned, committed after a previous conviction either for felony or such misdemeanour, shall on such subsequent conviction be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than [five (*f*)] years, or to be imprisoned for any term not exceeding two years, without hard labour."

Night commences at 9 p.m. and concludes at 6 a.m. (*g*).

A warehouse for the safe keeping only of goods is within the statute (*h*). The machine-house on large chemical works, where all goods sent out were weighed, and the men's time taken and wages paid, though the books were kept in the office, was held to be a counting-house (*i*).

By sect. 60, "Whosoever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the Stealing in a dwelling-house to the value of 5*l.*

(*b*) 27 & 28 Vict. c. 47, s. 2.
(*c*) *Reg.* v. *Jarrald*, 32 L. J., M. C. 258; L. & C. 301.
(*d*) *Reg.* v. *Oldham*, 2 Den. C. C. 472; 21 L. J., M. C. 134.
(*e*) *Reg.* v. *Bailey*, Dears. C. C. 244.
(*f*) 27 & 28 Vict. c. 47, s. 2.
(*g*) 24 & 25 Vict. c. 96, s. 1.
(*h*) *Reg.* v. *Hill*, 2 Moo. & R. 458.
(*i*) *Reg.* v. *Potter*, 2 Den. C. C. 235; 20 L. J., M. C. 170.

Stealing in a Dwelling-house.

whole of five pounds or more, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than [five (*k*)], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

See sects. 118 and 119 as to imprisonment and solitary confinement, *ante*, p. 389.

Stealing in a dwelling-house with menaces.

By sect. 61, "Whosoever shall steal any chattel, money, or valuable security in any dwelling-house, and shall, by any menace or threat, put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than [five (*l*)] years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

See as to imprisonment and solitary confinement, ss. 118, 119 of same act, *ubi sup.*

Indictment for breaking a Dwelling-house and stealing therein.

That A. B., on the ——— day of ———, A.D. ———, the dwelling-house of J. N. there situate (*m*), feloniously did break and enter, *and* two pewter dishes, six pieces of the current gold coin of the realm, called sovereigns, of the monies, goods and chattels of the said J. N. [and one bill of exchange for the payment of ten pounds, the property of J. N., *then and there* (*n*) being found, the said sum of ten pounds secured and payable by and upon the said bill of exchange, being then and there due and unsatisfied to the said J. N.; *as to this last*, see 24 & 25 Vict. c. 96, s. 27] (*o*), of the goods and chattels of the said J. N., in the said dwelling-houses there situate, then and there being found, feloniously did steal, take and carry away, against the form of the statute (*p*) in that case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Stealing in a dwelling-house.

The dwelling-house charged as broken, must be proved to be a "dwelling-house," subject to 24 & 25 Vict. c. 96, s. 53, (*ante*, p. 397), and to the following general rules. First, it must be a permanent building, which the occupier, whether he own or rent it, uses, not only for dwelling, but lying in, by himself or some one or more of his family or servants, either constantly, or alternately with other places of residence, and having an *animus*

(*k*) 27 & 28 Vict. c. 47, s. 2.

(*l*) *Ibid.*

(*m*) This is material if it is matter of local description.

(*n*) Sufficient without adding "in the same dwelling-house;" *Reg.* v. *Andrews*, C. & M. 121, *Coleridge*, J.

(*o*) *Ante*, p. 391.

(*p*) *Semble*, concluding "against the statute" is only necessary where something which, at common law, was not a subject of larceny is stolen; *R.* v. *Pearson*, 1 Moo. C. C. 313; see *id.* 403; *R.* v. *Chatburn*, and *R.* v. *Berry*, 1 M. & Rob. 463.

revertendi (*r*). Merely using a house to take meals, and transact business in (*s*), or for a servant to sleep in, without the owner having ever resided there (*t*), or after his quitting it without intending to return (*u*), will not make a house a "dwelling-house;" nor is this otherwise if one of the family has lain in a house at night for protection of goods there, till it should be ready for the owner's intended residence (*x*). Sleeping in a tent or booth in a fair will not make it such a permanent residence as will constitute a dwelling-house (*y*); nor will a servant's lying in a warehouse or barn to watch property make either a dwelling-house (*z*). A dwelling-house, what.

A dwelling-house may be divided so as to form two or more dwelling-houses under the same roof, within the meaning of that word; for instance, chambers in an inn of court (*a*); the wings of a building, of which the centre is a factory separated from them (*b*); a shop let off from the house of which it forms part, and having no internal communication with it by a doorway (*c*), if the occupier of the shop part, or any of his family, lie as well as work there (*d*); or a tenement opening on a passage or staircase, not having an outer door to the street, and common to others (*e*).

As to the construction of 24 & 25 Vict. c. 96, s. 53, *ante*, p. 397, with regard to buildings within the curtilage:—

A building within the curtilage is part of the dwelling-house within that section if both are under the same roof, though the room broken into be a washhouse on the ground floor, without any internal communication with the dwelling-house on that floor (*f*). Both the building and dwelling-house must be occupied together in the same right (*g*). If there is any doubt whether the building broken and entered is part of the dwelling-house, or is within the curtilage only, the count in p. 405

(*r*) *R.* v. *Westwood*, R. & R. 495; *R.* v. *Gibbons*, *id.* 442; *R.* v. *Stock*, *id.* 185; 1 Hale, 556; *R.* v. *Murray*, 2 East, P. C. 496.

(*s*) *R.* v. *Martyn*, R. & Ry. 108.

(*t*) *R.* v. *Davies*, 2 Lea. 876.

(*u*) *R.* v. *Flannagan*, R. & Ry. 187.

(*x*) *R.* v. *Hallard*, and *R.* v. *Fuller*, 2 East, P. C. 498; 1 Lea. 187; *R.* v. *Thompson*, 2 Lea. 771; *R.* v. *Harris*, *id.* 701.

(*y*) 1 Hawk. c. 38, s. 35; 1 Hale, 557. *Secus*, if a brick building, though only inhabited and slept in for the purposes of a fair; *R.* v. *Smith*, 1 M. & Rob. 256.

(*z*) *R.* v. *Smith*, 2 East, P. C. 497; *R.* v. *Brown*, *id.* 502.

(*a*) 1 Hale, 556; Foster, 76, 77.

(*b*) *R.* v. *Egginton*, 2 B. & P. 508; 2 Lea. 913.

(*c*) *Ibid.*

(*d*) 1 Hale, 558; *R.* v. *Rogers*, 1 Lea. 89, 428. See *R.* v. *Bailey*, 1 Moo. C. C. 23. A shop and house occupied separately by two families.

(*e*) *Reg.* v. *Eye* (*Mayor of*), *In re Evans*, 9 A. & E. 670, after *R.* v. *Bailey* had been cited.

(*f*) *R.* v. *Burrows*, 1 Moo. C. C. 274. See *R.* v. *Lithgo*, R. & Ry. 357; *R.* v. *Chalkley*, *id.* 334.

(*g*) *R.* v. *Jenkins*, R. & Ry. 244.

Stealing in Dwelling-house, &c.

As to laying the ownership.

should be inserted (*h*). As to laying the ownership of the dwelling-house broken, a dwelling-house occupied by a wife and her establishment, separately from her husband, should be laid as his house, though she has taken it and paid the rent and taxes, &c. (*i*). Occupation by a servant requires the same allegation, unless he occupy, not as a servant, but in his own right, which often leads to questions requiring nice discrimination. It may be laid as the dwelling-house of a workman, though he lives there rent free, if he has the exclusive benefit and possession of it (*k*). The other cases on this subject will be found collected in Archbold's Crim. Pl., under *tit. Burglary.* A house, the joint property of partners in trade, and in which the business is carried on, though only one resides in it, may be described as the house of all of them (*l*). It seems that the house may be described as that of the actual occupier, though his possession be wrongful, *e. g.*, continued after discharge from a service paid for in part by occupying the house in question (*m*).

Where the occupier of a room has the use merely, and no interest in it, *e. g.*, a guest at an inn, the dwelling-house must be laid as that of the innkeeper (*n*); but if a lodger rents part of a house and sleeps there, and no one else resides in the rest of it, it must be laid as the lodger's dwelling-house (*o*). Thus a loft, *rented* and resided in by a coachman, is his dwelling-house, though situated over his mistress's stables (*p*).

All difficulty may be obviated by laying the house in different counts as that of different persons; but any variance between the statement and proof in the ownership of any property may now be amended under 14 & 15 Vict. c. 100, s. 1, *ante*, p. 231.

The owner of a house who breaks and enters the room of a lodger therein, and steals his goods, can only be convicted of larceny (*q*).

(*h*) See *R.* v. *Ball*, 1 Mood. C. C. 30.

(*i*) See the cases collected Archb. Cr. Pl. 16th ed., p. 454, *tit. Burglary.*

(*k*) *R.* v. *Jobling*, R. & Ry. 525; *R.* v. *Camfield, id.* 42; *R.* v. *Witt*, Moo. C. C. 248. See next page.

(*l*) *R.* v. *Athea*, R. & Ry. 329; 1 Moo. C. C. 329.

(*m*) *R.* v. *Wallis*, 1 Moo. C. C. 344.

(*n*) 1 Hale, 557; *R.* v. *Prosser*, 2 East, 502.

(*o*) *R.* v. *Rogers*, 1 Lea. 89; *R.* v. *Trapshaw, id.* 427.

(*p*) *R.* v. *Turner*, 1 Lea. 305; 2 East's P. C. 492. The fact of a servant's paying his master rent for a house prevents it from being described as the master's, though it is on the premises where his business is carried on, and though the servant has it because of his service; *R.* v. *Jarvis* 1 Moo. C. C. 7; but if a workman at a colliery resides in one of his master's cottages *rent free*, his occupation, though at law that of his master at the master's election, may as to third persons, *e. g.*, in an indictment for burglary, be considered as that of *either;* it being wholly for the use and benefit of the servant, and not merely, if at all, for the use or business of the master or of the colliery; *R.* v. *Jobling*, R. & Ry. 525. See *R.* v. *Witt*, 1 Moo. C. C. 248; *R.* v. *Stock*, 2 Taunt. 339; 2 Lea. 1015; *R.* v. *Collett*, R. & Ry. 498; *R.* v. *Lakenheath*, 1 B. & C. 531; *R.* v. *Margetts*, 2 Lea, 930.

(*q*) Kelynge, 84; 2 East's P. C. 502, 506.

Of the Breaking and Entering.

Venue.

The local description of the house, as to the parish, &c. where it is situate, must accord with the fact, and be proved strictly as laid. If two parishes have been named, "parish aforesaid" refers to the last parish (*r*). If the place where the house is situate is not named, it shall be taken to be situate at the place laid as special venue (*s*).

Breaking.

Breaking a house may be *actual, viz.*, by breaking a wall, door, or pane of glass (*t*), picking a lock of a door, opening it by a key, lifting a latch, unloosing any fastening provided for a door or window, taking the glass from a door, coming down a chimney, lifting up or pulling down a window kept shut by the pulley weight only, without any fastening, opening a window fastened with wedges only, opening a window by putting an arm through a broken pane, and by so breaking more glass out, getting at and removing the window fastening, or lifting up the flap of a cellar usually kept down by its own weight. These are all breakings, whether done to admit the thief, or any part of his body, or any weapon or instrument with which to effect a felonious intent, *e. g.*, to draw out goods with it. But entering by an open door, or window partly open, or through an aperture made to admit light, is not, though the felon open it more so as to admit himself (*u*).

Breaking a house may be *constructive;* as where the offender, with intent to commit a felony, obtains admission by an artifice in order to effect it. Knocking at a door, and rushing in on its being opened, getting into a house by promising ale to the servant who keeps it, or conspiracy with him to rob it, are instances (*x*).

Entry and taking, what.

Entering a house with a felonious intent through an outer door or window which is open, and afterwards breaking or unlocking an inner door of a room, is a "breaking" (*y*). So is the opening by a servant of a door of a room not immediately within the scope of his employment, or by a lodger or guest in an inn of another room in it, if with a felonious design. Breaking an outward gate (*e. g.* a gate of an area, part of the outward fence of a curtilage and yard), is not a breaking of a dwelling-house, where there is no free passage in time of sleep from the area, yard, &c. into the house (*z*).

There must be an entry as well as a breaking, though they need not be simultaneous. Stepping over the threshold, putting a hand, a finger, or a hook, &c. in at a window, to undo its latch,

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(*r*) *R.* v. *Richards*, 1 M. & Rob. 177.

(*s*) *R.* v. *Napper*, 1 Moo. C. C. 44.

(*t*) Even though it may have been cut for a month, if it remains exactly in its place without any opening whatever, and the prisoner puts his hand through; *Reg.* v. *Bird*, 9 C. & P. 44.

(*u*) See cases collected, Archb. Cr. Pl. 16th ed. p. 458; and see *R.* v. *Gadbury*, 8 C. & P. 676.

(*x*) See cases collected, Archb. Cr. Pl. 16th ed. 458.

(*y*) *Ibid.* Breaking a chest, cupboard, &c. is not, *id.*

(*z*) *Ibid.*

Housebreaking, &c.

or to draw out goods, suffices; but throwing up a window, and introducing a crow-bar to force the shutters, without having any part of the hand within it, will not, though it be done with intent to steal (*a*). If the entry was in the night, so as to amount to burglary, it seems that the above indictment may be sustained notwithstanding (*b*). The taking must be actual, and a momentary possession after the abstraction will suffice; *e. g.*, where a thief took money, and being instantly detected, threw it under a fire-grate (*c*). If a breaking and entry be proved, the value of the goods stolen is immaterial: if the breaking and entry is not proved, but the goods are *laid*, and proved to be of 5*l.* value, and to have been taken in the dwelling-house, the party may be convicted of stealing in a dwelling-house (*d*); and if only the larceny is proved, without the other circumstances, the party may be convicted of simple larceny.

Though a person may be found guilty of breaking and entering a house with intent to steal certain goods mentioned in the indictment, though the goods were not in the house at the time, he cannot be found guilty of attempting to steal such goods (*e*).

Indictment for stealing in a Dwelling-house, some Person therein being put in Fear (f).

That A. B., on the ——— day of ———, A.D. ——, one silver basin and one coat (*chattel, money or valuable security*), of the goods and chattels of J. N., in the dwelling-house of the said J. N., there situate (*g*), then and there being found, feloniously did steal, take and carry away, and that at the time of the committing of the felony aforesaid, he, the said A. B., then and there, in the said dwelling-house, by certain menaces and threats by him then and there used and uttered to and in the presence and hearing of one Sophia N., in the said dwelling-house, and then and there being, her, the said S. N., did put in bodily fear (*h*), against the form of the statute in such case made and provided, and against the peace, &c.

The party may be convicted of simple larceny under this act if the cumulative circumstances are not proved.

Indictment on 24 *&* 25 *Vict. c.* 96, *s.* 60, *for stealing in a Dwelling-house to the value of* 5*l. or more.*

The last indictment will suffice for this, if the allegation of putting in fear be omitted. It does not seem in this case

(*a*) See the cases, Archb. Cr. Pl. 16th ed. 459.

(*b*) By analogy to *R.* v. *Pearce*, 2 Leach, 1049; and R. & Ry. 174; and *R.* v. *Robinson*, R. & Ry. 321; where it was held, that if it appear on indictment for stealing from the person that the force used was sufficient to constitute a robbery, defendant will not on that ground be entitled to an acquittal, *sed qu.*

(*c*) *R.* v. *Amier*, 6 C. & P. 344. *A. Park*, J.

(*d*) Archb. Cr. Pl. & Ev. 16th ed. 368.

(*e*) *Reg.* v. *M^c Pherson*, D. & B. 197.

(*f*) 24 & 25 Vict. c. 96, s. 61.

(*g*) See p. 400, note (*m*).

(*h*) This must be laid and proved; *R.* v. *Etherington*, 2 Leach, 671; East, P. C. 635.

Housebreaking, &c.

absolutely necessary to state *where* the house is situate, if it is stated as "*then and there being*," *viz.* at the parish before laid (*i*).

What articles under the protection of the house.

The articles intended to be protected by this act are not goods which, when stolen, were under protection of the prosecutor's person (*k*); but which were then deposited for safe keeping in a house, &c. or lodging not belonging to the offender himself (*l*); as, in a hat on a table (*m*), or by the bedside, on going to rest. It is sufficient if they are left at a wrong house for the person supposed to reside there, and another steals them (*n*). Whether they are under protection of the house or the person is a question for the court (*o*). A guest when in bed at an inn, placed his small-clothes containing money under his head. They were stolen. The indictment was on 12 Ann. c. 7 (now repealed) for stealing to the amount of 40*s.* in a dwelling-house. *A. Park*, J., held that the property having been thus taken under the party's personal protection, was no longer under that of the house (*p*). A person may be guilty of stealing *in his own* dwelling-house the goods of another (*q*).

Indictment for breaking, &c. a Building within the Curtilage, and stealing therein (*r*).

That A. B., on the ——— day of ———, A.D. ——, a certain building, of one C. D., there situate, feloniously did break and enter (the said building then and there being within the curtilage of the said dwelling-house of the said C. D., there situate, and by the said C. D. then and there occupied therewith; and there being then and there no communication between the said building and the said dwelling-house, either immediate or by means of any covered or enclosed passage, leading from the one to the other) (*s*); and that the said A. B. then and there, in the said building, one silver spoon, &c. of the goods and chattels of the said C. D., in the said building then and there being found, then and there in the said building feloniously did steal, take and carry away, against the form of the statute, &c., and against the peace, &c.

(*i*) *R.* v. *Napper*, 1 Moo. C. C. 44.

(*k*) *R.* v. *Campbell*, 2 Leach, 564; *R.* v. *Owen*, 2 Leach, 572; 2 East, P. C. 645.

(*l*) *R.* v. *Thompson et al.*, 1 Leach, 338; *R.* v. *Gould*, *id.* 4; *R.* v. *Taylor*, R. & Ry. 418.

(*m*) *R.* v. *Agnes Hamilton*, 8 C. & P. 49; *Parke* and *Patteson*, JJ.

(*n*) *R.* v. *Carrol*, 1 Moo. C. C. 89.

(*o*) *R.* v. *Thomas*, Carr. Supp. 295.

(*p*) The learned judge relied on *Castledine's case*, East's P. C. 645; *Watson's case*, *id.* 680; Starkie on Cr. Pl. 467; and said that *Ward's case*, held to the contrary by *Bayley*, J., at Lancaster Summer Assize, 1814, might have turned on some peculiar circumstances. Prisoners were convicted of simple larceny; *R.* v. *Challenor and Pycroft*, Worcester Summer Assize, 1824; Dick. Q. S. 245, ed. Talf.

(*q*) *Reg.* v. *Bowden*, C. & Kir. 147.

(*r*) 24 & 25 Vict. c. 96, s. 55.

(*s*) These are the words of 24 & 25 Vict. c. 96, s. 53, *ante*, p. 392. This count should be joined to a count for housebreaking or stealing in a dwelling-house to the amount of 5*l.*, whenever it is doubtful whether the building is in strictness a dwelling-house.

Housebreaking, &c.

The punishment is fixed by 24 & 25 Vict. c. 96, s. 55 (*t*).

Indictment for breaking and entering and stealing in a Shop, Warehouse, or Counting-house (*u*).

That A. B., on the ——— day of ———, the shop [*school-house, shop, warehouse, or counting-house*] of J. N., there situate, feloniously did break and enter, and one silver ewer of the goods and chattels of the said J. N., in the said shop, then and there being found, then and there *in the said shop* feloniously did steal, take and carry away, against the peace, &c.

[The section is directed against the committal of any felony; if the latter is charged, add, "contrary to the form of the statute," &c. (*v*).]

The shop must be shown to be the shop of the prosecutor, by his occupation, and carrying on business there, and to be situate as laid. The value of the article stolen is immaterial. If this proof fails, the party may be convicted of simple larceny.

The punishment is fixed by 24 & 25 Vict. c. 96, s. 56, *ante*, p. 398.

Section 5.

Larceny in Manufactories.

Larceny in manufactories.

By 24 & 25 Vict. c. 96, s. 62, whosoever shall steal to the value of ten shillings any woollen, linen, hempen or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material whilst laid, placed or exposed during any stage, process or progress of manufacture in any building, field or other place, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than [five years (*w*)], or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Goods may be still in process or progress of manufacture, though the texture be complete, if they be not yet brought into a condition for sale (*x*).

Form of Indictment.

For that the said A. B., thirty yards of a certain article of silk mixed with cotton, of the value of two pounds, the property of C. D. and others, whilst exposed during a certain process of manufacture called drying, in a certain building of the said C. D. at ———, feloniously did steal, take and carry away, contrary to the form, &c.

(*t*) *Ante*, p. 398.
(*u*) 24 & 25 Vict. c. 96, s. 56, *ante*, p. 398.
(*v*) See *ante*, p. 400.
(*w*) 27 & 28 Vict. c. 47, s. 2.
(*x*) *R.* v. *Woodhead*, 1 Moo. & R. 549.

Section 6.

LARCENY IN SHIPS, WHARFS, &c.

Stealing goods in any vessel, &c. in a haven or port.

By 24 & 25 Vict. c. 96, s. 63, whosoever shall steal any goods or merchandise in any vessel, barge or boat of any description whatsoever in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with such haven, port, river or canal, or shall steal any goods or merchandise from any dock, wharfs or quay adjacent to any such haven, port, river, canal, creek or basin, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Where ship in distress or wrecked.

Sect. 64. Whosoever shall plunder or steal any part of any ship or vessel, which shall be in distress or wrecked, stranded or cast on shore, or any goods, merchandise or articles of any kind belonging to such vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and the offender may be indicted and tried either in the county or place in which the offence shall have been committed, or in any county or place next adjoining.

Unlawful possession of goods, &c. belonging to a ship wrecked or in distress.

Sect. 65. If any goods, merchandise or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded or cast on shore, shall be found in the possession of any person or on the premises of any person with his knowledge, and such person, being taken or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justices, be forthwith delivered over to or for the use of the rightful owner thereof; and the offender shall, on conviction of such offence before the justice, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the goods, merchandise or articles, such sum of money not exceeding twenty pounds, as to the justice shall seem meet.

Sect. 66. If any person shall offer or expose for sale any goods, merchandise or articles whatsoever which shall have been unlawfully taken, or shall be reasonably suspected so to have been taken, from any ship or vessel in distress, or wrecked, stranded or cast on shore, in every such case any person to whom the same shall be offered for sale, or any officer of the customs or excise, or peace officer, may lawfully seize the same, and shall

Larceny in Ships, Wharfs, &c.

with all convenient speed carry the same, or give notice of such seizure, to some justice of the peace; and if the person who shall have offered or exposed the same for sale, being summoned by such justice, shall not appear and satisfy the justice that he came lawfully by such goods, merchandise or articles, then the same shall, by order of the justice, be forthwith delivered to and for the use of the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the justice) to the person who seized the same; and the offender shall, on conviction of such offence by the justice, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay over and above the value of the goods, merchandise or articles, such sum of money not exceeding twenty pounds, as to the justice shall seem meet.

Indictment for stealing Merchandise in a Vessel.

For that the said A. B., on the ——— day of ———, A.D. ——, one box of tea of the goods and merchandise of C. D., then being in and upon a certain vessel called ———, such vessel being in a certain basin called ———, such basin then and there communicating with the port of Newport, such port being the port of discharge of such vessel, feloniously did steal, take and carry away, contrary to the form, &c.

The place where the vessel is, is a matter of description, and must be proved as laid (*y*).

Luggage of a passenger going by steamboat would seem to be goods or merchandise within sect. 63 (*z*).

Section 7.

Of fixtures and things attached to or growing on land.

By 24 & 25 Vict. c. 96, s. 31, whosoever shall steal, or shall rip, cut, sever or break with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and in the case of any such thing fixed in any square, street or place as aforesaid, it shall not be necessary to allege the same to be the property of any person.

A building, what.

An unfinished structure, intended as a cart-shed, boarded up on all sides, having a door with a lock on it, and the frame of a roof with loose gorse thrown over it because not yet thatched,

(*y*) *R.* v. *Pike*, 1 Lea. 317.
(*z*) *R.* v. *Wright*, 7 C. & P. 159.

is a building within that section (*a*). A church is a building (*b*). A sun-dial, attached by screws to the top of a wooden post fixed in a churchyard, is within the section (*c*). So also are iron rails or brass fixed to a tomb or tombstone in a churchyard (*d*).

What is a Building.

Stripping a house of lead after getting possession of it under a treaty for a lease, but with intent to steal lead, is within it (*e*).

The ownership of the dwelling-house must be alleged and proved ; and an indictment for stealing a copper pipe, fixed to the dwelling-house of A. and B., was held not to be supported by proof of stealing a pipe fixed to two rooms of which A. and B. were separate tenants in the same house (*f*). Proof that the prosecutor received the rent of the house is *primâ facie* sufficient evidence of ownership (*g*).

Upon an indictment under this section the offender cannot be convicted of a simple larceny (*h*).

Trees in pleasure grounds, &c. of the value of 1*l*.

By 24 & 25 Vict. c. 96, s. 32, whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood respectively growing in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining to or belonging to any dwelling-house, shall, in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound, be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny ; and whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny.

The cutting of eight trees together of the aggregate value required by the statute during the course of one continuous employment, though it may have extended over several days and into several closes, and the trees may have been growing in separate closes, is sufficient to bring the case within the statute (*i*). The amount of the injury done must be directly to the trees, and it is not competent to make up the amount by calculating the cost of replacing a hedge which had been destroyed by stubbing, fencing and new quickwood (*j*).

By 24 & 25 Vict. c. 96, s. 33, whosoever shall steal, or shall

(*a*) *R.* v. *Worrall*, 7 C. & P. 516.
(*b*) *R.* v. *Parker*, 2 East, P. C. 592.
(*c*) *Reg.* v. *Jones*, D. & B. 555; 27 L. J., M. C. 171.
(*d*) See *R.* v. *Blick*, 4 C. & P. 377.
(*e*) *R.* v. *Munday*, 2 Lea. 850; 2 East, P. C. 594.
(*f*) *R.* v. *Finch*, 1 Moo. C. C. 418.
(*g*) *Reg.* v. *Brammitt*, L. & C. 9.
(*h*) *Reg.* v. *Gooch*, 8 C. & P. 293.
(*i*) *Reg.* v. *Shepherd*, 37 L. J., M. C. 45.
(*j*) *Reg.* v. *Whiteman*, Dears. C. C. 353.

Larceny of Trees, Saplings, Underwoods, &c.

cut, break, root up, or otherwise destroy or damage, with intent to steal, the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done being to the amount of a shilling at the least, shall, on conviction thereof before a justice of the peace, forfeit and pay over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money not exceeding five pounds, as to the justice shall seem meet; and whosoever having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months, as the convicting justice shall think fit; and whosoever having been twice convicted of any such offence, whether both or either of such convictions shall have taken place before or after the passing of this act, shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

As to appeal from the summary conviction, see *post*, Part II.

Indictment for stealing Glass and Wood-work belonging to a Dwelling-house or other Building (*k*).

That A. B., on the ——— day of ———, A.D. ——, feloniously did steal, take and carry away twenty panes of glass, and twenty pieces of wood-work, containing therein fifty square feet of wood, the property of C. D., and belonging to a certain dwelling-house [*or as the case may be*] and building (*l*) of the said C. D. there situate, against the form of the statute, and against the peace, &c.

Indictment for stealing Lead, &c. fixed to a Building (*m*).

That A. B., on the ——— day of ———, A.D. ——, feloniously did steal, take and carry away [*or*, feloniously did rip, cut, sever and break, with intent to steal] twenty pounds weight of lead, twenty pounds weight of copper, and twenty pounds weight of brass, and then and there being fixed to a certain dwelling-house [*or*, to a certain building (*l*), *as the case may be*] of the said C. D. there situate, against the form, &c., and against the peace, &c.

"Being fixed to a certain *wharf*" is a sufficient description in the indictment, and is proved by evidence showing that the lead was taken from a shed which was part of the wharf (*n*).

The jury must believe that the prisoner unfixed the lead from the building, or was aiding and abetting: for a person cannot be convicted of larceny at common law on this count (*o*).

(*k*) 24 & 25 Vict. c. 96, s. 3.

(*l*) The words "building called a temple" were held sufficient, without further description of its uses, as a summer-house for drinking tea, and retirement; *R.* v. *Norris*, R. & Ry. 69.

(*m*) 24 & 25 Vict. c. 96, s. 31.

(*n*) *Reg.* v. *Rice*, Bell, C. C. 87; 28 L. J., M. C. 64.

(*o*) *Reg.* v. *Gooch*, 8 C. & P. 293.

Forms of Indictments for stealing Things fixed to Buildings, &c.

Indictment for ripping, cutting, and breaking Metal fixed to a Building with intent to steal (p).

That A. B., on the ——— day of ———, A.D. ——, feloniously did rip, cut and break twenty pounds weight of lead, twenty pounds weight of copper, twenty pounds weight of iron, and twenty pounds weight of brass, the property of C. D., and then and there being fixed to the dwelling-house [any building whatsoever] of the said C. D. there situate, with intent then and there feloniously to steal, take and carry away the same, against the form, &c., and against the peace, &c.

Indictment for stealing any Utensil, Fixture, or Thing made of Metal, or other Material, fixed in or to any Building, or in any Land, being Private Property (q).

That A. B., on the ——— day of ———, A.D. ——, one leaden pipe, containing therein fifty pounds weight of lead, and one wooden pipe, containing twenty square feet of wood, then and there being fixed in certain land, to wit, a garden of the said C. D. there situate, which then and there was the private property of the said C. D. feloniously did steal, take and carry away, against the form, &c., and against the peace, &c.

Indictment on 24 & 25 Vict. c. 96, s. 31, for stealing or ripping, &c. Metal fixed as a Fence for a Dwelling-house, Garden, or Area.

That A. B., on the ——— day of ———, A.D. ——, one iron rail, containing twenty pounds weight of iron, the property of C. D. then and there being fixed for a fence, and being part of a fence to an area [*or* garden, or dwelling-house] of the said C. D. there situate, feloniously did steal, take and carry away, against the form of the statute, &c., and against the peace, &c.

Indictment on the same Section for stealing or ripping, &c. a Thing made of Metal in a Street, Square, &c., wherein it is unnecessary to allege the Article to be any Person's Property.

That A. B., on the ——— day of ———, A.D. ——, one iron rail, then and there being fixed in a certain square there situate, called ——— square, being a square dedicated to public use [*or* street, &c.] then and there feloniously did steal take, and carry away [*or* did rip, cut and break, with intent to steal], against the form, &c., and against the peace, &c.

Indictments for ripping, cutting and breaking metal fixed in land, being private property, or in public squares, may be easily framed on the above, by merely substituting for the words "*feloniously did steal, take and carry away*," the words "*feloniously did rip, cut and break, with intent then and there feloniously to steal, take and carry away the same.*"

Indictment under 24 & 25 Vict. c. 96, s. 32, for stealing Trees exceeding the Value of One Pound, from a Park, Pleasure Ground, Garden, Orchard, Avenue, or Ground adjoining or belonging to a Dwelling-house.

That A. B., on the ——— day of ———, A.D. ——, in a certain park [*or other place above mentioned, describing it truly, according to the words of the clause*] of C. D. there situate, feloniously did steal, take or carry away, one oak tree, one elm tree, one beech tree, and one ash tree, of greater value than one pound, to wit, of the value of three pounds, *the property of* the said C. D., in the said park then and there growing, against the form of the statute, &c., and against the peace, &c.

(*p*) 24 & 25 Vict. c. 96, s. 31.
(*q*) *Ibid.*

Forms of Indictments for stealing Things fixed to Buildings, &c.

Indictment under the same Section for cutting and damaging, &c. Trees in the same Places, the Damage exceeding One Pound.

That A. B., on the ——— day of ———, A.D. ——, in a certain park [*or other such place, as above*] of C. D. there situate, feloniously did cut, break and damage [*or "root up and damage," according to the fact*] one oak tree, one elm tree, one beech tree, and one ash tree [*no value should be inserted here in this indictment*], the property of the said C. D., in the said park then and there growing, with intent the same then and there feloniously to steal, take and carry away, thereby then and there feloniously doing unto the said C. D. injury, the amount whereof then and there exceeded the sum of one pound, that is to say, injury to the amount and value of two pounds, against the form of the statute, &c., and against the peace, &c.

Indictment on 24 *&* 25 *Vict. c.* 96, *s.* 32, *for stealing Trees, &c. growing elsewhere than in a Park, &c., exceeding in Value Five Pounds.*

That A. B., on the ——— day of ———, A.D. ——, in a certain close of C. D. there situate, not being a park, pleasure ground, garden, orchard or avenue, and not being ground adjoining or belonging to any dwelling-house, feloniously did steal, take and carry away, ten oak trees, ten elm trees, ten beech trees, and ten ash trees, of value exceeding five pounds, that is to say, of the value of ten pounds, the property of C. D. then and there growing and being in the said close of the said C. D. against the form of the statute, &c., and against the peace, &c.

Indictment on same Section for cutting or damaging Trees, &c. growing elsewhere than in a Park, &c. with intent to steal, the Injury exceeding Five Pounds.

That A. B., on the ——— day of ———, A.D. ——, &c., in a certain close of C. D. there situate, not being a park, pleasure ground, garden, orchard or avenue, and not being ground adjoining or belonging to any dwelling-house, feloniously did cut, break and damage [*or* root up and damage] ten oak trees, ten beech trees, ten elm trees, and ten ash trees, the property of the said C. D. [*state no value here*] in the same close of the said C. D. then and there growing and being, with intent then and there feloniously to steal, take and carry away the same, thereby then and there feloniously doing to the said C. D. injury to an amount exceeding five pounds, to wit, to the amount of ten pounds, against the form of the statute, &c., and against the peace, &c.

Indictment on 24 *&* 25 *Vict. c.* 96, *s.* 33, *for stealing Trees, Shrubs or Saplings, above the Value of One Shilling, in any Place, after two Convictions for the like Offence* (*r*).

That A. B., on the ——— day of ——— [*the date of the first conviction*] at, &c. was duly convicted before E. F., one of her Majesty's justices of the peace for the county of ———, for that he, on, &c. [*here carefully recite the first conviction and adjudication*]. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. having been so convicted as aforesaid, afterwards, on, &c. [*the date of the second conviction*] at, &c. was duly convicted before G. H., one of her Majesty's, justices of the peace for the county of ———, for that he [*here recite the second conviction*]. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., late of, &c., being so twice convicted as aforesaid, after the said two convictions, on the ——— day of ———,

(*r*) The convictions under this act may be proved in the manner provided for by 34 & 35 Vict. c. 112, s. 18, *ante*, p. 263. But the 7 & 8 Geo. 4, c. 28, s. 11, does not apply. A mistake in the conviction recited might formerly have been taken advantage of by the prisoner; *R.* v. *Allen*, R. & Ry. 513.

A.D. ——, at ———, unlawfully and feloniously did steal, take and carry away twelve oak saplings of greater value than one shilling, to wit, of the value of five shillings, the property of C. D. then and there growing and being, against the form of the statute, &c., and against the peace, &c. *Form of Indictment.*

Section 8.

LARCENY FROM MINES.

By 24 & 25 Vict. c. 96, s. 38, whosoever shall steal, or sever with intent to steal, the ore of any metal or any lapis calaminaris, manganese, or mundick, or any wad, black cawke or black lead, or any coal or cannel coal from any mine, bed or vein thereof respectively, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 39. Whosoever, being employed in or about any mine, shall take, remove or conceal any ore of any metal or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. Miners removing ore with intent to defraud.

See with reference to this enactment, *ante*, p. 370 (*s*).

Indictment on 24 & 25 Vict. c. 96, s. 38.

For that the said A. B. 50 lbs. weight of copper ore, the property of C. D., from a certain mine of copper ore of the said C. D., situate at ———, feloniously did steal, take and carry away, contrary to the form, &c.

Section 9.

LARCENY OF CATTLE, DEER OR OTHER ANIMALS.

By 24 & 25 Vict. c. 96, s. 10, whosoever shall steal any horse, mare, gelding, colt or filly, or any bull, cow, ox, heifer or calf, or any ram, ewe, sheep or lamb, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than five years (*t*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

For the decisions on what amounts to a stealing of horses, &c., see *ante*, p. 373.

(*s*) *R.* v. *Webb*, 1 Moo. C. C. 431.
(*t*) 27 & 28 Vict. c. 47, s. 2.

Larceny of Cattle, Horses, Deer, and other Animals.

Sect. 11. Whosoever shall wilfully kill any animal with intent to steal the carcase, skin or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony.

Stealing, &c. deer in any inclosed ground, felony.

Sect. 13. Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill, or wound, or attempt to kill or wound, any deer (*t*) kept or being in the uninclosed part of any forest, chase or purlieu, or in any inclosed land (*u*) wherein deer shall be usually kept, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping.

The same in uninclosed ground.

Sect. 12. Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill, or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and whosoever, having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed by this act or by any former act of parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such *second* offence be of the same description as the first or not, shall be guilty of *felony*, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping.

The 14th section provides for the summary conviction and punishment of persons in whose possession deer, or snares, or engines for taking deer, may be found, and who may not satisfactorily account for such possession. Section 15 provides for the summary punishment of persons setting snares or engines for the destruction of deer, or wilfully destroying the fences of any land where they may be kept. Section 16 enacts, That if any person shall enter into any forest, chase or purlieu (whether inclosed or not), or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, ensnare, or carry away, any deer, every person entrusted with the care of such deer, and any of his assistants

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(*t*) Young fawns or conies, though in a park or warren, were not at common law subjects of larceny, though deer in a park, &c. were; 1 Hale's P. C. 511; 4 Bla. Com. 235; and *qu.* if this act has made any difference?

(*u*) "Forest, chase, park, wood or plantation," were held "open or inclosed grounds" within 57 Geo. 3, c. 90; *R.* v. *Parkhurst*, R. & Ry. 503.

(whether in his presence or not), may demand from every such offender any gun, fire-arms, snare or engine in his possession, and any dog there brought for hunting, coursing or killing deer; and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places or (upon pursuit made) in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person entrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of *felony*, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping. As to what is a beating, so as to be a felony within this act, see *R.* v. *Amey*, R. & R. C. C. 500; *Reg.* v. *Hale*, 2 C. & K. 326.

Assaulting deer-keepers, &c.

Indictment under Section 13, *for coursing, killing, and carrying away Deer in inclosed Places.*

That A. B., on the ——— day of ———, A.D. ——, at, &c. in a certain enclosed land there situate, in the occupation of C. D., wherein deer had been, and then were usually kept, unlawfully, wilfully and feloniously did course, kill and carry away [*or* "snare, kill and carry away, hunt, kill and carry away," *or* kill or wound, or attempt to kill or wound, &c. *according to the fact*] one fallow deer, the property of the said C. D. (*x*), [then and there kept, and being in the said enclosed land (*y*),] against the form of the statute, &c., and against the peace, &c.

Indictment under same Section for coursing and carrying away Deer in the uninclosed part of any Forest, Chase or Purlieu, after a previous Conviction for some Offence relating to Deer (*z*).

That A. B., on, &c. [*the date of the conviction*] was duly convicted before E. F., one of her Majesty's justices of the peace for the county of ———, for that he the said A. B., on, &c. [*recite the conviction and adjudication*] (*a*). And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. B., being so convicted as aforesaid, after the said conviction, on the ——— day of ———, A.D. ——, at, &c. in a certain uninclosed part of a certain forest called ——— there situate, unlawfully and wilfully did course, kill and carry away [*or either* "hunt, snare, wound, or attempt to kill," *as the fact may be*] one fallow deer, then and there being in the said uninclosed part of the said forest, against the form of the statute, &c., and against the peace, &c.

(*x*) Seems at least surplusage; *Hickman's case*, 1 Moo. C. C. 2; 2 East, P. C. 593.

(*y*) Essential; see *Reg.* v. *King*, 13 L. J., M. C. 43; commitment on this clause held bad for want of these words.

(*z*) See p. 414.

(*a*) The identity of the prisoner with the person previously convicted should be strictly proved; but facilities are afforded by 34 & 35 Vict. c. 112, s. 18, *ante*, p. 263, in cases of previous convictions, for proving the previous convictions, but formerly it was competent for the prisoner to prove that he was not duly convicted in fact, *e. g.*, having been convicted but not in the proper county; or if the conviction, being joint, *viz.*, of four, the indictment states it to be of one; *R.* v. *Allen*, R. & Ry. 513.

Of Larceny from the Person.

Section 10.

LARCENY FROM THE PERSON.

By 24 & 25 Vict. c. 96, s. 40, whosoever shall rob any person, or shall steal any chattel, money or valuable security from the person of another, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than [five] years (*b*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Robbery is an aggravated form of larceny. The removal of a watch out of the pocket of a person who wore an albert chain, and pulling the chain and key out of the button-hole, but the point of the key catching in a button, the prisoner's hand was seized while the watch remained suspended, was held a sufficient taking from the person (*c*); but not so where a person took hold of a purse which was tied by its string to some keys which entangled in the pocket of the prosecutor, and was apprehended with the purse in hand, but still hanging by means of the keys to the pocket (*d*); in the former case there being a severance from the person for a moment before the key caught in the button, but in the latter none.

There may be a verdict upon an indictment for the above offence of guilty of an assault with intent to rob (*e*).

By sect. 42, whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except when a greater punishment is provided by this act) be liable, at the discretion of the court, to be kept in penal servitude for the term of [five] years (*f*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Indictment for Robbery.

For that the said A. B., in and upon C. D. feloniously did make an assault, and him, the said C. D., in bodily fear and danger of his life, then feloniously did put, and the monies of the said C. D., to the amount of five pounds, from the person and against the will of the said C. D., then feloniously and violently did steal, take and carry away, contrary to the form, &c.

Indictment for stealing from the Person.

For that the said A. B., one watch, one purse, one valuable security, to wit, bill of exchange for twenty-five pounds, of the value of twenty-five pounds, of the goods and valuable securities of the said C. D., from the person of the said C. D. feloniously did steal, take and carry away, contrary to the form, &c.

(*b*) 27 & 28 Vict. c. 47, s. 2.
(*c*) *Reg.* v. *Simpson*, Dears. C. C. 421; 24 L. J., M. C. 7.
(*d*) *R.* v. *Wilkinson*, 1 Hale, P.C. 508; *R.* v. *Thompson*, 1 Moo. C.C. 78.
(*e*) 24 & 25 Vict. c. 96, s. 41, *ante*, p. 227.
(*f*) 27 & 28 Vict. c. 47, s. 2.

Demanding money, &c., with menaces.

By sect. 45, whosoever shall with menaces or by force demand any property, chattel, money, valuable security or other valuable thing of any person with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for [five] years (*g*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

The demand must be with intent to steal, and therefore must be made under such circumstances as would, if successful, make the obtaining of the money larceny. In order to this, the taking must be against or without the consent of the owners, and a colourable gift, which in truth is extorted by fear, amounts to such a taking. The threatened violence must therefore be of a character to produce in a reasonable man some degree of alarm or bodily fear. The degree of alarm may vary in different cases, and it should therefore be left to the jury to say whether it has been of a nature, and to an extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes assent. A threat to execute a distress warrant may or may not be made under such circumstances as to come within the rule; therefore, it should be left to the jury to say whether it was (*h*). The offence is not the less a menace because the money has been obtained by it (*i*). No menace or threat is within the section, though it was a threat to accuse of a non-existing offence, as if a policeman states that he means to act, and arrest the prosecutor under an authority which he professes to have, unless money be given to him (*k*).

Indictment.

For that the said A. B. feloniously, with menaces, did demand of C. D. certain money, to wit, ten pounds and a watch and diamond ring, then and there being the monies, goods and chattels of the said C. D., with intent the same feloniously to steal, take and carry away, contrary to the form, &c.

Section 11.

OF LARCENY BY TENANTS AND LODGERS.

As lodgers and tenants of ready-furnished houses have a special property in the goods let to them for hire, it seems that at common law they could not be indicted for larceny in stealing the goods so let to them (*l*); and it has been decided, that

(*g*) 27 & 28 Vict. c. 47, s. 2.
(*h*) *Reg.* v. *Walton*, 32 L. J., M. C. 79; L. & C. 288.
(*i*) *Reg.* v. *Robertson*, 34 L. J., M. C. 35; L. & C. 483.
(*k*) *Ibid.*
(*l*) *R.* v. *Meeres*, Show. 50.

Larceny by Tenants or Lodgers.

if a man hires a furnished lodging with intent that his comrade should steal the furniture, the comrade removing it cannot be indicted at common law for stealing the goods of the original owner (*m*).

The 24 & 25 Vict. c. 96, s. 74, enacts, that whosoever shall steal any chattel or fixture, let to be used by him or her, in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and in case the value of such chattel or fixture shall exceed the sum of five pounds, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than five years (*n*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and in every such case of stealing any chattel in this section mentioned, it shall be lawful to prefer an indictment in the common form, as for larceny; and every such case of stealing any fixture in this section mentioned to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

Form of indictment.

The form of the indictment is sufficiently prescribed by the statute. Where a chattel is stolen, the indictment will be as for larceny at common law, *ante*, Sect. 1, p. 384; when a fixture is stolen, as *ante*, Sect. 7, p. 408, of this Chapter.

Section 12.

OF LARCENY BY CLERKS AND SERVANTS.

The question, whether a servant is guilty of larceny, in appropriating the goods of his master when they are lawfully in his own actual custody, depends on the nature of the custody and the degree of trust reposed in him. Where he has the mere charge or custody of them, it is clear that the legal possession remains in the master, and that the servant is guilty of larceny at common law in stealing them (*o*). Thus, a servant who goes off with money given to him by his master to carry

(*m*) *R.* v. *Belstead*, Russ. & Ry. 411.
(*n*) 27 & 28 Vict. c. 47, s. 27.
(*o*) See *ante*, p. 376, and Russ. on Crimes, Ed. Greaves's, Chap. xviii. p. 382, where all the cases on this subject are fully collected and explained.

to another, and applying it to his own use, is guilty of larceny (*p*); so is a clerk employed as such in the daytime, but not residing in the house, who embezzles a bill received from his master in the usual course of business, with directions to send it by post to a correspondent (*q*).

The larceny by a servant of his master's corn is now made punishable on summary conviction by 26 & 27 Vict. c. 103, see *ante*, p. 316.

Statute as to larceny by clerks or servants.

To protect masters against thefts by their servants, whether partially entrusted with the property or not, larceny by them is subjected to a severer punishment than in ordinary cases. For this purpose, the 24 & 25 Vict. c. 96, s. 67, now enacts, "Whosoever being a clerk or servant, or person employed for the purpose or in the capacity of clerk or servant, shall steal any chattel, money, or valuable security (*r*) belonging to or in the possession or power of his master or employer, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, nor less than five (*s*) years, or to be imprisoned for any term not exceeding two years, with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

The distinction between larceny as a servant and embezzlement is treated of in the next section.

Indictment under this Section for Larceny by a Servant of Goods, Monies and Securities belonging to his Master.

That A. B., on the ——— day of ———, A.D. ——, being then and there a servant to one C. D., feloniously did steal, take and carry away one gold ring, ten pieces of the current silver coin of this realm called shillings, and one promissory note of the governor and company of the Bank of England for the payment of five pounds, then unpaid and unsatisfied, being a valuable security for the payment of the said sum of five pounds, of the monies, goods, chattels and valuable securities of the said C. D. his master as aforesaid, and belonging to the said C. D., against the form of the statute, &c., and against the peace, &c.

Upon an indictment charging the prisoner with larceny as a servant, the allegation that he was a servant may be rejected in a conviction of simple larceny, will be good (*t*).

(*p*) *R.* v. *Lavender*, 2 East's P. C. 566; 2 Russ. on Cr. 383, *et seq.*
(*q*) *R.* v. *Paradice*, 2 East's P. C. 565.
(*r*) For definition of valuable security, see sect. 1, *ante*, p. 391.
(*s*) 27 & 28 Vict. c. 47, s. 2.
(*t*) *Reg.* v. *Jennings*, D. & B. 447.

Section 13.

Of embezzlement by clerks, servants, or persons in the public service.

Distinction between larceny and embezzlement.

The legal distinction between larceny and embezzlement by persons in the employ of those whom they defraud is this:—in the former, the property is taken from the actual or constructive possession of the master, or has been delivered by him to the servant for a special purpose only; in the latter, the property has never been in the possession of the master, but being received by the servant for his master's use, is fraudulently appropriated to his own.

The distinction between larceny as a servant and embezzlement may be illustrated by the following case (*u*), where a servant was sent by his master to the railway station for ten hundredweight of coals, which being supplied were placed in sacks and put into his master's cart. He was to bring the coals back to his master's house; on his way home he disposed of a quantity to a third person, without authority. It was held larceny, and Lord *Campbell* says, "There can be no doubt that in such a case the goods must have been in the actual or constructive possession of the master, and if the master had not otherwise the possession of them than by the bare receipt of his servant upon the delivery of another for the master's use, although as against third persons this is, in law, a receipt of the goods by the master, yet, in respect of the servant himself, this will not support a charge of larceny, because as to him there was no tortious taking in the first instance, and, consequently, no trespass. Therefore, if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them, as by carrying them on his back in a bag, without anything having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement and not of larceny. But if the servant had done anything which determines his original exclusive possession of the goods, so that thereby the master comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny and not merely of a breach of trust or embezzlement. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart" (*x*).

Money, &c. passing to the master.

And so, when the directors of a company, by the constitution of which they have the appointment and dismissal of the ser-

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(*u*) *Reg.* v. *Reed*, Dears. C. C. 257.

(*x*) *Reg.* v. *Reed, ubi sup.* See also *Spears' case*, 2 Lea. 825; 2 East, P. C. 568; *Reg.* v. *Hawkins*, 1 Den. C. C. 584.

vants, and they fix and pay their salary, and the prisoner was a salaried officer, and the directors had also the ultimate charge and custody of the documents of the company; and by the course of business between the company and its bankers the paid cheques that were returned to the directors were part of the company's documents, and became the voucher of the directors and their property as such directors. One of the prisoner's appointed duties was to receive and keep for his employers such returned cheques, any such paper, therefore, in his custody would be in the possession of his employers. The bankers delivered the company's pass-book containing the paid cheques to the messenger for the company, who delivered the book and cheque to the prisoner in the usual way, and he thereupon fraudulently destroyed it: it was held to be larceny of the cheque by the prisoner, for it had arrived at its ultimate destination when it came to his hands; just as a butler who has the keeping of his master's plate would be guilty of larceny if he should receive plate from the silversmith for his master at his master's house and afterwards fraudulently convert it to his own use (*y*); but if goods or money were merely in the course of passing through the hands of several servants towards the master and had not arrived at its ultimate destination, as where the prisoner was a clerk in a firm who, according to his duty, received money from a superintendent and accounted in his turn and paid over the money to a cashier, the object of his employment being to act as a check upon the superintendents and cashiers, and he fraudulently retained money received from a superintendent, it was held not to be larceny but embezzlement (*z*); but, on the other hand, if money has been in the possession of the master by the hands of one of his clerks, and another of his clerks receives it from such clerk and embezzles it, it is larceny; as where the prisoner was a clerk of A. and received 3*l.* of A.'s money from another clerk that he might pay for inserting an advertisement. He paid ten shillings and charged A. twenty shillings, fraudulently keeping back the difference, and it was held that this was not embezzlement, because A. had possession of the money by the other clerk, and, therefore, it was larceny (*a*). And so, where a confidential foreman over the workmen of his employer had to enter weekly on a pay-sheet the amount due to each workman for the weekly wages, and having presented his sheet to the cashier, the total amount would be given him by the cashier to pay thereout the amount due respectively to the workmen. The foreman, intending to defraud, made the pay-sheet to represent falsely that a larger sum was due to a particular workman than was really due, and, having obtained the larger sum from the cashier, appropriated the difference, it was

Distinction between Larceny and Embezzlement.

Money, &c. passing *from* the master.

(*y*) *Reg.* v. *Watts*, 2 Den. C. C. 14; 19 L. J., M. C. 192.
(*z*) *Reg.* v. *Masters*, 1 Den. C. C. 332; 18 L. J., M. C. 2.
(*a*) *Reg.* v. *Murray*, 1 Moo. C. C. 276; per *Willes*, J., *Reg.* v. *Cooke*, 40 L. J., M. C. 68.

Of Embezzlement.

held larceny of the amount of the difference from the master (*b*). But if servants to whom money is due for their work send one of their number to get the money of all, and he gets it from the cashier and makes away with it, the men having made him their agent to receive it, the payment by the cashier is good and the property in the money is changed, so that he cannot be convicted of larceny of the money of the master (*c*). So, if a common carrier, employed by glove sewers in carrying work from glove sewers to the manufacturers and to receive the earnings of the sewers from the manufacturers and to pay it over to the sewers, and he falsely deny the receipt of money for the sewers and appropriate it to his own use, it is not embezzlement, as he is not the servant of the sewers, and *semble*, it was a mere breach of trust (*d*).

Statutes as to embezzlement by clerks or servants.

By 24 & 25 Vict. c. 96, s. 68, whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money or valuable security which shall be delivered to or received or taken into possession by him or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant or other person so employed, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Larceny by persons in Queen's service or police.

By 24 & 25 Vict. c. 96, s. 69, whosoever, being employed in the public service of her Majesty, or being a constable or other person employed in the police of any county, city, borough, district or place whatsoever, shall steal any chattel, money or valuable security (see sect. 1, *ante*, p. 391) belonging to or in the possession or power of her Majesty, or intrusted to or received or taken into possession by him by virtue of his employment, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Embezzlement by persons in Queen's service or police.

By 24 & 25 Vict. c. 96, s. 70, whosoever, being employed in the public service of her Majesty, or being a constable or other person employed in the police of any county, city, borough, dis-

(*b*) *Reg.* v. *Cooke*, 40 L. J., M. C. 68; L. R., 1 C. C. R. 295.
(*c*) *Reg.* v. *Barnes*, 35 L. J., M. C. 204; L. R., 1 C. C. R. 45.
(*d*) *Reg.* v. *Gibbs*, Dears. C. C. 445; 24 L. J., M. C. 62.

trict or place whatsoever, and intrusted by virtue of such employment with the receipt, custody, management or control of any chattel, money or valuable security, shall embezzle any chattel, money or valuable security which shall be intrusted to or received or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever except for the public service, shall be deemed to have feloniously stolen the same from her Majesty, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and every offender against this or the last preceding section may be dealt with, indicted, tried and punished either in the county or place in which he shall be apprehended or be in custody, or in which he shall have committed the offence; and in every case of larceny, embezzlement or fraudulent application or disposition of any chattel, money or valuable security in this and the last preceding section mentioned, it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money or valuable security in her Majesty.

By Persons in Queen's service or Police.

This act is in substance the same as 39 Geo. 3, c. 85, which it repeals; and therefore the decisions on the construction of the repealed act apply to that now in force. According to these, in order to constitute the offence of embezzlement, these circumstances must concur:—the party must be a clerk or servant; he must have received the thing in question by virtue of his employment, and on account of his master; and he must fraudulently embezzle it.

The employed must be a clerk or servant in fact, but he need not be so called. Thus, an accomptant or treasurer to overseers (*e*), or to a corporation (*f*), though not appointed under the common seal (*g*), an assistant overseer, elected in vestry to collect the poor-rate as servant of the parishioners (*h*), a female servant (*i*), and an apprentice, though under age, if employed to receive the money which they purloin, may be thus guilty (*k*). A person engaged to travel for several houses, and allowed a percentage on the orders he obtains, has been holden to be in the situation of *clerk* to each of his employers, and to be liable to prosecution for embezzlement by each of them, though paid by

Who a clerk or servant.

(*e*) *R.* v. *Squire*, R. & R. 349.
(*f*) *Williams* v. *Stott*, 3 Tyr. 703, per *Vaughan*, B
(*g*) *R.* v. *Wellings*, 1 C. & P. 457.
(*h*) *Reg.* v. *Carpenter*, 35 L. J., M. C. 169; L. R., 1 C. C. R. 29. See *Reg.* v. *Adey*, 1 Den. C. C. 571; 19 L. J., M. C. 149; as to a collector of poor's-rate employed by overseers, *post*, p. 427.
(*i*) *R.* v. *Smith*, R. & Ry. 267.
(*k*) *R.* v. *Mellish*, R. & Ry. 80.

A Clerk or Servant, what.

a percentage and not a salary (*l*). So a delivery clerk at a joint railway station, worked by a joint committee of four companies using the station, is the servant of the four companies or of the committee (*m*); but, whilst a person may be employed as clerk or servant for more than one master, he is not a servant if he follows an independent occupation in which he is entitled to take his own time, or get orders and collect money at other times for his employer according to his convenience (*n*). There is a distinction between the employment of a commission agent and that of a clerk or servant, and the former is not within the statute. And where the agreement under which the prisoner is employed is in writing, the construction of the document is for the judge (*o*). That case is an example of what is an agent and not a clerk or servant. There the prisoner, with the permission of his employers, traded in the retail coal trade on his own account, and was employed, under an agreement in writing, by them as their agent for the sale of coals on commission. He was also to collect monies in connection with his orders, but not to be held responsible for bad debts; the commission was not to be due till the money had been received by his employers; he was not to keep such monies in his possession for more than a week after receiving the same; and in case of dissatisfaction, on either side, a month's notice in writing to terminate the agreement was to be given. His mode of pay had been changed from by way of salary to commission in the course of his employment (*p*). The distinction seems to be that the clerk or servant must be under the orders and control of his master as to getting orders or receiving money; but if the man be intrusted to get the orders or the money when and where he chooses, he is not a clerk or servant (*q*). So a commercial traveller, though paid by commission, may be within the statute, as he may be under orders to go here and there within the control of his employers (*r*). It is not a material distinction that the payment should be by commission and not by wages (*s*). So, where a prisoner was employed to carry out

Commission agent is not a servant or clerk within the statute.

(*l*) *R.* v. *Carr*, R. & Ry. 198. Doubted by *Parke*, B., in *Reg.* v. *Goodbody*, 8 C. & P. 665; but upheld in *Reg.* v. *Tite*, 30 L. J., M. C. 142; L. & C. 29; *R.* v. *Batty*, 2 Moo. C. C. 257. A coachman, employed by one proprietor of a coach to drive a part of a journey, and to receive money and hand it over to him, may be charged with embezzling the money of that proprietor, though the money when received would belong to him and his partners; *Reg.* v. *White*, 2 Moo. C. C. 91; and *R.* v. *Leach*, 3 Stark. N. P. C. 70.

(*m*) *Reg.* v. *Bailey*, D. & B. 121; 26 L. J., M. C. 4.

(*n*) *Reg.* v. *Walker*, D. & B. 600; 27 L. J., M. C. 207.

(*o*) *Reg.* v. *Bowers*, 35 L. J., M. C. 206; L. R., 1 C. C. R. 41. Per *Erle*, C. J.

(*p*) *Reg.* v. *Bowers*, 35 L. J., M. C. 206; L. R., 1 C. C. R. 41; see also *Reg.* v. *May*, L. & C. 13; 30 L. J., M. C. 81; *Reg.* v. *Walker*, D. & B. 600; 27 L. J., M. C. 207, where the prisoner followed an independent occupation.

(*q*) *Reg.* v. *Bowers*, *supra*.

(*r*) *Reg.* v. *Tite*, 30 L. J., M. C. 142; L. & C. 29. See *Reg.* v. *May*, *ib.* 81; L. & C. 13; *R.* v. *Carr*, R. & Ry. 195.

(*s*) *Reg.* v. *Tite*, *ubi sup*, per *Wilde*, B.

goods in his employer's barge and sell them, and was allowed a share of the profits for his remuneration, a majority of the judges held, that in fraudulently retaining the entire price of the cargo he was guilty of embezzlement, though it was objected that he had a joint interest with his master (*t*); and so might be the cashier and collector of a manufacturing firm, who had, in addition to a salary, a percentage on the profits of the firm (*u*). And where a servant manufactured an article from materials the property of his master, for a customer, and having received the price, retained it, concealing the order from his master, he was holden thus indictable, though he would have been entitled to a proportion of the money for his work (*x*). A clerk of a savings bank, elected annually by ballot of the managers, embezzled the savings, and was held properly indicted as clerk to the trustees (named) (*y*). A local secretary of a money club, whose duties were sufficiently cognate to that of the receipt of money for the club to make his employment a clerk or servant (*z*), and a secretary of a benefit building society whose employment was of a similar nature (*a*), and the secretary of a duly certified friendly society (*b*), and the manager of an office at a place in connection with the branch bank of a joint stock banking company, is respectively a clerk or servant within the act (*c*). A person *occasionally* employed is sufficiently a servant within the act to be liable to its penalties (*d*). Thus, a person employed to drive cattle to the buyer, and to bring back the purchase-money, though it did not appear that he had extra reward beyond his pay for driving, is guilty of embezzlement within the statute, as a "servant," if he receives it and does not pay it over (*e*); but a general pig drover may not be a servant (*f*); but a person employed to collect the sacrament money from the communicants is not liable for embezzling it, not being the servant of the minister, churchwardens, or poor objects of the bounty (*g*). So, where a

A Clerk or Servant, what.

Occasional employment is sufficient.

(*t*) *R.* v. *Hartley*, R. & Ry. 139; *Reg.* v. *Betts*, Bell, C. C. 90; 28 L. J., M. C. 69.

(*u*) *Reg.* v. *Macdonald*, 31 L. J., M. C. 67; L. & C. 85.

(*x*) *R.* v. *Huggins*, R. & Ry. 145.

(*y*) *R.* v. *Jenson*, 1 Moo. C. C. 434. Savings bank deposits are vested in the trustees only by 9 Geo. 4. c. 92, s. 8; and the money may be laid as the property of the trustees of a benefit society, though not inrolled, and though the money ought, in the ordinary course, to have been received by a steward; *R.* v. *Hall*, 1 Moo. C. C. 474; confirming *R.* v. *Jenson*. See *Reg.* v. *Essex*, D. & B. 369.

(*z*) *Reg.* v. *Tongue*, Bell, C. C. 289; 30 L. J., M. C. 49.

(*a*) *Reg.* v. *Hastie*, L. & C. 269; 32 L. J., M. C. 63.

(*b*) *Reg.* v. *Proud*, L. & C. 97; 31 L. J., M. C. 71; *Reg.* v. *Stainer*, L. R., 1 C. C. R. 230; 39 L. J., M. C. 54.

(*c*) *Reg.* v. *Wright*, D. & B. 431; 27 L. J., M. C. 65. See, however, *Reg.* v. *Garbutt*, D. & B. 166; 26 L. J., M. C. 47.

(*d*) *R.* v. *Spencer*, R. & Ry. 299; and see *R.* v. *Metcalf*, 1 Moo. C. C. 433; but see *R.* v. *Freeman*, 5 C. & P. 534.

(*e*) *R.* v. *Hughes*, 1 Moo. C. C. 370.

(*f*) *Reg.* v. *Hey*, 1 Den. C. C. 602.

(*g*) *R.* v. *Burton*, 1 Moo. C. C. 237.

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master of a charity school, appointed by a committee, was requested by the treasurer in one instance to receive a voluntary donation to the institution, and withheld the money, he was held not within this act(*h*). A person sworn in at a court leet to the office of chamberlain of a corporation, his duty being gratuitously to collect monies from the commoners in order to spend them in keeping the lands in order, subject to a yearly account to two aldermen, is not a "clerk or servant" within this act(*i*). Nor is a treasurer of a friendly society duly enrolled and certified, whose duty it was to receive monies paid into the society, and hold them to the order of the secretary, countersigned by the chairman or a trustee, and to account whenever called up (*k*) ; but see otherwise as to a local secretary of a similar society (*l*). A county court bailiff is not the servant of the high bailiff of the court to receive money, whether he be or not of the registrar (*m*).

Embezzlement by partners.

By 31 & 32 Vict. c. 116, s. 1, if any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods or effects, bills, notes, securities or other property, shall steal or embezzle such money, goods or effects, bills, notes, securities or other property, of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners.

Receipt must be for and in the name of and on account of the master.

The clerk or servant must have received the things for and in the name and on the account of his master. And, therefore, where the chattel, &c., is taken by the servant from the possession of the master, or of another servant of his, the statute does not apply (*n*), but the offender shall be indicted for larceny at common law (*o*) ; and if there is any doubt of the fact, counts both for larceny and embezzlement should be joined (*p*). But where the prosecutor, suspecting his shopman, gave marked money to his friend, with directions to buy some goods at his shop, and the friend accordingly purchased goods, and paid the prisoner, who purloined the money, the judges held that this was a case of embezzlement within the statute, although the money had been previously in the possession of the master (*q*).

(*h*) *R.* v. *Nettleton*, 1 Moo. C. C. 259; for he did not stand in relation of "clerk or servant" to the committee.

(*i*) *Williams* v. *Stott*, 3 Tyr. 688.

(*k*) *Reg.* v. *Tyree*, 38 L. J., M. C. 58; L. C., 1 C. C. R. 177.

(*l*) *Reg.* v. *Stainer*, 39 L. J., M. C. 54; L. R., 1 C. C. R. 230.

(*m*) *Reg.* v. *Glover*, L. & C. 466; 33 L. J., M. C. 169.

(*n*) *R.* v. *Murray*, 1 Moo. C. C. 276; 5 C. & P. 145; *R.* v. *Metcalf*, 1 Moo. C. C. 433, *post*. The statute does not seem to apply to cases which are larceny at common law.

(*o*) *Reg.* v. *Hawkins*, 1 Den. C. C. 584.

(*p*) *R.* v. *Headge*, R. & Ry. 160; *R.* v. *Hughes*, 1 Moo. C. C. 370.

(*q*) *Reg.* v. *Gill*, Dears. C. C. 289; 23 L. J., M. C. 50; *R.* v. *Headge*, R. & Ry. 160. See *R.* v. *Atkinson*, 1 Lea. 302; *R.* v. *Sullens*, 1 Moo. C. C. 129.

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Receipt for and on account of the master.

But if a miller of a mill, who has no right to grind any grain at the mill for his own benefit, makes an improper use of the mill by grinding corn for persons, and applied the money he received for the grinding to his own use, it is not embezzlement, as he did not receive the money for or on account of his master (*r*). But an assistant overseer of a union may, under the rules and orders of the Poor Law Board, receive the monies for and on account of the overseers of a township in the union and not for the guardians (*s*); whilst a treasurer to a union may under his bond, coupled with the act specifying the duties, receive monies for and on account of the guardians (*t*). If the money be received on account of the master, it is not material whether as a debt it were recoverable by the master. Thus, where in a parish there were two overseers, and the prisoner was employed as their servant to collect the poor's rate, and as such collector he demanded from the *landlord* of certain premises the amount of the rate which was assessed in the rate book on his tenant the occupier. The landlord was in the habit of paying his tenants' poor rates, paid the amount to the prisoner, who appropriated it, it was embezzlement, although the overseers could not have enforced payment from the landlord (*u*). The words "*by virtue of such employment*," appeared in former statutes now repealed, but now it is only required that the money, &c. should be received for or in the name, or on the account of the master. So, if it is received *on account* of the master, it matters not that it was received in the name of a third person, and the receipt given for it in such name (*x*), but due receipt of the money in the name of the third party may be under such circumstances as to make it also on his account and not on account of the master (*y*). As, for example, it is necessarily inferred, from the nature of the office, that a book-keeper in a coach-office or waggon-office is authorized to receive money for his principal; but it is not necessarily inferred that the driver of such coach or waggon, or the porter, has authority to receive money at the office; and, therefore, to bring such person within the statute, a special authority must appear, or at least a practice of receiving to such an extent that the authority must be implied. Thus, a butcher's apprentice, who delivered meat to his master's customers, but who had not been in the habit of receiving money, nor was specially commissioned to receive it in the particular instance, was holden not within the former statute, which contained the words, "by virtue of such employment" (*z*). But where the purloined is delivered to a servant by the master to be paid to a third person on his account, and instead of being so paid, is property

Receipt need not be by virtue of the employment.

(*r*) *Reg.* v. *Harris*, Dears. C. C. 344; 23 L. J., M. C. 110.
(*s*) *Reg.* v. *Townsend*, 1 Den. C. C. 167.
(*t*) *Reg.* v. *Welch*, 1 Den. C. C. 199.
(*u*) *Reg.* v. *Adey*, 1 Den. C. C. 571; 19 L. J, M. C. 149.
(*x*) *Reg.* v. *Thorpe*, Dears. & B. 562; 27 L. J., M. C. 264.
(*y*) *Reg.* v. *Beaumont*, Dears. C. C. 270; 23 L. J., M. C. 54.
(*z*) *R.* v. *Mellish*, R. & Ry. 80. *Sed vide R.* v. *Thorley*, 1 Moo. C. C. 342.

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retained fraudulently, the statute does not apply, as the money is directly received from the master (*a*). And if the property has been in the possession of the master or of any of his servants, as if one clerk receive from another a sum of money to pay for the use of the master, and misapply the money so received, the case will not be within the statute (*b*). So, where persons who employed the prisoner two or three times a week to keep their books, *viz.* as a clerk, gave him a cheque payable to a creditor, to deliver to that creditor, but he appropriated it, it was held larceny of the cheque (*c*). On the other hand, a servant sent to get change for a note, who converts the *change* to his own use, is guilty of embezzlement, and not of larceny (*d*).

What is the act of embezzlement.

He must *embezzle* the money or thing; that is, he must *fraudulently* retain and conceal it. This may be proved by evidence of his having in fact received it either without accounting for it at all, or without entering it in any book of receipts which it was his duty to keep, coupled with evidence of having denied the receipt of it (*e*), or of his having omitted it in an account which he rendered after having received it (*f*), or of his having rendered a false account, or made a false entry (*g*), or of his having entered the receipt of it in the proper book but neglected to pay it over, obtained by fraud receipts for it, as if he had paid it over (*h*). It was held by eight against seven judges, that since 7 & 8 Geo. 4, c. 29, s. 48, an indictment for embezzlement will be supported by proof of a general deficiency of money which ought to be forthcoming, though without showing any particular sum to have been received and not accounted for (*i*). Receiving money belonging

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(*a*) *R.* v. *Peck*, 2 Russ. 180, 213; but see *Reg.* v. *Gill*, Dears. C. C. 289; 23 L. J., M. C. 50. *Semb. acc. R.* v. *Smith*, R. & Ry. 267.

(*b*) *R.* v. *Murray*, 1 Moo. C. C. 276.

(*c*) *R.* v. *Metcalf*, 1 Moo. C. C. 433; *R.* v. *Walsh*, R. & Ry. 215; 2 Lea. 1054; 4 Taunt. 258; and the question put to the judges was, whether a cheque in the hands of drawers was of *any* value so as to be the subject of a charge of larceny.

(*d*) *R.* v. *Sullens*, 1 Moo. C. C. 129; but if he convert the *money*, &c. sent to be changed, it is larceny; *R.* v. *Atkinson*, 1 Lea. 302.

(*e*) *R.* v. *Jones*, 7 C. & P. 833.

(*f*) See *Reg.* v. *Creed*, 1 C. & Kir. 63; *Reg.* v. *Chapman*, *id.* 119.

(*g*) *R.* v. *Jones*, 7 C. & P. 833; and see 1 Moo. C. C. 447. A servant, immediately on receiving a sum for his master, entered a smaller sum in his master's books as received, and ultimately accounted for the smaller sum: held an embezzlement of the difference at the time he made the entry; nor is there any difference though he received other sums for his master the same day, in paying which and the smaller sum to his master together, he might give the latter every piece of money or note he received at the time he made the false entry; *R.* v. *Hall*, R. & Ry. 463; 2 Stark. N. P. C. 67.

(*h*) *Reg.* v. *Guelder*, Bell, C. C. 284; 30 L. J., M. C. 34 (the case of an assistant overseer).

(*i*) *R.* v. *Grove* (cashier in the house of Masterman & Co., bankers), 1 Moo. C. C. 447; 7 C. & P. 635; but *Reg.* v. *Jones*, 8 C. & P. 288, and *Reg.* v. *Chapman*, 1 C. & Kir. 119, are *contra*. And see *Reg.* v. *Moah*, Dears. C. C. 626; 25 L. J., M. C. 66, where the question was raised, but

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to an employer, giving him account of it and then absconding with it, is not embezzlement (*k*), but an entry in a ledger made only to deceive does not amount to such an accounting (*l*). Nor if in rendering the account he admits the appropriation, and sets up a right in himself on some frivolous pretext, is the keeping the money embezzlement (*m*). Where it was the duty of a servant authorized to receive money for his employer to account for, and to pay over to her every evening, money so received by him in the day, *Coleridge*, J., held that his wilfully omitting so to account for or pay over sums so received was equivalent to a denial of having received the money (*n*).

Before 7 & 8 Geo. 4 (now repealed), great practical obstacles were thrown in the way of prosecuting a servant for embezzlement, by the technical rules of law. Where the charge was for embezzling money, it was not sufficient to allege that the prisoner embezzled a certain sum, but it was necessary to specify some individual piece of money which he had received and appropriated. This was often difficult, and, where he had given change for a larger note or coin, impossible. At the trial, the master was compelled to select some one act of embezzlement, perhaps out of many, at the risk of failing altogether in the proof, and the certainty that the case of fraudulent intention would be very imperfectly presented to the jury.

Of the indictment.

Three acts of embezzlement, &c., committed within six months, may be included in the same indictment:—

To prevent difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition hereinbefore mentioned, it is now enacted by the 71st section of 24 & 25 Vict. c. 96, as follows:—"That it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or fraudulent application or disposition, not exceeding *three*, which may have been committed by him against her Majesty or against the same master or employer, *within the space of six months* from the first to the last of such acts; and in every such indictment, where the offence shall relate to any money or valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled or fraudulently applied or disposed of any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security or any portion of the value thereof, although such piece of coin or valuable security may

No particular coin, &c. need be mentioned.

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not decided, as to whether a general deficiency on the balance of accounts would be sufficient to sustain embezzlement; but *semble*, that it would.

(*k*) *Reg.* v. *Creed*, 1 C. & Kir. 63.

(*l*) *Reg.* v. *Lister*, D. & B. 118; 26 L. J., M. C. 26.

(*m*) *Reg.* v. *Norman*, C. & M. 501, per *Cresswell*, J.

(*n*) *Reg.* v. *Jackson*, 1 C. & K. 384; see *Reg.* v. *Norman*, C. & M. 501.

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have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly" (*o*).

Of the indictment.

The correct course of indicting with reference to this section is to put each of the three charges in a separate count (*p*).

Under this section, where an indictment alleged the embezzlement to be of money, and the proof was a cheque, without evidence to show that it had been presented or cashed, or that the maker had assets at the bank to meet it; it was held, that the indictment failed, as the allegation should have been that the prisoner embezzled a cheque, being a valuable security. If the cheque had been proved to have been cashed, and the prisoner had received the money, the allegation of money would have been sufficiently proved (*q*).

Persons indicted for embezzlement not to be acquitted if offence turns out to be larceny.

By sect. 72, "If upon the trial of any person indicted for embezzlement, or fraudulent application or disposition as aforesaid, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant or person employed for the purpose, or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application

(*o*) This provision, while it removes the great difficulties under which the prosecutor formerly laboured, may oppose too great obstacles to the defence of an innocent prisoner, by giving him no satisfactory information of the specific charges of embezzlement to be made at the trial; accordingly, in *R.* v. *Hodgson*, 3 C. & P. 422, *Vaughan*, B., inclined, at the request of the prisoner, to order him to be furnished with at least a particular of the persons from whom money is alleged to have been received; if not also of the sums and dates which the prosecutor intended to apply to the accusation, as in the case of a general indictment for barratry. In that case the prosecutor consented to give such information as was desired; no order was therefore made, and the prisoner was acquitted on the merits. Mr. Justice *Littledale* made an order to the same effect in *R.* v. *Bootyman*, 5 C. & P. 300, and the same course is now followed in indictments for not repairing highways and for nuisances, where the counts are numerous and the charges multifarious. *R.* v. *Downshire* (*Marquis*), 4 A. & E. 698; *R.* v. *Curwood*, 3 A. & E. 816. See *ante*, p. 161.

(*p*) *Reg.* v. *Purchase*, C. & M. 617, cor. *Patteson* and *Cresswell*, JJ. Indictment for embezzlement charged in one count *that within six calendar months* prisoner *received* three sums (laying a separate day to the receipt of each), and that "on the several days aforesaid" the prisoner embezzled these sums. Held bad on demurrer, for not showing that the sums were embezzled within six months of each other. *Reg.* v. *Noake*, 2 C. & K. 620.

(*q*) *Reg.* v. *Keena*, 37 L. J., M. C. 43; L. R., 1 C. C. R. 113.

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or disposition as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or larceny, upon the same facts."

Venue.

Where a servant receives money in one county, and denies or conceals the receipt of it in another, it seems he may be indicted for the embezzlement in either (*r*). So, if he receive money in one county and refused to account for it or omitted so to do, expressing his contrition in another county: it was held, that there was evidence of embezzlement in the latter county (*s*).

Indictment against a Clerk or Servant for Embezzlement.

That A. B., on the ——— day of ———, A.D. ———, being then (*t*) and there employed as clerk [*or "servant," &c. in the words of the statute, as the fact may be*] to C. D., did, *while* he was so employed as aforesaid (*u*), then and there receive and take into his possession certain money to

(*r*) The prisoner was servant of a person who lived in Staffordshire, and having received money for his master from B. in Shropshire, afterwards told his master in Staffordshire that he had not received any. Being sent to Shrewsbury to B., he desired B. to search the room where they had been together; but B. refused. The judges held the prisoner properly indicted in Shropshire where he received the money, though he might have been also indicted in Staffordshire, where he embezzled it, by not accounting for it to his master; for, as by the act (39 Geo. 3, c. 85, then in force) the receiving property and embezzling it, amounts to a larceny, the offence is made a felony in the county where the property was first taken: so that the offender might be indicted in that or any other county into which he carried the property; *R.* v. *Hobson*, R. & Ry. 56; 1 East's P. C., Addenda xxiv.; 2 Leach, C. C. 975. *Lawrence*, J., *contra*, held that embezzling being the offence, there was no evidence of it in Shropshire. In a subsequent case, a servant who had received money in Surrey for the use and on account of his master who lived in Middlesex, returned to his master's house soon after, but when asked for the money, denied having received it, and never afterwards accounted for it. Held, that he might be indicted in Middlesex for embezzlement; and *semble*, that had he been proved to have spent the money in Surrey, that would not have confined the trial to that county, the embezzlement *not being completed* till he had refused to account; *R.* v. *Taylor*, 3 B. & P. 596; 2 Lea. 974; R. & Ry. C. C. 63. Mr. Starkie, 2nd ed. 451, cites this case, adding that the prisoner had probably possession of the embezzled money in Middlesex; and a *qu.* whether it is not necessary that the prisoner should have had possession of the goods, &c. in the county where he is indicted, as in common larceny.

(*s*) *Reg.* v. *Murdock*, 2 Den. C. C. 298; 21 L. J., M. C. 22.

(*t*) See *R.* v. *Somerton*, 7 B. & C. 463, cited 8 M. & W. 368; *Cotton's case*, Cro. El. 738, relied on in *Reg.* v. *Brownlow*, 11 A. & E. 127.

(*u*) It seems the words, "while he was so employed" are necessary; *Reg.* v. *Lovell*, 2 M. & Rob. 336 (on 2 Will. 4, c. 4, s. 1).

The Indictment.

a large amount, to wit, the amount of five pounds (*x*), for, and in the name, and on the account of the said C. D. his said master and employer (*y*), and the said money did then and there unlawfully, fraudulently and feloniously (*z*) embezzle; and so the jurors, &c. do say that the said A. B. then and there the said last-mentioned money so received by the said A. B. for, and in the name, and on the account of the said C. D. his master and employer as aforesaid, and then and there being the property of the said C. D. (*a*) from the said C. D. in manner and form aforesaid, feloniously and fraudulently did steal, take and carry away, against the form of the statute, &c., and against the peace, &c.

When it is proposed to charge two or three distinct acts of embezzlement under 24 & 25 Vict. c. 96, s. 71, they should be stated separately in different counts (see *ante*), and not only the receipt of the money, but the embezzlement also be alleged (*b*), and the second and third counts should introduce each charge by alleging it to be "*within six calendar months from the time of committing the said offence in the first count of this indictment charged.*" Strictly speaking, perhaps, this is not necessary, as the objection to charging several distinct acts of felony in an indictment is never an objection which can be taken to the record, where every count always professes to charge a separate offence, but merely the ground of an application to the discretion of the court to compel the prosecutor to elect on which charge he will proceed. It is, however, safer to insert it.

Before sect. 72 of the 24 & 25 Vict. c. 96, it was better always to add a count for a larceny by a clerk or servant, and another for a larceny at common law; for if the money so embezzled was ever even constructively in possession of the master, it amounted to that offence (*c*), though as the statute provides that the offender "*shall be deemed to have feloniously stolen*" the chattel or money, it is by no means clear that this last count would not in all cases have sufficed (*d*), but this difficulty is now met by the above sect. 72, *ante*, p. 430.

(*x*) The exact sum laid need not be proved, if money or a note of the kind alleged in the indictment is proved to have been embezzled; *R.* v. *Carson*, R. & Ry. 303; nor since 24 & 25 Vict. c. 96, s. 71, need the coin or security embezzled be stated specifically in the indictment, as in *R.* v. *Furneaux*, R. & Ry. 335; *R.* v. *Flower*, 8 D. & R. 512; *R.* v. *Tyers*, R. & Ry. 402, was held to be requisite; but any "chattel" embezzled must be described as in larceny.

(*y*) Unnecessary to state from whom he received it; *R.* v. *Beacall*, 1 C. & P. 434; *R.* v. *Wellings*, *id.* 454.

(*z*) The insertion of the word "feloniously" here is not necessary, if it be introduced at the conclusion, that he "*feloniously*" stole; but it cannot prejudice; *R.* v. *Crighton*, R. & Ry. 62.

(*a*) This is absolutely necessary; *R.* v. *Macgregor*, R. & Ry. 23. And if the property be erroneously laid, that variance will be fatal; *R.* v. *Beacall*, 1 Moo. C. C. 15, unless amended.

(*b*) *Reg.* v. *Noake*, 2 C. & K. 620.

(*c*) See *R.* v. *Peck*, and *R.* v. *Smith*, *ante*, p. 428.

(*d*) *R.* v. *Johnson*, 3 M. & S. 549, 556.

But upon an indictment charging the prisoner with larceny as a servant, the allegation that he was servant may be rejected, and a conviction of simple larceny would be good (*f*). Larceny as a servant.

Section 14.

OF PRINCIPALS AND ACCESSORIES.

All parties who are present at the fact of committing a *felony*, and concur therein, are principals, whether they assist by manual exertion (which constitutes them principals in the *first* degree), or only by command, co-operation or encouragement (*g*). But, to be a principal in the first degree, it is not always necessary that the principal should even be present, as if he lay poison for another, who takes it and is killed when he is absent (*h*); or turn out a wild beast with intent to do mischief, so that thereupon death ensues out of his sight (*i*); or if he commit an offence through the medium of an innocent agent, who acts in his absence (*k*); and an agent is deemed to be innocent who lends himself to the offence for the purpose only of detecting and punishing his employer (*l*). And if a child under the age of discretion, or any other instrument excused from responsibility for his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or other crime, the master, though absent when the deed is done, is *ex necessitate* liable for the act of his agent, and a principal in the first degree (*m*), and *à fortiori* if he be present (*n*); but if the instrument, though of weak intellect, be aware of the consequences of the act, he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessory before the fact (*o*), or if he be present, as a principal in the second degree. It is a question for the jury, whether a child used as an agent were an innocent agent or not (*p*). Principals in first and second degrees.

A constructive presence suffices to make a man a principal (in the *second* degree) as an aider and abettor; for he need not be

(*f*) *Reg.* v. *Jennings*, D. & B. 447.

(*g*) They were anciently deemed only accessories, *i. e.*, at the fact, *viz.*, down to the reign of Henry VII. See Plowden, 100; *Reg.* v. *Hughes*, 29 L. J., M. C. 77, per *Williams*, J.

(*h*) *Vaux's case*, 4 Co. Rep. 44 b.

(*i*) Fost. 349; 1 Hale, 514.

(*k*) *Reg.* v. *Ball*, 1 Cox, C. C. 281; *R.* v. *Michael*, 2 Moo. C. C. 120; *Reg.* v. *Clifford*, 2 C. & K. 202; *R.* v. *Giles*, 1 Moo. C. C. 166.

(*l*) *R.* v. *Bannen*, 2 Moo. C. C. 309; *Reg.* v. *Valler*, 1 Cox, C. C. 84; *R.* v. *Danelly*, 2 Marsh. 571; R. & Ry. 310.

(*m*) Fost. 349; 1 East, P. C. 118; 1 Hawk. c. 13, s. 7; *R.* v. *Palmer*, 1 N. R. 96.

(*n*) *R.* v. *Tyler*, 8 C. & P. 616.

(*o*) *R.* v. *Williams*, 1 Den. C. C. 39; *R.* v. *Stewart*, R. & Ry. 363.

(*p*) *R.* v. *Manley*, 1 Cox, C. C. 104.

Of Principals.

actually present, an eye or ear-witness of the transaction; he is, in construction of law, "*present* aiding and *abetting*" (*q*), if he act in concert with the principals, and if, with the intention of giving them assistance, he be near enough at the time of the felony committed to afford it, should the occasion arise; *e. g.*, by watching outside a house to prevent surprise, while his companions are committing the felony, or to receive goods which they are stealing in it, or remaining at a convenient distance in order to favour their escape, if necessary (*r*).

Principals in second degree.

But to make a person present, not being the actual actor, a principal, there must be common purpose to him and the actor (*s*); thus, where a woman walking along the street found a female prisoner walking by her side, and the male prisoner following behind her, she felt a tug at her pocket, and found her purse gone, and on looking round saw the female and male prisoners walking off together, and the female hand something to the male: it was left to the jury to say whether the male was participating in the theft, and if not, whether he received property from the other, and the jury having found that he did not participate, he was held to be rightly convicted as a receiver (*t*); but if one burglar stand outside the house while another hands out the goods to him, he is a principal in the second degree, and cannot be convicted as a receiver (*u*); and in case of stealing in a shop, if several are acting in concert, some in the shop and some outside, and the property is stolen by some of those in the shop, those who are on the outside are equally guilty as principals in the offence of stealing in a shop (*x*); presence during the whole of the transaction is not required if he take part at any time before the completion and assented to the felony (*y*); but mere proximity, unless indeed the presence also amounts to assistance, without active assistance, is not sufficient (*z*). If persons have assembled together with a general though undefined purpose of setting the lawful authorities at defiance, they are answerable for everything done in the execution of it, and it is not necessary that their minds should have been bent on any defined and particular mischief (*a*).

(*q*) (*I. e.*, encouraging or setting on.) This term includes seconds present at a fatal duel; see *Reg.* v. *Cuddy*, 1 C. & K. 210.

(*r*) *Ante*, p. 368; Fost. 350; 1 Hale, 439. See *R.* v. *Borthwick*, 1 Doug. 207; *R.* v. *Gogerly*, R. & Ry. 343; *R.* v. *Owen*, 1 Moo. C. C. 296; *R.* v. *Stewart*, R. & Ry. 363; Plowden, 96.

(*s*) Fost. 353.

(*t*) *Reg.* v. *M'Evin*, Bell, C. C. 20.

(*u*) *R.* v. *Owen*, 1 Moo. C. C. 296; *R.* v. *Perkins*, 2 Den. C. C. 459.

(*x*) *R.* v. *Perkins*, *ubi sup.*; *R.* v. *Gogerly*, R. & Ry. 343.

(*y*) *R.* v. *Dyer*, 2 East, P. C. 767; *Reg.* v. *Kelly*, 2 C. & K. 379; *R.* v. *Gordon*, 7 C. & P. 432.

(*z*) Hawk. 62, c. 29, s. 10.

(*a*) *R.* v. *Tyler*, 8 C. & P. 616; 1 Hawk. c. 13, s. 51; *R.* v. *Howell*, 9 C. & P. 437.

Of Accessories.

An accessory is he who is not the chief actor in an offence, nor present at its performance, but is in some way concerned therein, either *before* or *after* the fact committed (*b*); but bare permission or tacit acquiescence is not enough (*c*).

Accessories before the fact, what.

An accessory *before* the fact is he who, being absent at the time of the commission of a felony, "*procures, counsels or commands*" (*d*) the principal felon to commit it (*e*); as if several plan a theft which one is to execute; or if a person incites a servant to embezzle the goods of his master.

An accessory *after* the fact is one who, knowing a felony to have been committed, receives, harbours, relieves, comforts or assists the principal, or accessory before the fact, with a view to his escape (*f*).

Accessories after the fact, what.

A man indicted as a principal felon cannot be convicted of being an accessory after the fact on such indictment (*g*); and after an acquittal on an indictment as principal, or as accessory before the fact, he may again be indicted as accessory after the fact (*h*).

As in treason, so in *misdemeanours*, there are no accessories, but in felonies only (*i*).

A party guilty of receiving stolen goods did not come within the definition of an accessory after the fact at common law; but his offence was made punishable as that of an accessory after the fact, and otherwise by several acts, now consolidated by 24 & 25 Vict. c. 96, s. 91 *et seq.*, and which, as constituting a substantive offence, will be noticed in the next section.

Trial of accessories before the fact.

By the old law, no accessories before or after the fact could, without their consent, be brought to trial, unless with the principal, or after his guilt had been legally ascertained by his conviction on having taken his trial singly; or, after his outlawry on a capital crime, which is equivalent to attainder (*j*).

But by 24 & 25 Vict. c. 94, s. 1, "Whosoever shall become an accessory *before* the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be

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(*b*) 4 Steph. Comm. 113, 4th ed.

(*c*) 1 Hale, 616; 2 Hawk. c. 29, s. 23.

(*d*) *Command* includes all those who incite, procure, set on or stir up any other to do the fact; Fost. 126; East's P. C. 641; 2 Hawk. c. 33, s. 65; and it is enough if it be done through an intermediate agent; *R.* v. *Cooper*, 5 C. & P. 535.

(*e*) 1 Hale, 613.

(*f*) 1 Hale, 618. Employing another to harbour felons seems sufficient to constitute this offence; 4 Bla. C. 37; 2 Hawk. c. 29, s. 1; 3 P. W. 475; but the assisting must be to the felons personally; *Reg.* v. *Chapple*, 9 C. & P. 355.

(*g*) *Reg.* v. *Fallon*, L. & C. 217; 32 L. J., M. C. 66.

(*h*) *Reg.* v. *Fallon*, *ubi sup.*

(*i*) 1 Hale, 238, 613; Fost. 341. See Co. Lit. 57, a, b; *Reg.* v. *Greenwood*, 2 Den. C. C. 453. What makes a man accessory before the fact in felony makes him principal in misdemeanour; *Reg.* v. *Clayton*, C. & K. 128. And see now 24 & 25 Vict. c. 94, s. 8, *post*, p. 440.

(*j*) 4 Bla. C. 40, 132. As to outlawry, see *ante*, p. 337.

Of Accessory before the Fact.

passed, may be indicted, tried, convicted and punished as if he were a principal felon."

An accessory before the fact can now, under the above 24 & 25 Vict. c. 94, s. 1, be convicted upon an indictment charging him as a principal felon (*k*); for that statute has made the crime of being an accessory before the fact to a felony a substantive felony, and the old law, which made the conviction of the principal felon a condition precedent to the conviction of the accessory, is done away with by that enactment, and, therefore, an accessory before the fact may now be convicted if the principal be acquitted of the principal felony, either before or after or at the trial of the accessory (*l*). So that where an indictment charged A. and B. with larceny in one count, and B. as a receiver in another count, and an acquittal of A. was taken, upon which he was admitted as a witness against B., and upon his evidence it appeared that he was the thief, and that B. was an accessory before the fact and received the goods afterwards, and thereupon a general verdict of guilty was given against B., it was held that the verdict was good, and there was no inconsistency in finding B. guilty generally, as upon the first count he might have been convicted of being an accessory before the fact, which was consistent with his being a receiver (*m*); but a man indicted as an accessory before the fact cannot be convicted on evidence proving him to be a principal (*n*).

By sect. 2, "Whosoever shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact, to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."

This section contemplates that a felony should have been committed, and therefore leaves the offence of soliciting to commit a felony, though no felony be committed, still a misdemeanour (*o*).

So that even in a case where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory was charged in the same indictment as accessory before the fact "to the said felony and burglary," and the jury found the principal guilty of the larceny only and acquitted him of the

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(*k*) *Reg.* v. *Hughes*, 29 L. J., M. C. 71; Bell, C. C. 242.
(*l*) *Reg.* v. *Hughes*, *ubi sup.*
(*m*) *Ibid.*
(*n*) *R.* v. *Winifred Gordon*, 1 East, P. C. 352; Fost. 362; *R.* v. *Perkins*, 2 Den. C. C. 459; *R.* v. *Owen*, 1 Moo. C. C. 96.
(*o*) *Reg.* v. *Gregory*, 36 L. J., M. C. 60; L. R., C. C. R. 77.

burglary, the judges seemed of opinion that the accessory should have been acquitted; for as the indictment charged him as accessory to the burglary only, and the principal had been acquitted of that, the accessory should be acquitted also (*p*). If the person indicted as accessory before the fact was present when the felony was committed, he must be acquitted; for his minor offence is merged in the greater one of principal (*q*).

Indictment of Accessory before the Fact.

Indictment against an Accessory before the Fact to a Felony jointly with the Principal.

After concluding the indictment as against the principal, in the usual form, proceed—

And the jurors, &c. do further present, that E. F., before the felony and larceny aforesaid was by the said A. B. [*the principal*] done and committed in form aforesaid, that is to say, on, &c., feloniously, wilfully, and maliciously, did incite, move, aid, *counsel, hire, command* (*r*), and procure the said A. B., the felony and larceny aforesaid, in manner and form aforesaid, to do and commit, against the peace, &c. (*s*).

Accessory before the fact.

In indicting an accessory *before* the fact, the principal having been convicted on a prior indictment, or in indicting an accessory after the fact, it must be alleged by whom and upon whose oaths the former presentment was made; for to allege by way of caption of the prior indictment, "that heretofore, to wit, at the general sessions of gaol delivery of, &c. holden, &c. *it was presented*, that J. S." (reciting the former indictment), is bad in arrest of judgment, notwithstanding it goes on to allege, "upon which said indictment the said J. S. at the session of the gaol delivery aforesaid, was *duly convicted* of the felony and larceny aforesaid, as by the record thereof more fully and at large appears" (*t*). The conclusion of an indictment against an accessory before the fact is as above.

In indicting an accessory *after* the fact, first conclude the indictment as against the principal, and then proceed—

And the jurors, &c. do further present, that E. F., well knowing the said A. B. to have done and committed the said felony in manner and form aforesaid, afterwards, to wit, on, &c., at, &c., him the said A. B. did feloniously receive, aid, and comfort, against the peace, &c.

(*p*) *R.* v. *Dannelly*, R. & Ry. 310; 2 Marsh. 571. It was not necessary to decide the point.

(*q*) See *R.* v. *Gordon*, 1 Leach, 515. But he might be indicted again as principal.

(*r*) The words "excite, move, and procure," seem equivalent to "command, hire, or conceal," in a statute, so as to describe the act of an accessory; *R.* v. *Grevil*, 1 Anderson's Rep. 195.

(*s*) For indictments against accessories before the fact, as for a substantive felony, see Archbold's Cr. Pl. 16th ed. 886. Counts charging a person as accessory *before and after* the fact, may not only be joined where the felony is the same; *R.* v. *Dannelly*, R. & Ry. 310; 2 Marsh. 571; *Reg.* v. *Hughes*, Bell, C. C. 242; 29 L. J., M. C. 71; but the prosecutor will not be required to elect on which he will proceed, as the party may be found guilty on both; *R.* v. *Blackston*, 8 C. & P. 43, *Parke*, B., and *Patteson*, J.; but as to receivers, see sect. 15.

(*t*) *Reg.* v. *Butterfield*, 2 M. & Rob. 523, *Maule*, J.

Of Principals and Accessories.

Punishment in larceny.

The punishment of accessories for offences partaking of the nature of *larceny* is prescribed by 24 & 25 Vict. c. 96, s. 98, which enacts, that, in the case of every felony punishable under that act, every accessory *before* the fact shall be punished in the same manner as the principal in the first degree is punishable; and every accessory *after* the fact to any felony punishable under that act, except a receiver of stolen goods, shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel or procure the commission of any misdemeanour punishable under this act shall be liable to be indicted and punished as a principal offender.

Punishment in malicious injuries.

In the case of every felony punishable under the act relating to malicious injuries to property, every principal in the second degree, and every accessory *before* the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory *after* the fact to any felony punishable under this act, shall, on conviction, be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel or procure the commission of any misdemeanour punishable under this act, shall be liable to be proceeded against, indicted and punished as a principal offender (*u*).

In coinage offences.

And similar enactments are contained as to coinage offences in 24 & 25 Vict. c. 99, s. 35, and as to offences against the person in 24 & 25 Vict. c. 100, s. 67; see *post*, p. 440.

Accessories after the fact to felony.

By the old law, no accessories before or after the fact could without their consent be brought to trial, unless with the principal, or after his guilt had been legally ascertained by his conviction on having taken his trial singly; or, after his outlawry on a capital crime, which is equivalent to attainder; but now, by 24 & 25 Vict. c. 94, s. 3, whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.

One who, since the 31 & 32 Vict. c. 116, receives from one member of a co-partnership goods of the firm, knowing that he

(*u*) 24 & 25 Vict. c. 97, s. 56.

had stolen such goods, may be indicted as an accessory to the felony under the above section, though not as a receiver under 24 & 25 Vict. c. 96, s. 91 (*x*). *Accessories after the Fact.*

By 24 & 25 Vict. c. 94, s. 4, every accessory after the fact to any felony, except where it is otherwise specially enacted, whether the same be a felony at common law, or by virtue of an act passed or to be passed, shall be liable, at the discretion of the court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour; and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either for keeping the peace, in addition to such punishment: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year. Punishment.

By the same act, sect. 5, if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned or otherwise delivered before attainder; and every such accessory shall, upon conviction, suffer the same punishment as he would have suffered if the principal had been attainted. As to proceedings against accessories to felonies generally. Time of trial.

By 24 & 25 Vict. c. 94, s. 6, any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice. Number of, may be tried.

By sect. 7, where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act, by reason whereof such person shall have become such accessory, shall have been committed, and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony, may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within her Majesty's dominions or without, or partly within her Majesty's Place of trial.

(*x*) *Reg.* v. *Smith*, 39 L. J., M. C. 112; L. R., 1 C. C. R. 265.

Of Principals and Accessories.

dominions and partly without; provided, that no person who shall be once duly tried, either as an accessory before or after the fact, or for a substantive felony under the provisions hereinafter contained, shall be liable to be afterwards prosecuted for the same offence.

Abettors in misdemeanours.

By sect. 8, whosoever shall aid, abet, counsel or procure the commission of any misdemeanour, whether the same be a misdemeanour at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender. The relationship of master and servant, and obedience by the servant to the master's orders, whereby a misdemeanour is done, would not make, or prevent the servant from being, an aider and abettor (*y*); and it is said that a man may be none the less an aider and abettor because he might be convicted as a principal (*z*).

As to accessories to felonies within the jurisdiction of the Admiralty.

By sect. 9, where any person shall within the jurisdiction of the Admiralty of England or Ireland become an accessory to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed "on the high seas," provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces.

Accessories after the fact to felonies under the Larceny Act (*a*) are punishable under sect. 98 of that act (*b*).

Accessories in coinage offences.

By 24 & 25 Vict. c. 99, s. 35, in the case of every felony punishable under the act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

Punishment of accessories to offences against the person.

By 24 & 25 Vict. c. 100, s. 67, in the case of every felony punishable under this act, every principal in the second degree and every accessory before the fact shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except murder) shall be liable to be

(*y*) *Wilson* v. *Stewart*, 32 L. J., M. C. 198; *Howells* v. *Wynne*, 32 L. J., M. C. 241; 15 C. B., N. S. 3.

(*z*) *Stacey* v. *Whitehurst*, 34 L. J., M. C. 94; 18 C. B., N. S. 344.

(*a*) 24 & 25 Vict. c. 96.

(*b*) See *ante*, p. 438.

imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than [five] (*c*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall counsel, aid or abet the commission of any indictable misdemeanour punishable under this act shall be liable to be proceeded against, indicted and punished as a principal offender. *Of Feloniously receiving Goods, &c.*

Section 15.

OF FELONIOUSLY RECEIVING STOLEN AND EMBEZZLED GOODS, &C.

By stat. 24 & 25 Vict. c. 96, s. 91, "Whosoever shall receive any chattel, money, valuable security or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony either at common law or by virtue of this act, such person knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted either as an accessory *after* the fact, *or* for a *substantive felony;* and, in the *latter* case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than [five] (*d*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping: provided always, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence."

The guilty knowledge is, of course, the very essence of this offence. Of this, except in cases of confession, direct proof cannot be given; but it may be inferred from circumstances,—as the low price at which the goods, if purchased, were bought, —facts tending to show a connexion between the thief and the receiver—the time and secrecy of the transfer, &c., &c., which are always peculiarly for the consideration of the jury. If the receiver, knowing of the theft, takes the property into his possession for the mere purpose of concealment, without making any bargain or deriving any profit, he is as much a "receiver" as if he had purchased it (*e*). So if he acts without the Of guilty knowledge.

(*c*) 27 & 28 Vict. c. 47, s. 2.
(*d*) *Ibid.*
(*e*) *R.* v. *Richardson*, 6 C. & P. 335, per *Taunton*, J. (*Gasclee*, J., and *Vaughan*, B., present).

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purpose of profit, and merely to assist the thief (*c*). A party charged as receiver may controvert the guilt of his principal; and if he show that the goods were not *stolen*, will of course be entitled to an acquittal (*d*).

The offence of receiving is confined by the express language of the 91st section to goods taken under such circumstances as to amount to felony either "at common law or by virtue of this act;" therefore it does not extend to receiving goods, knowing them to have been stolen, by one partner from his partner, made punishable by 31 & 32 Vict. c. 116 (*e*), but an indictment as accessory is the proper course in that case (*f*). A principal in the larceny, whether of the first or second degree, cannot as such be convicted of receiving the stolen goods (*g*).

The goods received must have the character of stolen goods at the time.

The goods stolen must continue to possess the character of stolen goods, and the receipt must be from the thief or from some intermediate innocent agent, so that if after the theft the goods have got back again into the possession of the owner, and the owner makes the thief his agent to deliver them to the receiver, who receives them knowing them to have been stolen, but in ignorance of what has passed between the owner and the thief, it is not a guilty receiving of stolen goods, as they had lost that character, and were received from the agent of the true owner (*h*). And so if a railway company by their servant discover that stolen goods are in course of transit between the thief and the receiver, and the company assume possession of them and stop the transitus, and afterwards direct the delivery to the receiver, the receipt becomes a receipt from the railway company, who have become the agents of the true owner (*i*); but it would seem that a policeman who, in the execution of his duty, merely stops the stolen goods for the purpose of examining them, and then sent them on, would not effect such a change in the character of the goods.

Possession by the receiver, what is sufficient.

There may be a joint possession in the thief and the receiver (*j*), and a receiver may be convicted of receiving goods never in his actual possession, but all the time in the possession of one who was probably the thief, if it can be shown to the satisfaction of the jury that the prisoner had absolute control over the person in whose possession it was, so that he could command the production of the property at any time (*k*). And so conversely, the possession of the receiver may be the posses-

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(*c*) *R.* v. *Davis*, 6 C. & P. 177, per *Gurney*, B. See also *Reg.* v. *Smith*, 1 Dears. 494; 24 L. J., M. C. 135.
(*d*) *R.* v. *Smith*, 1 Lea. 323; Foster, 365.
(*e*) *Reg.* v. *Smith*, 39 L. J., M. C. 112; L. R., 1 C. C. R. 266.
(*f*) *Ibid.*
(*g*) *Reg.* v. *Perkins*, 21 L. J., M. C. 152; 2 Den. C. C. 459.
(*h*) *Reg.* v. *Dolan*, Dears. C. C. 436; 24 L. J., M. C. 59.
(*i*) *Reg.* v. *Schmidt*, 35 L. J., M. C. 94; L. R., 1 C. C. R. 15.
(*j*) *Reg.* v. *Smith*, Dears. 494; 24 L. J., M. C. 135; *Reg.* v. *Wiley*, 2 Den. C. C. 37.
(*k*) *Reg.* v. *Smith*, *ubi sup.*

sion of the thief if the receiver can be shown to be under the control, and the property at the command, of the thief (*l*). *Of Feloniously receiving Stolen Goods.*

Recent possession of stolen goods may according to the special circumstances of each case be evidence that the person in possession either stole the goods, or received them knowing them to be stolen. Thus, where the prisoner was found in the recent possession of some stolen sheep of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he did not steal them himself, it was held that there was evidence for the jury that he received them knowing them to have been stolen (*m*); and so, though there be no circumstances from which it could be inferred that he did not steal them himself, there being none to lead to the inference that he did (*n*). Recent possession.

A person who was seen coming out of a pepper warehouse, where he had no business, in which was stored a large quantity of pepper, was stopped, and then threw a quantity of pepper of a like description out of his pocket on the ground, saying, "I hope you will not be hard with me;" but no pepper was missed from the warehouse, or could be from the large quantity stored, and it was held that there was sufficient proof of the larceny (*o*). But finding a shovel in the prisoner's possession six months after it was stolen is not enough to call on him for his defence (*p*). Presumption from possession.

By a recent statute, where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen, which forms the subject of the proceedings taken against him (*q*). Proof of guilty knowledge.

And "where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to

(*l*) *Reg.* v. *Rogers*, 37 L. J., M. C. 83; L. R., 1 C. C. R. 136.
(*m*) *Reg.* v. *Langmead*, L. & C. 427.
(*n*) *Reg.* v. *Deer*, L. & C. 240; 32 L. J., M. C. 33.
(*o*) *Reg.* v. *Burton*, Dears. C. C. 282. But see *Reg.* v. *Bond*, 1 Den. C. C. 517.
(*p*) *R.* v. *Partridge*, 7 C. & P. 551.
(*q*) 34 & 35 Vict. c. 112, s. 19.

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be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused" (*q*).

Form of the indictment.

By 24 & 25 Vict. c. 96, s. 92, in any indictment containing a charge of feloniously stealing any property (sect. 1) (*r*), it shall be lawful to add a count or several counts for feloniously receiving the same, or any part or parts thereof, knowing the same to have been feloniously stolen; and in any indictment for feloniously receiving any property, knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty, either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same, or any part or parts thereof, knowing the same to have been stolen.

Where two or more persons indicted.

Separate receivers may be included in the same indictment.

By sect. 93, whenever any property (sect. 1) (*r*), whatsoever shall have been stolen, taken, extorted, obtained, embezzled, or otherwise disposed of in such manner as to amount to a felony either at common law or by virtue of this act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

By sect. 94, if upon the trial of any two or more persons indicted for jointly receiving any property (sect. 1) (*r*), it shall be proved that any one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property.

(*q*) 34 & 35 Vict. c. 112, s. 19.

(*r*) The term "property" shall include every description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise; 24 & 25 Vict. c. 96, s. 1.

Of Feloniously receiving Stolen Goods, &c.

The proper course, in order to charge two or more persons for receiving stolen property successively, is to indict each under the 93rd section in separate counts; but where two persons were indicted jointly for receiving, and the proof was that the whole of the property was first received by the one and then sold to the other, and they were both convicted, the court, in order, as it said, to give effect to the two sections together, held the conviction good (*r*).

Whosoever shall receive any chattel, money, valuable security (*s*), or other property (*t*) whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or otherwise disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanour only, be dealt with, indicted, tried and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanour may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property (*u*).

Venue for trial.

What is the possession of receiver, &c., within this section.

The post office authorities delivering a letter containing a stolen bank note sent by the receiver in a post letter are his agents, so as to make their possession of the note his possession in the place where it was directed to (*x*). And so a railway company, employed to carry stolen goods from the thief in one county to the receiver in another, have the possession of the goods as agent for the consignor until delivered to the consignee (*y*).

Husband and wife.

A husband may be convicted of receiving goods which the wife had stolen voluntarily and without his constraint, if he receives them knowing that she has stolen them (*z*), on an indictment charging them with a joint stealing and receiving; and so a wife may be convicted with her husband if she received the stolen goods in his absence (*a*), but not of receiving from him goods stolen by him (*b*); and a husband may be convicted of receiving goods stolen, which were taken in by his wife in his absence, to be paid for at a price not then fixed, but afterwards on another occasion agreed upon, and paid by the husband to the thief, as until then there was not a complete receipt of the goods (*c*). Since an accessory before the fact to a felony

(*r*) *Reg.* v. *Reardon*, 35 L. J., M. C. 171; L. R., 1 C. C. R. 31; *Reg.* v. *Matthews and Wife*, 1 Den. C. C. 596.
(*s*) 24 & 25 Vict. c. 96, s. 1; see *ante*, p. 391.
(*t*) *Ibid. ante*, p. 444.
(*u*) *Ibid*, *s.* 96.
(*x*) *Reg.* v. *Cryer*, D. & B. 324; 26 L. J., M. C. 192.
(*y*) *Reg.* v. *Rogers*, 37 L. J., M. C. 83.
(*z*) *Reg.* v. *M'Athey*, L. & C. 250; 32 L. J., M. C. 35.
(*a*) *Reg.* v. *Wardroper*, 29 L. J., M. C. 116; Bell, C. C. 249.
(*b*) *Reg.* v. *Brooks*, 22 L. J., M. C. 121; Dears. C. C. 184.
(*c*) *Reg.* v. *Woodward*, 31 L. J., M. C. 91; L. & C. 122, per *Pollock*, B. See *Reg.* v. *Moah*, Dears. C. C. 631.

Of Feloniously receiving Stolen Goods, &c.

may be indicted and tried in all respects as if he were the principal felon, there is no inconsistency in finding a person guilty generally on an indictment charging in one count a larceny of the property and in the other a receiving knowing it to be stolen (*d*).

Form of indictment for receiving feloniously.

Indictment against Receiver as Accessory jointly with Principal.

Frame indictment against the original felon, A. B., in the common form, then add—

And the jurors, &c. that C. D., on ———, the said gold ring, &c. [*describing the property as in the former part of the indictment*], the goods and chattels above mentioned, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive, he the said C. D. then and there well knowing the said goods and chattels to have *been* (*e*) feloniously stolen, taken and carried away, as aforesaid, against the form of the statute, &c., and against the peace, &c.

If a man be indicted only as receiver of stolen goods, and the evidence proves him to have been the principal in the larceny, he is entitled to be acquitted on the charge of receiving (*f*); and so if a prisoner be indicted in the first count for stealing goods, and in the second count for receiving the said goods knowing them to have been stolen as aforesaid, and be acquitted on the first count, he may be convicted on the second (*g*); and the words "as aforesaid" in the second count may be rejected as surplusage (*h*).

Indictment against a Receiver of stolen Goods as for a substantive Felony.

That A. B., on the ——— day of ———, A.D. ——, one gold ring [the words of the act are "*chattel, money, valuable security or other property whatsoever*"], of the goods and chattels of C. D., before then feloniously stolen, taken and carried away, feloniously did receive and have, he the said A. B. then well knowing the said goods and chattels to have been feloniously stolen, taken and carried away, against the form of the statute, &c., and against the peace, &c.

A count for a substantive felony in receiving stolen goods may be joined with a count charging principals with stealing, and the same receiver with receiving the same goods or portions of them (*i*). Receivers so charged may be convicted on the count for the substantive felony, though all the principals are acquitted of stealing the goods received (*k*).

(*d*) *Reg.* v. *Hughes*, Bell, C. C. 242; 29 L. J., M. C. 71.

(*e*) The omission of "*been*" seems fatal; *R.* v. *Kernon*, 2 Russ. C. & M. 259.

(*f*) *Reg.* v. *Perkins*, 2 Den. C. C. 459; 21 L. J., M. C. 52.

(*g*) *Reg.* v. *Huntley*, Bell, C. C. 238; 29 L. J., M. C. 70.

(*h*) *Ibid.*

(*i*) *R.* v. *Wheeler*, 7 C. & P. 471; *R.* v. *Hartall*, *id.* 475; *R.* v. *Austin*, *id.* 796; *Reg.* v. *Pulham*, 9 C. & P. 280.

(*k*) *Reg.* v. *Pulham*, *ubi sup.* Three were charged with stealing a bag, and several articles therein, the property of J. D., and the two others with receiving *separately* certain of the goods so stolen. There were also two counts, one of which charged each of the last-mentioned two with a *substantive* felony in separately receiving portions of the same goods (omitting to state the receipt to be *from the principal*, *R.* v. *Jervis*).

Section 16.

OF INJURIES TO PROPERTY.

By 24 & 25 Vict. c. 97, s. 1, whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house, or other place of divine worship, shall be guilty of felony. Setting fire to a church or chapel.

Such felony is not triable at quarter sessions.

Sect. 2. Whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony. This offence is not triable at sessions. Setting fire to a dwelling-house, any person being therein.

Sect. 3. Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony. This offence is not triable at sessions. Setting fire to a house, out-house, manufactory, farm building, &c.

A building twenty-four feet square erected on land let out for building purposes, with slated roof, wooden sides, and glass windows, used as a store house for seasoned timber, as a place of deposit for tools, and as a workshop where timber was worked up into its proper form and prepared for use, is a shed within above section (*l*).

Insurance should be proved by policy, or a notice to produce should have been given (*m*).

Sect. 4. Whosoever shall unlawfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, port, dock or harbour, or to any canal or other navigation, shall be guilty of felony. This offence is not triable at sessions. Setting fire to any railway station.

Sect. 5. Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this act before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony. Setting fire to any public building.

None of such felonies are, as mentioned in the above five sections, triable at quarter sessions.

By sect. 6, whosoever shall unlawfully and maliciously set fire to any building, other than such as are in this act before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in Setting fire to other buildings.

(*l*) *Reg.* v. *Amos*, 2 Den. C. C. 65; 20 L. J., M. C. 103.
(*m*) *R.* v. *Kitson*, 1 Dears. C. C. 187.

Setting Fire to Buildings.

penal servitude for any term not exceeding fourteen years and not less than five (*n*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Setting fire to goods in any building the setting fire to which is felony.

By sect. 7, whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than five years (*o*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Indictment for setting Fire to anything in a Building, contrary to Sect. 7.

For that the said A. B., on the ——— day of ———, A.D. ——, at ———, unlawfully, maliciously and feloniously set fire to certain goods and chattels, to wit, chairs, tables and other furniture, the property of C. D., then and there being in a dwelling-house of the said C. D. [*add a count, taking words of the statute*], one E. F. then and there being in the said dwelling-house [under such circumstances that if the dwelling-house had been thereby set fire to the offence would have amounted to felony (*p*)].

Attempting to set fire to buildings.

Sect. 8. Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any building, or any matter or thing in the last preceding section mentioned, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than five years (*q*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Attempting to destroy buildings with gunpowder.

Sect. 10. Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods or chattels, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than

(*n*) 27 & 28 Vict. c. 47, s. 2.
(*o*) *Ibid.*
(*p*) See *Reg.* v. *Child*, 40 L. J., M. C. 127; L. R., 1 C. C. R. 307.
(*q*) 27 & 28 Vict. c. 47, s. 2.

five years (*r*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*s*). *Attempting to destroy Buildings with Gunpowder.*

Indictment on the above 10th Section.

For that the said A. B., on the ——— day of ———, A.D. ———, unlawfully, maliciously and feloniously did place under the dwelling-house of C. D., situate at ——— in the parish of ———, a large quantity, to wit, ——— pounds of a certain explosive substance, to wit, gunpowder, with intent then and there thereby to destroy the said dwelling-house, contrary to the form, &c.

Section 17.

DESTROYING MACHINES, ETC.

By 24 & 25 Vict. c. 97, s. 15, whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other or mixed with any other material, or any frame-work-knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than [five] (*t*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*u*). Destroying machines in other manufactures, threshing machines, &c.

The injury inflicted upon the engine to be within this section need not be of a permanent nature, so that to screw up parts of a thrashing machine so that the steam power would not work it, and to reverse the plug of the pump and stop up the pipe leading from the plug of the pump to the boiler, so as to make it useless and liable to burst, is within the section (*x*).

(*r*) 27 & 28 Vict. c. 47, s. 2.
(*s*) See sects. 74, 75, *post*, p. 459.
(*t*) 27 & 28 Vict. c. 47, s. 2.
(*u*) See sects. 74, 75, *post*, p. 459.
(*x*) *Reg.* v. *Fisher*, 35 L. J., M. C. 57; L. R., 1 C. C. R. 7.

Section 18.

Injuries to corn, trees, and vegetable productions.

Setting fire to crops of corn, &c.

By 24 & 25 Vict. c. 97, s. 16, whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall be guilty of felony.

This felony is not triable at quarter sessions.

Setting fire to stacks of corn, &c.

And by sect. 17, whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony (*z*).

Nor is this felony triable at quarter sessions.

Attempting to set fire to any crops of corn, &c. or to any stack or steer.

But by sect. 18, whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned, under such circumstances that if the same were thereby set fire to the offender would be, under either of such sections, guilty of felony, shall be guilty of felony; and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven and not less than [five] (*a*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

This offence is therefore triable at quarter sessions, but it would be well that the committal should be to the assizes.

Destroying hopbinds.

Sect. 19. Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than five (*a*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*b*).

Destroying or damaging

Sect. 20. Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole

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(*z*) Beans are *pulse; R.* v. *Woodward*, 1 Moo. C. C. 323. Barley is *corn; R.* v. *Swatkins*, 4 C. & P. 548. "The *haulm* is the straw of the wheat or the rye, which once being reaped, they mow by and by."—*Tupper.* "Having stripped off the *haum* or binds from the poles as you pick the hops, stack them up."—*Mortim.* A score of faggots heaped in a temporary loft is not a stack. *R.* v. *Aris*, 6 C. & P. 348.

(*a*) 27 & 28 Vict. c. 47, s. 2.

(*b*) As to the imprisonment, solitary confinement and whipping, see sects. 74, 75, *post*, p. 459.

or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of [five] (*c*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

trees, shrubs, &c. to the value of more than 1*l.* growing in a pleasure ground, &c.

The amount of the injury done has reference to the immediate injury done to the tree, &c., and not to the consequential damage and costs of replanting (*d*).

Sect. 21. Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing elsewhere than in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling-house (in case the amount of injury done shall exceed the sum of five pounds), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years (*e*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying or damaging trees, shrubs, &c. of the value to more than 5*l.* growing elsewhere than in a pleasure ground, &c.

"Amount of injury done" means actual injury done the trees, and does not include consequential damage, as stubbing up and replacing a hedge (*f*).

Sect. 23. Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for

Destroying any fruit or vegetable production in a garden.

Second offence.

(*c*) 27 & 28 Vict. c. 47, s. 2.

(*d*) See *Reg.* v. *Whiteman*, Dears. C. C. 1; 23 L. J., M. C. 120; see sects. 74, 75, *post*, p. 459.

(*e*) 27 & 28 Vict. c. 47, s. 2.

(*f*) *Reg.* v. *Whiteman*, Dears. C. C. 353; see *ante*, p. 409.

Injuries to Plants, Fruit or Vegetable Productions.

the term of five years (*g*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Section 19.

injuries to mines.

Setting fire to a coal mine.

By 24 & 25 Vict. c. 97, s. 26, whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, shall be guilty of felony, but such felony is not triable at quarter sessions.

Attempting to set fire to a mine.

And by sect. 27, whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than five years (*h*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*i*).

A committal for this offence is better made to the assizes.

Conveying water into a mine, obstructing the shaft, &c.

By sect. 28, whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than five years (*k*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping: provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working (*l*).

Workmen obeying the orders of their master, to be liable

(*g*) 27 & 28 Vict. c. 47, s. 2.
(*h*) *Ibid.*
(*i*) See sects. 74, 75, *post*, p. 459.
(*k*) 27 & 28 Vict. c. 47, s. 2.
(*l*) As to punishment, see sects. 74, 75, *post*, p. 459.

must know that the orders of the master are to do what is a malicious act of the master (*m*).

Damaging steam engines, staiths, waggon-ways, &c. for working mines.

By sect. 29, whosoever shall unlawfully and maliciously pull down or destroy, or damage (*n*) with intent to destroy or render useless, any steam engine or other engine for sinking, draining, ventilating or working, or for in anywise assisting in sinking, draining, ventilating, or working any mine, or any appliance or apparatus in connexion with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggonway or trunk be completed or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct or delay the working thereof, or shall unlawfully and maliciously wholly or partially cut through, sever, break or unfasten, or damage with intent to destroy or render useless, any rope, chain or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever, in anywise belonging or appertaining to or connected with or employed in any mine or the working or business thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than five years (*o*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*p*).

Section 20.

Injuries to sea and river banks, and to works on rivers, canals, etc.

Removing the piles of any sea bank, &c., or doing any damage to obstruct the navigation of a river or canal.

By 24 & 25 Vict. c. 97, s. 31, whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank, dam or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent

(*m*) *Reg.* v. *James*, 8 C. & P. 131.
(*n*) *R.* v. *Norris*, 9 C. & P. 241.
(*o*) 27 & 28 Vict. c. 47, s. 2.
(*p*) See sects. 74, 75, *post*, p. 459.

Injuries to Sea and River Banks, and Works on Canals, Rivers, &c.

and so as thereby to obstruct or prevent the carrying on, completing or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than five years (*q*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*r*).

Section 21.

INJURIES TO CATTLE AND OTHER ANIMALS.

Killing or maiming cattle.

By 24 & 25 Vict. c. 97, s. 40, whosoever shall unlawfully and maliciously kill, maim or wound any cattle shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than five years (*s*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

The particular species of cattle must be mentioned in the indictment (*t*). Cattle includes horses, oxen, pigs, asses. In an indictment for administering sulphuric acid to a horse, evidence of other acts may be given to show the intent (*u*). To set a dog at a sheep, which bit the sheep, is not a *wounding* (*x*).

As to imprisonment and solitary confinement, see sects. 74 and 75, *post*, p. 459.

The wounding may be accomplished by the hand only without any instrument, as where the tongue of an animal may be pulled by the hand so as to lacerate the roots of the tongue and tear the mouth (*y*).

Section 22.

ATTEMPTING TO SET FIRE TO SHIPS, ETC., AND COMMITTING OTHER DAMAGE TO SHIPS, BUOYS, ETC.

Attempting to set fire to a vessel.

By 24 & 25 Vict. c. 97, s. 44, whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to, cast away, or destroy any ship or vessel, under such circumstances that if the ship or vessel were thereby set fire to, cast away

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(*q*) 27 & 28 Vict. c. 47, s. 2.
(*r*) See sects. 74, 75, *post*, p. 459.
(*s*) 27 & 28 Vict. c. 47, s. 2.
(*t*) *R.* v. *Chalkley*, R. & R. 258.
(*u*) *R.* v. *Mogg*, 4 C. & P. 364.
(*x*) *R.* v. *Hughes*, 2 C. & P. 420.
(*y*) *Reg.* v. *Bullock*, 37 L. J., M. C. 47; L. R., 1 C. C. R. 115.

or destroyed, the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than five years (*z*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*a*). *Attempt to set Fire to a Ship or Vessel.*

Sect. 42. Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony. Setting fire to a ship.

But such felony is not triable at quarter sessions.

Sect. 43. Whosoever shall unlawfully and maliciously set fire to, or cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony. Setting fire to ships to prejudice the owner or underwriters.

This offence also is not triable at quarter sessions.

Sect. 45. Whosoever shall unlawfully and maliciously place or throw in, into, upon, against or near any ship or vessel any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods or chattels, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than five years (*b*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*c*). Placing gunpowder near a vessel with intent to damage it.

This offence is better committed for trial to the assizes.

Sect. 46. Whosoever shall unlawfully and maliciously damage, otherwise than by fire, gunpowder or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than five years (*d*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without Damaging ships otherwise than by fire.

(*z*) 27 & 28 Vict. c. 47, s. 2.
(*a*) See sects. 74, 75, *post*, p. 459.
(*b*) 27 & 28 Vict. c. 47, s. 2.
(*c*) See sects. 74, 75, *post*, p. 459.
(*d*) 27 & 28 Vict. c. 47, s. 2.

Injuries to Ships, Boats, &c.

solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*e*).

Removing or concealing buoys and other sea marks.

Sect. 48. Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy rope, perch or mark used or intended for the guidance of seamen or the purpose of navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than five years (*f*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*g*).

Destroying wrecks or any articles belonging thereto.

Sect. 49. Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than five years (*h*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (*i*).

Section 23.

Sending Threatening Letters.

Sending letters threatening to burn or destroy houses, buildings, ships, &c.

By 24 & 25 Vict. c. 97, s. 5, whosoever shall send, deliver or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn or other building, or any rick or stack of grain, hay or straw, or other agricultural produce, or any grain, hay or straw, or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than five years (*k*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with

(*e*) See sects. 74, 75, *post*, p. 459.
(*f*) 27 & 28 Vict. c. 47, s. 2.
(*g*) See sects. 74, 75, *post*, p. 459.
(*h*) 27 & 28 Vict. c. 47, s. 2.
(*i*) See sects. 74, 75, *post*, p. 459.
(*k*) 27 & 28 Vict. c. 47, s. 2.

or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Letters threatening to murder.

By 24 & 25 Vict. c. 100, s. 16, whosoever shall maliciously send, deliver or utter, or directly or indirectly cause to be received knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than five years (*l*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping (*m*).

These offences are better committed for trial to the assizes.

A letter is sent when and where it is delivered by the postman (*n*).

Section 24.

General provisions with respect to malicious injuries to property.

As to principals in the second degree and accessories.

Punishment of principals and accessories.

By 24 & 25 Vict. c. 97, s. 56, in the case of every felony punishable under this act, every principal in the second degree and every accessory after the fact shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or to hard labour and solitary confinement (*o*).

Malice against owner of property unnecessary.

By sect. 58, every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.

Provisions of this act shall apply to persons in possession of the property injured.

By sect. 59, every provision of this act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done.

Intent to injure or defraud

By sect. 60, it shall be sufficient in any indictment for any

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(*l*) 27 & 28 Vict. c. 47, s. 2.
(*m*) See sects. 74, 75, *post*, p. 459.
(*n*) *R.* v. *Lloyd*, 2 East, P. C. 1131, *ante*, p. 119.
(*o*) See sects. 74, 75, *post*, p. 459.

particular persons need not be stated in any indictment.

offence against this act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be).

A summary conviction shall be a bar to any other proceeding for the same cause.

By sect. 67, when any person convicted of any offence punishable upon summary conviction by virtue of this act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or the lord lieutenant or other chief governor of Ireland, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment awarded in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, he shall be released from all further or other proceedings for the same cause.

Convictions to be returned to the quarter sessions.

How far evidence in future cases.

By sect. 70, every justice of the peace before whom any person shall be convicted of any offence against this act shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown.

Offences committed within the jurisdiction of the admiralty.

By sect. 72, all indictable offences mentioned in this act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas:" provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces.

Fine and sureties for keeping the peace; in what cases.

By sect. 73, whenever any person shall be convicted of any indictable misdemeanour punishable under this act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorized, fine the offender, and

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require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony, punishable under this act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Hard labour.

By sect. 74, whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Solitary confinement and whipping.

By sect. 75, whenever solitary confinement may be awarded for any indictable offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any indictable offence under this act, the court may sentence the offender to be once privately whipped; and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the court in the sentence.

Summary proceedings in England may be under the 11 & 12 Vict. c. 43, and in Ireland under the 14 & 15 Vict. c. 93;

By sect. 76, every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, so far as no provision is hereby made for any matter or thing which may be required to be done in the course of such prosecution, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any act that may be passed for like purposes, and all provisions contained in the said acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this act: provided that nothing in this act contained shall in any manner alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the city of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

except in London and the Metropolitan Police District.

The costs of the prosecution of misdemeanors against this act may be allowed.

By sect. 77, the court before which any indictable misdemeanour against this act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Section 25.

OFFENCES AGAINST THE PERSON.

Bodily harm and danger to life from noxious drugs.

By 24 & 25 Vict. c. 100, s. 23, whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than five years (*p*), or to be imprisoned for any term not exceeding two years, with or without hard labour.

As to accessories, see sect. 67, *ante*, p. 440; *post*, p. 489.

And as to hard labour, sect. 69, *post*, p. 490.

By sect. 25, if the jury be not satisfied that the person is guilty under the above section, but shall be that he is of the misdemeanour mentioned in the 24th section (for which see *post*, p. 479, amongst the Misdemeanours), the jury may acquit of the felony and find him guilty of such misdemeanour.

Placing gunpowder near a building with intent to do bodily injury to any person.

Sect. 30. Whosoever shall unlawfully and maliciously place or throw in, into, upon, against or near any building, ship or vessel any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than five years (*q*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Indictment for administering Poison, &c.

For that the said A. B. unlawfully, maliciously and feloniously, on the ——— day of ———, at ———, administered to C. D. a certain noxious thing, to wit, ——— of cantharides, so as thereby then and there to inflict on the said C. D. grievous bodily harm, contrary to the form, &c. and against the peace, &c.

Indictment for placing Gunpowder near Building with intent to do Bodily Injury.

For that the said A. B. unlawfully, maliciously and feloniously, on the ——— day of ———, at ———, placed under the dwelling-house of C. D., then and there being ——— ounces of gunpowder, with intent thereby then to do bodily injury to the said C. D., contrary to the form, &c. and against the peace, &c.

(*p*) 27 & 28 Vict. c. 47, s. 2.
(*q*) *Ibid.*

Section 26.

CHILD STEALING.

Up to the age of sixteen a father is entitled to a *habeas corpus* to get back a daughter, though she may wish to stay away from him (*r*). Father entitled to custody of child.

By 24 & 25 Vict. c. 100, s. 56, whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away or detained as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than five (*s*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping: provided that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child or taking such child out of the possession of any person having the lawful charge thereof. Child stealing.

Indictment for Child Stealing.

For that the said A. B., on the ——— day of ———, A.D. ——, at ———, feloniously and unlawfully did by force take away one C. D., then and there being a child under the age of fourteen years, to wit, of the age of ——— years, with intent thereby then to deprive J. D., then being the father of the said C. D., of the possession of the said C. D., contrary to the statute, &c.

As to the punishment of accessories in felonies under 24 & 25 Vict. c. 100, see sect. 67, *ante*, p. 440, and *post*, p. 488.

Section 27.

COINAGE OFFENCES BEING FELONIES.

By 24 & 25 Vict. c. 99, s. 14, whosoever shall falsely make or counterfeit any coin resembling or intended to resemble or pass for any of the Queen's current copper coin, and whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend Counterfeiting, &c. copper coin.

(*r*) *Reg.* v. *Howes*, 30 L. J., M. C. 148.
(*s*) 27 & 28 Vict. c. 47, s. 2.

Coinage Offences.

or begin, or proceed to make or mend, or buy or sell, or have in his custody or possession any instrument, tool or engine adapted and intended for the counterfeiting any of the Queen's current copper coin; or shall buy, sell, receive, pay or put off, or offer to buy, sell, receive, pay or put off, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, at or for a lower rate or value than the same imports, or was apparently intended to import, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than five years (*t*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Impairing the gold or silver coin, with intent, &c.

Sect. 4. Whosoever shall impair, diminish or lighten any of the Queen's current gold or silver coin, with intent that the coin so impaired, diminished or lightened may pass for the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than five (*u*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Unlawful possession of filings of gold or silver coin.

Sect. 5. Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise, which shall have been produced or obtained by impairing, diminishing or lightening any of the Queen's current gold and silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Counterfeiting foreign gold or silver coin.

Sect. 18. Whosoever shall make or counterfeit any kind of coin, not being the Queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Sect. 19. Whosoever [without lawful authority or excuse (the

(*t*) 27 & 28 Vict. c. 47, s. 2.
(*u*) *Ibid.*

proof whereof shall lie on the accused)] shall bring [or receive] into the United Kingdom any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than (five) (*x*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Bringing Counterfeit Foreign Coin into this Kingdom.

For the interpretation clause and general clauses relating to the venue, the evidence sufficient to show the offences to be complete, jurisdiction in admiralty cases, and the punishment of accessories, and in other cases, see sects. 28—42, *post*, Chap. IX. p. 503.

Section 28.

BANKRUPTCY OFFENCES BEING FELONY.

By the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 12, if any person who is adjudged a bankrupt, or has his affairs liquidated by arrangement, after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of 20*l.* or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury are satisfied that he had no intent to defraud) be guilty of *felony*, punishable with imprisonment for a time not exceeding two years, with or without hard labour.

Quitting England with property of 20*l.* in value with intent to defraud.

This offence being felony does not appear to be subject to the provisions of the Vexatious Indictments Act (*y*), inasmuch as sect. 18 of the Debtors Act, 1869, only applies to misdemeanours, but it is triable at quarter sessions by virtue of the 20th section of that act.

Indictment against a Bankrupt.

For that the said A. B. was on the ——— day of ———, A.D. ——, at ———, adjudged a bankrupt, and that a petition in bankruptcy was presented against him on ——— the ——— day of ———, and that after the presentation of such petition in bankruptcy, to wit, on the ——— day of ———, A.D. ——, the said A. B. unlawfully and feloniously quitted England, and took with him a certain portion of his property, to wit, money to the amount of four hundred pounds, and that such money ought then and there to have been divided amongst the creditors of him the said A. B.; and the said A. B. so quitted England and took with him such money as aforesaid, with intent to defraud, contrary to the form, &c. and against the peace, &c.

(*x*) 27 & 28 Vict. c. 47, s. 2.
(*y*) 22 & 23 Vict. c. 17.

CHAPTER IX.

OF INDICTABLE MISDEMEANOURS, WITH PRECEDENTS OF INDICTMENTS.

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SECTION 1.

OF INDICTABLE MISDEMEANOURS IN GENERAL.

Misdemeanour, what.

THE term *misdemeanour* includes every indictable offence below the degree of *felony*. It is thus distinguished from the

Of Misdemeanours generally.

higher class of crimes by a line of boundary which cannot be mistaken; but its extent downwards is less capable of being marked with precision. As the moral criminality of an act or omission cannot be the criterion of legal responsibility attendant upon it, the question has sometimes arisen whether conduct undoubtedly blameable is punishable by law, or is left by it to the sting of conscience and the indignation of society. So, in cases of injury done to an individual, doubts have been occasionally suggested whether the wrongdoer was amenable to criminal justice, or liable only to be compelled to make compensation by civil process (*b*). These difficulties only arise in reference to cases unprovided for by statute; for, of course, when an act is made a misdemeanour by statute, no doubt as to its character can arise; and when it is prohibited either with or without a specific penalty, a plain rule of construction will determine the question, whether it is indictable, or to be otherwise visited with penalties. It may be laid down as a general rule, that in order to constitute a culpable act a misdemeanour at common law, it must either consist of an attempt to commit an indictable offence; or it must violate the public peace; or it must have a direct tendency to injure the public by causing the peace to be disturbed; or the moral feeling of the public to be injured or insulted; or the course of justice to be assailed or vilified; or public rights to be invaded; or the ordinary securities of dealing to be unsettled by frauds, the result of combination or conspiracy. In the application of this rule to particular instances, there has been occasional uncertainty, which renders it necessary to look more closely to the cases than to abstract principle. It will, therefore, be necessary to enumerate the general heads of misdemeanour at common law, as well as to state the law applicable to statutory prohibition; and to glance at some cases which have been considered doubtful.

The following are the principal classes of misdemeanours indictable at common law, and cognizable by a court of sessions of the peace.

1. Breaches of the peace; as assaults with or without battery; affrays; combats, whether from anger or for money; riots, and forcible entries.

(*b*) The following illustrates the distinction between public and indictable, and private and actionable injuries. Two indictments were preferred for two *misdemeanours*. The first was for scattering over the *private enclosed premises* of the prosecutor wilfully, and with intent to destroy his poultry, divers quantities of poisoned corn, whereby, and by means whereof, great quantities of his poultry were actually destroyed. The *second* was for committing a similar offence, and with the same design, *on a public highway* contiguous to the premises of the prosecutor. The first bill was dismissed as being only a private and individual injury, and a proper subject for an action. The second was holden to be a public nuisance, and a proper subject for an indictment.—*Mr. Dickinson's note.* Dick. Q S. ed. Talf. p. 307.

Misdemeanours, what are.

2. Acts, which, being without legal warrant or excuse, tend directly, or have been holden to tend, to produce breaches of the peace, as challenges, and letters provocative of challenge, except libels, which are now expressly taken out of the cognizance of sessions.

3. All nuisances generally affecting the public, as the carrying on unwholesome trades in crowded neighbourhoods, obstructing or encroaching on highways, bridges, or harbours, and omitting to perform the duty of repairing them (*b*). Keeping a ground for shooting pigeons near a highway, the consequence of which is that persons collected outside to shoot at the birds which escape from the ground, thus making a great noise, and endangering the public, is indictable, for the nuisance is of a public nature, though occasioned by an act in itself innocent (*c*).

Nuisances.

Whenever the law inflicts imprisonment for the commission of a particular act, *e. g.*, any act prohibited by the Smuggling Act (4 & 5 Will. 4, c. 13), it no doubt considers that act in the light of an offence against the public, and makes it a criminal matter within the Habeas Corpus Act (*d*). As to the indictable quality of acts to which no statute applies, the following may serve as examples; it has been made a question, whether a man, in the prosecution of a legal calling, as distributing handbills of an innocent description on a causeway, by means of which, however, passengers were to a certain degree obstructed and impeded, commits an indictable offence (*e*). The like of a stage-coachman, or driver of a waggon, who, *though plying in the way of his lawful calling*, for passengers or loading, thereby to some degree obstructs a public highway. *Any* unauthorized obstruction of a highway, to the annoyance of the subject (*f*), as well as any unnecessary exposure on a highway, of any object that has a direct tendency to injure health, life, liberty, or property, is an indictable offence; and further, that in no case is it necessary to prove actual injury from any such nuisance; for that, of whatever kind it be, if in its nature and circumstances it be *sufficient to* produce injury to passengers, it is indictable (*g*). But if works carried on in a harbour render it in some extreme cases less secure, consequences so slight, uncertain, and rare, are not the subjects of indictment (*h*). See further, as to obstructions on the highway, *post*, Sect. 18, p. 585.

(*b*) *Reg.* v. *Watts*, 1 Salk. 357; 2 Ld. Raym. 856; Raym. Entries, 25, cited 9 B. & C. 736, *post*; *R.* v. *Gregory*, 5 B. & Ad. 555; 3 L. J., M. C. 25.

(*c*) *R.* v. *Moore*, 3 B. & Ad. 184.

(*d*) *Eaton, In re*, 9 D. P. C. 207; see *Beeching's case*, 4 B. & C. 137.

(*e*) *R.* v. *Sermon*, 1 Burr. 516; *R.* v. *Russell*, 6 East, 427.

(*f*) *R.* v. *Cross*, 3 Campb. 227; *R.* v. *Vantandillo*, 4 M. & S. 73.

(*g*) *R.* v. *Vantandillo*, 4 M. & S. 73; *R.* v. *Pedly*, 1 A. & El. 822; 3 Nev. & M. 627. See *Benjamin* v. *Storr*, 43 L. J., C. P. 162; L. R., 9 C. P. 400.

(*h*) *R.* v. *Tindall*, 6 A. & E. 143; 1 Nev. & P. 719.

Of Misdemeanours generally.

4. Outrages on public decency or feeling, as the exhibition of indecent prints, exposure of the person, openly keeping brothels, and removing dead bodies from the grave.

5. Indecent attacks on the religion established by law, and wilful disturbances of divine service, whether performed in the established church, or in Protestant dissenting, or Roman Catholic chapels.

6. All contempts and obstructions of the execution of powers granted by statute (*i*), or of courts of law and magistrates in the discharge of their duty; attempts to prevent the course of justice, by abstracting a witness (*k*), and all interference with the process of the law, as escapes and rescues, or refusals to assist peace officers in the execution of their duty (*l*).

7. All corrupt breaches of duty in public officers, and refusals to execute offices by parties required by law to serve them.

Of attempts to commit offences.

8. All attempts to commit an offence, whether felony or misdemeanour; as, for example, an attempt to obtain money on false pretences (*m*), bribe a public officer (*n*) or a juryman (*o*) in their duty, or to bribe a person to commit an offence (*p*), or to prevail on him to commit perjury, or to provoke him to send a challenge (*q*), and all solicitations of another to commit any crime soever, which are no less criminal though they may fail (*r*). Again, the attempt to commit a misdemeanour created by statute, is in itself a misdemeanour at common law (*s*). It may be observed, that although a bare criminal intent is not in itself indictable, if merely expressed in words or gestures, or otherwise, without further proceeding to the crime to which it points, yet if it is accompanied by any act being a proximate step (*t*) and attempt towards the accomplish-

A bare criminal intent is not indictable.

(*i*) *R.* v. *Smith*, 2 Doug. 441; and the indictment should not conclude "*contra formam statuti*," *ibid.*

(*k*) We have seen that perjury, &c. is out of the jurisdiction of sessions.

(*l*) *Reg.* v. *Sanders*, 36 L. J., M. C. 87; L. R., 1 C. C. R. 75.

(*m*) *E. g.*, by asking a pawnbroker to advance money on articles which prisoner stated to be silver, but which were not, and no money was lent; *Reg.* v. *Bell*, C. & M. 249.

(*n*) *R.* v. *Vaughan*, 4 Burr. 2494.

(*o*) *Young's case*, cited in *R.* v. *Higgins*, 2 East, 14, 16.

(*p*) *Wade* v. *Broughton*, 2 V. & B. 173, per Lord *Eldon*, Ch.; see *Harding* v. *Stokes*, 2 M. & W, 233.

(*q*) *R.* v. *Phillips*, 6 East, 463.

(*r*) *R.* v. *Scofield*, Cald. 400, per Lord *Mansfield;* 2 East, P. C. 1030; *R.* v. *Higgins*, 2 East, 5. See 3 Geo. 4, c. 38, s. 3.

(*s*) See per *Le Blanc*, *R.* v. *Cartwright*, R. & Ry. 108, n.; *R.* v. *Butler*, 6 C. & P. 368; and per *Patteson*, J., *acc.* in *R.* v. *Harris*, *id.* 129; *R.* v. *Roderick*, 7 *id.* 795; and *Reg.* v. *Martin*, 9 C. & P. 213, 215.

(*t*) In *Reg.* v. *Meredith*, 8 C. & P. 589, Lord *Abinger* said, that an attempt to commit a misdemeanour is not indictable unless there be some illegal act done, and that taking any step towards committing a misdemeanour, unless by an illegal act, is not sufficient.

Attempts to commit Offences.

ment of the crime, that act, though in itself out of the reach of indictment, will not be judged alone, but as coupled with the criminal intent which prompted it, and is therefore punishable on indictment (*p*). Thus, the mere *possession* of counterfeit coin not being an *act*, was not *per se* indictable at common law, though there might be an intent to utter it (*q*). But if the possession was detected under circumstances which lead to the belief that it was *obtained* with intent to utter it, as, for instance, having possession of a large quantity wrapped up in such a way, as to preserve the impression made on soft base metal, such obtaining will unquestionably be a substantive offence (*r*). And so to obtain and procure indecent prints and libels, for the purpose of afterwards publishing them, is an act done, and indictable; but merely to preserve and keep in possession such indecent prints, with intent afterwards to publish them, is not indictable, as not being an act done, and the possession may have been come by innocently (*s*).

9. Conspiracies, an anomalous head of offence particularly considered hereafter in Sect. 7, *post*, p. 511.

Of statutory offences.

10. All offences created or declared by statute to be misdemeanours, are of course indictable as such by force of it; but where a statute creates an offence, not having been one at common law, and goes on in the prohibitory clause to annex a penalty to be levied in a particular mode, *e. g.*, on conviction before one or more justices of the peace, the specific penalty or other punishment to be enforced by the mode pointed out is all that can be inflicted, and no indictment will lie for disobeying the enactment (*t*). On the other hand, if the prohibition of the particular act be general in the first instance, and a specific penalty or punishment is provided by a distinct section, to be enforced by "action or information," without mentioning "indictment" (*u*), a prosecutor has his option of proceeding for the penalty in the mode provided by the statute, or of indicting for disobedience to the prohibition; on the same principle that if a statute only permits, enjoins, or prohibits an act, without annexing any specific penalty or punishment, an indictment at common law would be the proper mode of proceeding to punish

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(*p*) See per Lord *Mansfield*, in *R.* v. *Scofield*, Cald. 400; 2 East's P. C. 1030. Also *Fuller's case*, East's P. C. 92; *Bacon's case*, 1 Levinz, 146; 11 Co. 98, b; 1 Keble, 809; *R.* v. *Ponsonby*, Sayer's R. 245; Bull. N. P. 211; *Reg.* v. *Martin*, 9 C. & P. 215.

(*q*) *R.* v. *Stewart*, R. & Ry. 288; *R.* v. *Heath*, *id.* 184; but see now 24 & 25 Vict. c. 99, s. 11, *post*, p. 500.

(*r*) *R.* v. *Fuller*, R. & Ry. 308; *Reg.* v. *Jarvis*, Dears. C. C. 552; 25 L. J., M. C. 30, *post*; 24 & 25 Vict. c. 99, s. 11.

(*s*) *Dugdale* v. *Reg.*, 1 E. & B. 435; 22 L. J., M. C. 50.

(*t*) *R.* v. *Wright*, 1 Burr. 543; *R.* v. *Douse*, 1 Ld. Raym. 672; *Reg.* v. *Buchanan*, 7 Q. B. 883.

(*u*) See as to this, 2 Hale's P. C. 171, 191; *R.* v. *Gregory*, 5 B. & Ad. 555; 3 L. J., M. C. 25.

the offence of disobedience or infringement (*x*). As a general rule, the *mens rea* is necessary to the commission of an offence, although the statute does not in terms make it necessary (*y*); but the nature of the act is to be considered in determining whether the *mens rea* is necessary or not (*z*). When a statute only inflicts an additional penalty or punishment for an offence previously indictable, and does not prohibit the former manner of proceeding at common law, the new penalty or punishment is cumulative, and the prosecutor may proceed either according to the common law, or on the statute (*a*). On this principle it is clear that the father of a bastard child might, before 4 & 5 Will. 4, c. 76, s. 69, either be indicted for disobeying the order of justices for its maintenance, or be punished at the option of the parish aggrieved, under 49 Geo. 3, c. 68, according to the summary process which it provided (*b*). So constables and parish officers may either be punished at common law by indictment for neglect of duty and disobedience of the orders of justices, or summarily under 33 Geo. 3, c. 55 (*c*).

Offences created by Statute.

On the other hand, a person cannot be indicted for selling ale without a licence: because it was no offence at common law, and because an exclusive and specific punishment for so doing is directed by statute (*d*).

11. Frauds committed *in the way of trade* have also frequently given occasion to doubts respecting the extent of the remedy by indictment. It was once thought that the law was only for the protection of the strong and prudent, but that notion has ceased to prevail (*e*). Accordingly, it seems to have been

Frauds in way of trade.

(*x*) This may be collected from the judgments in *R.* v. *Harris*, 4 T. R. 202, where disobedience to an order which the king in council was empowered by statute to make was held indictable at common law. But no indictment lies against overseers for not accounting. *Reg.* v. *Crossley*, 10 A. & E. 132; 2 P. & D. 319; and *Reg.* v. *Fordham*, 11 A. & E. 84, per *Patteson*, J.; *Collins* v. *Carnegie*, 1 A. & E. 703. By 6 & 7 Will. 4, c. 86, the father or mother of a child, or, in case of their illness or absence, the occupier of the house in which the child has been born, shall, within forty-two days after the birth, give information of the particulars thereof to the registrar of births on request. This is imperative, and being matter of public concern, disobedience to it is indictable; *Reg.* v. *Price*, 11 A. & E. 727.

(*y*) *Reg.* v. *Sleep*, L. & C. 44; 30 L. J., M. C. 170; *Reg.* v. *Cohen*, 8 Cox, C. C. 41; *Dickinson* v. *Fletcher*, 43 L. J., M. C. 25; L. R., 9 C. P. 1.

(*z*) *Mullins* v. *Collins*, 43 L. J., M. C. 67; L. R., 9 Q. B. 292.

(*a*) *R.* v. *Robinson*, 2 Burr. 799; relied on in *R.* v. *Harris*, 4 T. R. 205, and *R.* v. *Carlile*, 3 B. & A. 163. "A penalty implies a prohibition, though there are no prohibitory words in the statute;" per *Holt*, C. J., Carthew, 252. See 3 B. & Ad. 240.

(*b*) *R.* v. *Carlile*, 3 B. & A. 161; *R.* v. *Hollis*, 2 Stark. Cr. P. 536. Indicting where there is another remedy, is said by Lord *Mansfield* to carry an appearance of oppression; *R.* v. *Boyall*, 2 Burr. 834.

(*c*) *R.* v. *Boyall*, 2 Burr. 832.

(*d*) *R.* v. *Douse*, 1 Ld. Raym. 672; *R.* v. *Storr*, 3 Burr. 1699.

(*e*) *Reg.* v. *Woolley*, 1 Den. C. C. 564; 19 L. J., M. C. 165, per *Erle*, J.

Frauds in the way of Trade.

decided that the delivering *short measure* of any commodity sold, *e. g.*, the selling as two chaldrons of coals, a less quantity, is not an indictable offence, being a mere imposition on an individual whose own carelessness neglected measuring the article; but using false weights, measures, tokens, or marks, is an indictable offence, because that is a general plan, or conspiracy, calculated to defraud numbers (*l*). It had also been decided, that the exposing to sale, and selling wrought gold under the sterling alloy, as and for gold of the true standard weight (though said to be indictable by statute in the case of goldsmiths), is not an indictable offence at common law in the case of a common person, the sale not being by any false weight or measure, for being an imposition and one of those frauds only which a man's common prudence should guard him against, the law leaves him to his private remedy (*m*). So it has been said that a miller keeping a common mill, and either changing corn brought to be ground, or substituting the flour of corn of another kind, or inferior quality, commits an act to be remedied by private action, not by a criminal indictment (*n*); but in later cases it is held to be sufficient, if faith has been placed in such false statements. Thus, where a person asked for change for a 5*l.* note, putting at the same time in the hands of the prosecutrix, who could read and write, a 1*l.* note, but who instead of examining it gave the change for a 5*l.* without looking at it, the conviction was supported (*o*). And though inquiry may easily be made into the truth of the statement made, there is no duty on the part of the person to whom the statement is made to inquire into it, and if relied upon and false, the party making it may be convicted (*p*). On an indictment against a miller for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, which was *musty and unwholesome*, it was said by Lord *Ellenborough*, C. J., that the article not being laid in the indictment to be delivered *for the food of man*, the act was not indictable. He also observed, that had it been laid that the mill in question was a soke mill, to which the inhabitants of the vicinage were *bound* to resort, and that the miller, abusing the confidence of his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but that as it there appeared to be merely an individual fraud, it was not an indictable offence (*q*).

(*l*) *R.* v. *Wheatley*, 2 Burr. 1125; 1 Bla. 273; 1 Leach, 489, *S. C.*; *R.* v. *Osborne*, 3 Burr. 1697; *R.* v. *Dunnage*, 2 Burr. 1121.

(*m*) *R.* v. *Bower*, East, P. C. 820; Cowp. 323.

(*n*) *R.* v. *Dunnage*, 2 Burr. 1131; *R.* v. *Channel*, Stra. 793; East, P. C. 818.

(*o*) *Reg.* v. *Jessop*, D. & B. 442; 27 L. J., M. C. 70.

(*p*) *Reg.* v. *Woolley*, 1 Den. C. C. 559; 19 L. J., M. C. 165.

(*q*) *R.* v. *Haynes*, 4 M. & S. 214.

Frauds in Commercial Transactions.

Deceits also in commercial dealings, when no artifice is used but such as ordinary precaution might provide against, present many doubtful cases. Thus, the mere offer of a cheque on a banker as a good one, when in fact the person offering it had no money in the banker's hands, and knew that he had none, was long holden to be no fraud indictable at common law, though now it is by statute (*r*). A mere false *assertion*, without *some artful contrivance*, does not constitute such a fraud (*s*). A person pretending also to be the servant of a lady, who was the customer of a tradesman, and going to that tradesman, pretending that she was sent by her mistress, and obtaining goods, but using no other artful contrivance to obtain credit, has been holden not to commit a fraud indictable at common law (*t*). But when any message or note, pretending to be written by any person, or other artful contrivance is employed, the deception amounts to more than a mere wicked falsehood; and becomes of the class of those artful contrivances, against which ordinary caution cannot be expected to provide (*u*). And where *two or more* persons have confederated together to impose on a tradesman, though only by *an affirmance* of a fact which was not true, they are clearly liable to indictment for a conspiracy, although they may not be indictable for the fraud at common law (*v*).

The indictable character of acts clandestinely done, which may eventually bring burthens upon parishes, has been the subject of much doubt and controversy, *ex. gr.*, privately bringing into a parish, and secreting a single woman with child, which child is afterwards born a bastard there, and so (before 4 & 5 Will. 4, c. 76, s. 71) chargeable to the parish, that not being the place of the mother's settlement (*w*). These kinds of acts, however, when accomplished by concert of two or more persons, are indictable as conspiracies.

(*r*) *R.* v. *Jackson*, 3 Campb. 370, *post*, Sect. 9 of this Chapter, p. 529.
(*s*) *R.* v. *Lara*, 1 Leach, 746; 6 T. R. 565. As to naked lie, *Foster* v. *Charles*, 6 Bing. 396; 4 Moo. & P. 61; *R.* v. *Harvey*, 2 B. & C. 257.
(*t*) *R.* v. *Bryan*, 2 East, P. C. 819. See however *Reg.* v. *Burnside*, Bell, C. C. 282.
(*u*) *Reg.* v. *Maloney*, 2 Cox, C. C. 172; *Freeth's case*, R. & R. 127; *Reg.* v. *Coulson*, 1 Den. C. C. 592.
(*v*) *R.* v. *Mackartney*, Salk. 286; 2 East, P. C. 828.
(*w*) *R.* v. *Chandler*, 2 Ld. Raym. 1368.

Section 2.

ASSAULTS.

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(1) *What is a Common Assault.*

What is an assault.

An assault is an attempt or offer to do an injury to the person of another, under circumstances denoting a present intention, coupled with a present ability (*x*) to do such injury, whether that injury be actually done or not. Thus, to collect a number of workmen round a person, who tuck up their sleeves and aprons, and threaten to break his neck if he do not go out of the place, through fear of whom he goes out, is to commit an assault (*y*). To lift up a stick or fist in a threatening attitude, so near to the party threatened that a blow might take effect, although the fist or the stick is not brought in actual contact with his person; to present a loaded fire-arm at a person within the distance to which it will carry, though without firing it (*z*), or even unloaded, if having the appearance to him of being loaded, and so near that if it was loaded and went off it might produce injury (*a*); to strike at, or throw any substance at another with intent to strike, though the attempt fail, are assaults in law (*b*); but mere words, whatever violence they may threaten, never amount to an assault (*c*). These assaults do not include

Battery, what.

(*x*) Selwyn's N. P. 10th ed. 25. See *Stephens* v. *Myers*, 4 C. & P. 349; *Tindal*, C. J., and Hawk. b. 2, ch. 62, s. 1; *Osborn* v. *Veitch*, 1 F. & F. 317.

(*y*) *Read* v. *Cohen*, 13 C. B. 850; 22 L. J., C. P. 201.

(*z*) The fact of firing a gun into a room of A.'s house with intent to shoot A., the prisoner supposing him to be in the room, will not support a charge of shooting *at* A. if he is shown not to be in the room, or within reach of the shot; *Reg.* v. *Lovel*, 2 M. & Rob. 39.

(*a*) *Parke*, B., *Reg.* v. *St. George*, 9 C. & P. 493, *quære*, see note (*u*). But later authorities have held that if it be not loaded, or if loaded it could not possibly go off by reason of improper priming or damp powder, it would be no assault to present it and pull the trigger; *Blake* v. *Barnard*, 9 C. & P. 626; *R.* v. *Baker*, 1 C. & K. 254; but if it be loaded, and the only reason of its not going off is that it is on half-cock, it would be an assault, as the cocking is an instantaneous act; *Osborn* v. *Veitch*, 1 F. & F. 317; and per *Tindal*, C. J.; *Reg.* v. *James*, C. & Kir. 530.

(*b*) *Reg.* v. *Light*, D. & B. 332; 27 L. J., M. C. 1; *Coward* v. *Baddeley*, 4 H. & N. 478; 28 L. J., Ex. 260.

(*c*) See *Reg.* v. *Light*, *id.*; *Read* v. *Cohen*, 13 C. B. 850; 22 L. J., C. P. 201; *Coward* v. *Baddeley*, 4 H. & N. 478; 28 L. J., Ex. 260; Hawk. b. 2, c. 62, s. 1.

Of a Common Assault.

a battery, which consists in some actual and unwarranted force applied to the person; but every battery, however small, includes an assault; *e. g.*, spitting in a man's face, cutting off his hair in derision (*d*), forcibly stripping him of his clothes (*e*), or even touching him, if done with the purpose to insult him. And the assault and battery will be equally committed, whether by actually employing the hand, or by any other means, as placing an infant in a bag, hanging the bag on palings, and leaving it there (*f*). Setting a dog on another or driving a cart wilfully against the carriage of another, by which bodily injury is done to those within it (*g*). So if a drunken man be wilfully pushed against the complainant (*h*); but never where the act is merely the result of accident, or an injury is done in an amicable contest (if lawful), as in wrestling (*i*), or if it be done without any hostile intention, and merely for the purpose of engaging a person's attention (*k*).

An assault may also be committed by exposing a servant of tender years to the inclemency of the weather (*l*); but a mere act of nonfeasance, as withholding a proper supply of food or warmth from a servant, unless of tender years, under the control of the master, is not an assault (*m*).

An assault cannot be committed except it be without the consent of the person alleged to be assaulted, but mere absence of resistance is but evidence of consent, although in ordinary cases it may be cogent evidence, yet from the relative ages, positions, characters or personal strength of the parties, its value may be diminished, or even amount to no more than mere submission. Consent involves submission, but it by no means follows that mere submission involves consent (*n*). The submission of a child when in the power of a strong man, and acted upon by fear, does not prevent the act being an assault (*o*). So an act of indecency committed on little boys, who submitted willingly in ignorance of the moral nature of the acts, is an assault (*p*); as also a similar act towards a female scholar of thirteen, who submitted to it, on the part of the man whose wife kept the

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(*d*) *Forde* v. *Skinner*, 4 C. & P. 239. See also 3 Inst. 109.

(*e*) See *Sunbolf* v. *Alford*, 3 M. & W. 248.

(*f*) *Reg.* v. *March*, 1 C. & K. 496

(*g*) *Hopper* v. *Reeve*, 7 Taunt. 698; and see now, as to furious driving, 24 & 25 Vict. c. 100, s. 35, *post*, p. 489.

(*h*) *Short* v. *Lovejoy*, Bull. N. P. 16.

(*i*) Com. Dig. Pleader (3 M. 18). See Bull. N. P. 16; Bac. Abr. *tit. Assault and Battery*, B.; 1 East, P. C. 268; but all struggles in *anger*, whether by wrestling, pushing, &c. are unlawful, so that death occasioned thereby is manslaughter at least; *Reg.* v. *Canniff*, 9 C. & P. 359.

(*k*) *Wiffin* v. *Kennard*, 2 N. R. 471; *Coward* v. *Baddeley*, 4 H. & N. 478; 28 L. J., Ex. 260.

(*l*) *R.* v. *Ridley*, 2 Campb. 650, 653. See *post*, Sect. 8 of this Chapter.

(*m*) See now as to this, 24 & 25 Vict. c. 100, s. 26, *post*.

(*n*) *R.* v. *Day*, 9 C. & P. 722, per *Coleridge*, J.

(*o*) *Ibid.*

(*p*) *Reg.* v. *Lock*, 42 L. J., M. C. 5; L. R., 2 C. C. R. 10.

Assaults must be without the Consent of Patient.

school (*q*), or towards a female patient suffering from fits, who submitted to it at the hands of her medical attendant, in the belief that he was treating her medically (*r*). So also connexion by a medical man had with a female patient of fourteen, submitted to in the belief that he was treating her medically for suppressed menstruation (*s*); but mere tenderness of age, except helpless infancy, does not incapacitate from consenting to an act so as to prevent its being an assault (*t*). Thus it is not an assault to have connexion with a girl between the age of ten and twelve years, if she consent (*u*), or even if she be only nine, and consent to such an act by boys slightly older (*x*).

A person cannot give another leave to beat and strike him so as to prevent a voluntary fight being an assault, for such a consent is void and illegal, being in breach of the peace (*y*). And so, being present at a prize fight, in order by one's presence to encourage it, is indictable as an assault (*z*).

Assault and battery, when excusable.

There are many cases, however, in which a battery is no offence. Thus, whenever a man is first assaulted, he may lawfully strike with a violence not exceeding that which appears necessary for the defence of his person; though he cannot justify a battery manifestly excessive by setting up the first assault from his adversary (*a*). So he may remove a trespasser from his land, after requesting him to depart (*b*); and even without such request, where the party is proceeding to acts of destruction and violence, or is forcibly removing goods (*c*), or to remove a servant who at night is misconducting himself as to disturb the peace of the household (*d*), or to remove a person out of a public-house, if the party be misconducting himself (*e*), or to prevent him from entering the defendant's house or close (*f*), or to retake personal property improperly detained or taken away (*g*), or to remove persons disturbing others playing at a lawful game, *e. g.* cricket (*h*). The

(*q*) *R.* v. *Nicholl*, R. & Ry. 130.
(*r*) *R.* v. *Rosinski*, 1 Moo. C. C. 19.
(*s*) *Reg.* v. *Case*, 1 Den. C. C. 580; 19 L. J., M. C. 174.
(*t*) *R.* v. *March*, 1 C. & K. 496.
(*u*) *R.* v. *Martin*, 2 Moo. C. C. 123; *R.* v. *Meredith*, 8 C. & P. 589.
(*x*) *Reg.* v. *Read*, 1 Den. C. C. 377; 18 L. J., M. C. 88.
(*y*) *Matthew* v. *Ollerton*, Comb. 218; Bull. N. P. 16.
(*z*) *R.* v. *Perkins*, 4 C. & P. 537. See *R.* v. *Billingham*, 2 C. & P. 234.
(*a*) Bull. N. P. 18; *Hinton* v. *Heather*, 14 M. & W. 131. See *Fish* v. *Scott*, Peake, N. P. C. 135.
(*b*) *Hayling* v. *Ikey*, 8 Exch. 53; 22 L. J., Ex. 139.
(*c*) *Green* v. *Goddard*, 2 Salk. 641.
(*d*) *Shaw* v. *Charitie*, 3 C. & K. 21.
(*e*) *Howell* v. *Jackson*, 6 C. & P. 723; *Moriarty* v. *Brook*, *id.*; *Webster* v. *Watts*, 11 Q. B. 311; 13 L. J., Q. B. 73; *Ingle* v. *Bell*, 1 M. & W. 516; *Wheeler* v. *Whiting*, 9 C. & P. 265.
(*f*) *Polkinghorn* v. *Wright*, 8 Q. B. 197; *Holmes* v. *Bagge*, 1 E. & B. 872; 22 L. J., Q. B. 301.
(*g*) *Blades* v. *Higgs*, 12 C. B., N. S. 501; 30 L. J., C. P. 347; *R.* v. *Mellon*, M. & M. 107.
(*h*) *Holmes* v. *Bagge*, 1 E. & B. 786; 22 L. J., Q. B. 301.

use of necessary force in executing legal process on the person, and for frustrating an attempt to escape, or preventing the rescue of goods taken in execution (*i*), may also, at all times, be justified (*k*); but the force must be necessary and not wanton (*l*). And there are relationships which justify a battery in defence of another; thus, a husband may justify a battery in defence of a wife; a wife in defence of her husband; a parent in defence of his child; a child in defence of his parent; a master in defence of his servant; and a servant in defence of his master (*m*). But it has been said, that a servant cannot justify beating another in defence of his master's son, though he were commanded to do so by his master, because he is not a servant to the son; and that a tenant may not beat another in defence of his landlord (*n*).

When justifiable.

A battery may also be justified when done in the way of domestic correction by a party having authority to employ it; as if a father correct his infant son; a schoolmaster his scholar; or a master his apprentice; provided the punishment be moderate, and the instrument of correction proper (*o*). And it has been holden, that an officer of the army may justify even a wounding, if done for disobedience of orders; and that a sentence of a council of war in his favour, on the petition of the soldier wounded, will conclusively entitle him to an acquittal (*p*). *Semble*, an imprisonment will not necessarily amount to battery? (*q*); and a captain of a ship may justify acts in proper correction of his crew (*r*); but if the correction exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, it is an assault, and that is a question for the jury (*s*).

It was formerly thought that a man could not be indicted for assaulting two persons in one charge (*t*); but Lord *Mansfield* disagreed from that case; the contrary is now understood to be the rule (*u*). Where the prosecutor complains of several assaults, he may include them in one indictment, inserting counts applicable to each; and may give evidence of all at the trial.

(*i*) 3 Lev. 313.
(*k*) *Harrison* v. *Hodgson*, 10 B. & C. 445.
(*l*) 2 Roll. Abr. 546 (A).
(*m*) Hawk. b. 1, c. 60, s. 23.
(*n*) *Id.* s. 24.
(*o*) *Id.*
(*p*) *Lane* v. *Degberg*, Bull. N. P. 19; *Hannaford* v. *Hume*, 2 C. & P. 148.
(*q*) See *Wilson* v. *Lainson*, 3 New C. 307; *Briggs* v. *Bowgin*, 1 New R. 355.
(*r*) *Lamb* v. *Burnett*, 1 Cr. & J. 295; *Noden* v. *Johnson*, 16 Q. B. 218; 20 L. J., Q. B. 95.
(*s*) *Broughton* v. *Jackson*, 18 Q. B. 381; 21 L. J., Q. B. 265.
(*t*) *R.* v. *Clendon*, Stra. 890; 2 Ld. Raym. 1572.
(*u*) *R.* v. *Benfield*, 2 Burr. 984. See 3 T. R. 105, *Buller*, J.

Of Common Assaults.

Of assaults punishable by summary conviction.

A party assaulted not only has his option, either to proceed civilly or to indict, but he may take both courses (*x*); although such a proceeding would probably influence both the damages and the sentence; or he may seek the summary remedy given by 24 & 25 Vict. c. 100, by sect. 42 of which statute, "where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence; and the offender shall upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs if ordered, the sum of 5*l.*; and if such fine as shall be so awarded, together with the costs if ordered, shall not be paid either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, unless such fine or costs be sooner paid."

By sect. 43, when any person shall be charged before two justices of the peace with an assault or battery upon any male child, whose age shall not, in the opinion of such justices, exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot, in their opinion, be sufficiently punished under the provisions hereinbefore contained as to common assaults and batteries, may proceed to hear and determine the same in a summary way; and if the same be proved may convict the person accused, and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of twenty pounds, and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid; and, if the justices shall so think fit in any of the said cases, shall be bound to keep the peace, and be of good behaviour for any period not exceeding six months from the expiration of such sentence.

And by sect. 44, if the justices, upon the hearing of any such case of assault or battery upon the merits where the complaint was preferred by or on behalf of the party aggrieved under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have

(*x*) *Reg.* v. *Deny*, 20 L. J., M. C. 189; *Jones* v. *Clay*, 1 B. & P. 191, but cannot apply for criminal information without giving up right of action; *R.* v. *Sparrow*, 2 T. R. 198; 1 Ch. Cr. L. 855, 1st ed.

been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred. And by sect. 45, if any person against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on behalf of the party aggrieved shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

Certificate of dismissal of complaint.

By sect. 46 it is provided, that in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same: provided also, that nothing herein contained shall authorize any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

Justices may abstain from summarily adjudicating on complaint.

The justices cannot convict the defendant for using more violence than was necessary when a question as to the title to land arises, as their jurisdiction over the case is ousted (*y*).

So the words "when the complaint was preferred by or on behalf of the party aggrieved" are also new.

The granting of the certificate is a ministerial and not a judicial act, and is not discretionary with the justices; there is, therefore, no objection to its being granted after the parties have left the court (*z*); and it is to be deemed to be granted "forthwith" if it be done forthwith upon demand of the party entitled to it. The word forthwith, moreover, is said not to be a condition of the certificate, and does not mean immediately but upon demand (*a*).

A party may be prosecuted on one indictment for an assault upon two or more persons (*b*).

Under the general issue any legal justification or excuse may be given in evidence (*c*); but a defence by statute should be specially pleaded, unless the statute giving the defence provide for its being received in evidence without being so

(*y*) *Reg.* v. *Pearson*, 39 L. J., M. C. 76; L. R., 5 Q. B. 237.
(*z*) *Hancock* v. *Somes*, 1 E. & E. 795; 28 L. J., M. C. 196; *Costar* v. *Hetherington*, 1 E. & E. 802; 28 L. J., M. C. 198.
(*a*) *Ibid.*
(*b*) *R.* v. *Benfield*, 2 Burr. 984.
(*c*) 1 Hawk. c. 15, s. 3; 1 East, P. C. 406

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pleaded (*f*). A certificate of dismissal under 24 & 25 Vict. c. 100, s. 46, must be specially pleaded (*g*), and so also must a previous conviction under the same sections (*h*); but if not pleaded, and a conviction take place, the judge should take into consideration the circumstance of any previous conviction, and the previous payment of penalty or imprisonment suffered (*i*).

Certificate of dismissal of complaint must be specially pleaded.

The certificate or conviction must be in respect of a case over which the justices had jurisdiction, but if the prosecution arises out of the same state of facts, the conviction or certificate of dismissal by justices is pleadable in bar to the indictment, though the indictment allege it to be a felonious or aggravated assault (*k*).

To make the certificate or conviction pleadable in bar, there must have been a hearing on the merits, and the language of the section differs from the prior statute of 9 Geo. 4, c. 31, in the addition of the words "on the merits," so that the cases of *Tunnicliffe* v. *Tedd* (*l*) and *Vaughton* v. *Bradshaw* (*m*), must be now considered with reference to that difference of language.

When the charge before the justices was assault, but the evidence before them, if true, proved a rape, or assault with intent, they are at liberty to disbelieve the portion relative to the graver offence over which they had no jurisdiction, and conviction of the assault under those circumstances would probably be a bar to an indictment for the rape (*n*). So it is for the justices to decide whether the assault is accompanied by an intent to commit a felony: so that on a charge of that nature they may nevertheless convict of an assault (*o*).

But the justices have no jurisdiction to convict under sect. 42, upon a summons taken out under the Municipal Corporations Act, for an assault upon a police constable in the execution of his duty (*p*).

Compromises.

Assaults may form the proper subject of a compromise if confined to personal injuries, but not if they are of a public nature, as if accompanied by riots, or the obstruction of a public officer in the execution of his duty (*q*).

(*f*) *Hardy* v. *King*, 6 C. & P. 427; *R.* v. *Stanton*, 5 Cox, C. C. 324; and see *Reg.* v. *Elrington*, 1 B. & S. 688; 31 L. J., M. C. 15; *Hartley* v. *Hindmarch*, 35 L. J., M. C. 255; *Costar* v. *Hetherington*, 1 E. & E. 802; 28 L. J., M. C. 196; *Hancock* v. *Somes*, 1 E. & E. 795; 28 L. J., M. C. 198.

(*g*) *Hardy* v. *King*, 6 C. & P. 427.

(*h*) *Reg.* v. *Walker*, 2 Moo. & R. 212.

(*i*) *Reg.* v. *Stanton*, 5 Cox, C. C. 324. See *Reg.* v. *Elrington*, 1 B. & S. 688; 31 L. J., M. C. 15.

(*k*) *Reg.* v. *Elrington*, 1 B. & S. 688; 31 L. J., M. C. 14; *Reg.* v. *Stanton*, 5 Cox, C. C. 324; *Reg.* v. *Walker*, 2 Moo. & R. 446.

(*l*) 5 C. B. 553; 17 L. J., M. C. 67.

(*m*) 9 C. B. 103; 30 L. J., C. P. 93.

(*n*) *Wilkinson* v. *Dutton*, 3 B. & S. 821; 32 L. J., M. C. 152; and see *Thompson, In re*, 6 H. & N. 193; 30 L. J., M. C. 19.

(*o*) *Anon.*, 1 B. & Ad. 382.

(*p*) *Reg.* v. *Brickhall*, 33 L. J., M. C. 157.

(*q*) *Keir* v. *Leeman*, 6 Q. B. 308; 9 Q. B. 371; *Goodall* v. *Lowndes*, 6 Q. B. 464. See *ante*, p. 180.

(2) *Assaults occasioning actual Bodily Harm.*

Assaults occasioning bodily harm.

By 24 & 25 Vict. c. 100, s. 20, whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of [five] years (*r*), or to be imprisoned for any term not exceeding two years, with or without hard labour, *i. e.*, either in common gaol or house of correction (*s*).

And the court may, if it think fit, in addition to or in lieu of such punishment fine the offender, and require him to enter into his own recognizances, and to find sureties both or either for keeping the peace and being of good behaviour, provided that no person shall be imprisoned for not finding sureties under this clause for any period exceeding one year.

Malice, what.

Grievous bodily harm inflicted intentionally, though without premeditation and under the influence of passion, is maliciously inflicted within the meaning of the above section (*t*). If the injury is inflicted upon a person under sixteen years of age, the prosecution may be ordered to be conducted by the guardians of the union or overseers under sect. 73, *post.*

Punishment for assaults occasioning actual bodily harm.

Common assault.

By sect. 47, whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years (*u*), or to be imprisoned for any term not exceeding two years, with or without hard labour: and whosoever shall be convicted upon an indictment for a common assault shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, *i. e.*, in common gaol or house of correction (*x*).

If the injury is inflicted upon a person under sixteen, the guardians of the place or overseers may be ordered to prosecute under sect. 73.

Maliciously administering poison, &c. with intent to injure, aggrieve or annoy any other person.

By 24 & 25 Vict. c. 100, s. 24, whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with *intent to injure, aggrieve, or annoy* such person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of [five] (*y*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Evidence of administering at different times may be given to show the intent (*z*).

(*r*) 27 & 28 Vict. c. 47.
(*s*) 24 & 25 Vict. c. 100, s. 69.
(*t*) *Reg.* v. *Sparrow*, Bell, C. C. 298; 30 L. J., M. C. 43.
(*u*) 27 & 28 Vict. c. 47.
(*x*) 24 & 25 Vict. c. 100, s. 69.
(*y*) 27 & 28 Vict. c. 47.
(*z*) *R.* v. *Mogg*, 4 C. & P. 364.

If the jury be not satisfied that any person charged is guilty of felony, but guilty of misdemeanour, they may find him guilty accordingly.

By sect. 25, if, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanour in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanour, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanour.

Sect. 23 is set out amongst the felonies, *ante*, p. 460.

(3) *Assaults aggravated by Office, &c. of Person assaulted.*

Assault on clergyman or other minister.

By 24 & 25 Vict. c. 100, s. 36, whosoever shall, by threats or force, obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid; or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, in the gaol or house of correction (*y*).

Assaults on magistrates or persons preserving wrecks.

By sect. 37, whosoever shall assault and strike or wound any magistrate, officer or other person whatsoever lawfully authorized in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods or effects wrecked, stranded or cast on shore, or lying under water, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than [five] (*z*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, *i. e.*, in a gaol or house of correction (*a*).

Assaults with intent to commit a felony, or on peace officers, &c.

By 24 & 25 Vict. c. 100, s. 38, whosoever shall assault any person with intent to commit felony, or shall assault, resist or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person for any

(*y*) 24 & 25 Vict. c. 100, s. 69.
(*z*) 27 & 28 Vict. c. 47.
(*a*) 24 & 25 Vict. c. 100, s. 69.

offence, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, in a gaol or house of correction (*a*). *Assaults on Officers in the Execution of their Duty, &c.*

The guardians of the union or place, or the overseers of the poor, may be ordered by the justices to prosecute under sect. 73.

Where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against the 34 & 35 Vict. c. 112, and shall, in the discretion of the court, be liable to pay a penalty not exceeding 20*l.*, and in default of payment to be imprisoned, with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six months, or in case such a person has been convicted of a similar assault within two years, nine months, with or without hard labour (*b*). Punishment.

It is sufficient for a bailiff executing a warrant of the county court, in an indictment for an assault, to prove the warrant alone as his authority, and he need not prove the proceedings in the county court (*c*), just as a writ of execution out of superior court is authority for the sheriff; but a policeman apprehending a person for disobedience to a bastardy order must have his warrant in his actual possession at the time ready to be produced, or the arrest is illegal (*d*). The constable to whom the warrant is addressed is the proper person to execute it (*e*), and a warrant addressed to the constable of G. must be executed by the parish constable of G., and not by a police constable stationed at G. (*f*). An arrest by a bailiff to whom the warrant is not addressed, but who has been left by the officer to whom it was addressed, and by whom it was indorsed to the bailiff to execute it in his absence, and who does so, is irregular, on the ground that the bailiff was not acting in the execution of the warrant, as it was addressed to another officer (*g*). A policeman may, without warrant, arrest a man whom he has seen commit an assault some time before and who is going away from the person he has assaulted, if he has reasonable grounds for expecting that he would return and renew the assault (*h*); but a constable is not justified in apprehending a man, without warrant, two hours after he had assaulted him and gone away and was not about to return (*i*). A constable, or a commander of a ship, may apprehend a supposed offender for felony without a warrant on a reasonable charge made by

As to lawfulness of arrest.

Warrant sufficient authority, when.

Arrest without warrant.

(*a*) 24 & 25 Vict. c. 100, s. 69.
(*b*) 34 & 35 Vict. c. 112, s. 12.
(*c*) *Reg.* v. *Davis*, 30 L. J., M. C. 159; L. & C. 64.
(*d*) *Galliard* v. *Laxton*, 31 L. J., M. C. 123; 2 B. & S. 363.
(*e*) *Freegard* v. *Barnes*, 7 Ex. 827; 21 L. J., Ex. 320.
(*f*) *Reg.* v. *Sanders*, 36 L. J., M. C. 87; L. R., 1 C. C. R. 75.
(*g*) *Rhodes* v. *Hall*, 26 L. J., Ex. 265.
(*h*) *Reg.* v. *Light*, D. & B. 332; 27 L. J., M. C. 1.
(*i*) *Reg.* v. *Walker*, 23 L. J., M. C. 123; Dears. C. C. 358.

Assaults with Intent to prevent a lawful Apprehension.

a third party (*l*), but the charge must be shown to have rested on some reasonable grounds (*m*), but this rule does not apply to misdemeanours (*n*). When a constable was called upon by a collector of taxes to accompany him into the house of a person from whom he was demanding payment of an arrear, and had reasonable ground from previous threats to expect violence, the constable was held justified in staying while the collector remained to be paid as long as there was reason to expect violence, and the owner of the house, who used force to expel them, was held indictable for an assault on a peace officer in the execution of his duty (*o*).

Lawfulness of apprehension.

By sect. 57 of the 24 & 25 Vict. c. 97, any constable or peace officer may take in custody, without warrant, any person whom he shall find lying or loitering in any highway, yard or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony against this act. And by sect. 61 of the same act, any person found committing an offence against this act may be apprehended by any peace officer, or owner of property injured, or his servant. See Criminal Law Amendment Act for other powers.

Indictment for a Common Assault.

Forms of indictment.

That A. B., on the ——— day of ———, A.D. ———, in and upon C. D. unlawfully did make an assault; and him the said C. D. then and there did beat, wound and ill-treat, and other wrongs to the said C. D. then and there did, against the peace, &c.

Count for Assault inflicting grievous bodily harm.

For that the said A. B., on the ——— day of ———, A.D. ———, at ———, in and upon C. D. unlawfully did make an assault, and upon him the said C. D. did unlawfully and maliciously inflict grievous bodily harm.

Count for an Assault occasioning actual bodily harm.

For that the said A. B., on the day and year aforesaid at ———, in and upon C. D. did make an assault, and then and there did thereby occasion actual bodily harm to the said C. D., contrary to statute, &c.

Assaults aggravated by the employment or office of the party assaulted.

In support of an indictment for an assault on a peace officer, it is not necessary to prove his appointment; but evidence that he was accustomed to *act as* such, and was known to be such when assaulted, as by having produced his staff, or by being generally known to be a constable of the place (*p*), or by having declared his intention to arrest in the Queen's

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(*l*) 1 Burn's Justice, 30th ed. p. 295; *Hogg* v. *Ward*, 27 L. J., Ex. 443; *Broughton* v. *Jackson*, 18 Q. B. 378; 21 L. J., Q. B. 265.
(*m*) *Ibid.*
(*n*) *Griffin* v. *Colman*, 4 H. & N. 265; 28 L. J., Ex. 134.
(*o*) *R.* v. *Clark*, 3 A. & E. 287.
(*p*) *Gordon's case*, 1 Lea. 518.

name (*q*), and being in the legal discharge of his duty at the time, will suffice (*r*). *Aggravated Assaults.*

Indictment for assaulting a Constable in the Execution of his Duty. Forms of indictment.

That A. B., on the ——— day of ———, A.D.———, at ———, in and upon one C. D. then and there being one of the constables of the said parish of ———, in the county of ———, and in the due execution of his duty as such constable, then and there also being, did make an assault, and him the said C. D. did then and there beat, wound and ill-treat, and other wrongs to the said C. D. then and there did, against the form, &c., and against the peace, &c. [*Add a count for a common assault.*]

Indictment for an Assault with intention to obstruct the Apprehension of a Party charged with an Offence (*b*).

That A. B., on the ——— day of ———, A.D.———, at ———, in and upon one C. D. wilfully and unlawfully did make an assault, and him the said C. D. did then and there beat, wound and ill-treat, with intent in so doing wilfully and unlawfully to obstruct, resist and prevent the lawful apprehension and detention of him the said A. B. for a certain offence, to wit, for, &c. [*here state the offence with which the defendant was charged*] for which said offence he the said A. B. was then and there liable by law to be apprehended, imprisoned and detained against the form of the statute, &c., and against the peace, &c. (*s*). [*Add a count for a common assault.*]

(*q*) 1 Hale, 583.

(*r*) *Berryman* v. *Wise* (Attorney), 4 T. R. 366, after citing *Gordon's case*, 1 Leach, 516. Also *R.* v. *Rickets*, 3 Camp. 68; *Carnegie* v. *Collins* (Physician), 1 Ad. & E. 695; 3 Nev. & M. 703; *Smith* v. *Taylor*, 1 New R. 196; *Cannell* v. *Curtis*, 2 Bing. N. C. 228 (Assistant Overseer); *Mac Gahey* v. *Alston*, T. & Gr. 981 (Vestry Clerk). Acting in an office is *primâ facie* evidence of appointment to it, *Reg.* v. *Price*, 11 A. & E. 727 (Registrar of Births). Acting as sheriff, *Bunbury* v. *Matthews*, C. & K. 380.

(*s*) The following count, which formed the fourth in *R.* v. *Fraser*, 1 Mood. C. C. 419, will (though for cutting and wounding) be useful in framing indictments for common *assaults, with intent to obstruct arrest:*—

"in and upon said J. C. in the peace of God and our said lady the Queen, then and there being, unlawfully, &c. did make an assault, and then and there unlawfully, &c. did cut and wound said J. C. in and upon the head and face of said J. C., with intent to resist and prevent the lawful apprehension and detainer of him the said M. F., for a certain offence by him committed, for which he the said M. F. was then and there liable by law to be apprehended and detained, that is to say, for then and there wilfully and maliciously committing damage and injury upon certain plants and roots then and there growing in a certain garden of and belonging to H. I. there situate, against the statute, &c., and against the peace, &c."

The prosecutor, a metropolitan police constable, having no warrant, attempted to apprehend the prisoner under 7 & 8 Geo. 4, c. 29, s. 63, for an offence for which he might be convicted before a justice of peace by sects. 42 and 43 of that act (and also by 7 & 8 Geo. 4, c. 30, ss. 21, 22, and 24 and 28), *viz.* for wilfully and maliciously plucking and cutting flowers from plants or roots in a garden, with intent to steal the flowers; and a conviction on the above count was held good.

Forms of Indictment.

Indictment for assaulting a Collector of a Turnpike Toll in the Execution of his Duty (t).

That A. B., late of ———, &c. on ———, &c., with force and arms, at ———, &c., in and upon one C. D., then and there being one of the collectors and receivers of the tolls payable by virtue of a certain act of parliament made in the third year of the reign of our said lady the Queen, intituled "An Act to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England," in the due execution of his office of collector and receiver of the said tolls, then and there being, did make an assault, and him the said C. D., so being in the execution of his said office as aforesaid, then and there did beat, wound and ill-treat, and other wrongs, &c. against the peace, &c. [*Add a count for a common assault.*]

Where a complaint for an assault was preferred before justices, and the defendant was merely ordered by them to enter into his recognizance to keep the peace and pay the costs of the recognizance, such decision was held not to be a conviction which would be pleaded in bar (*u*).

Lawful verdict, what.

A verdict of common assault is a lawful verdict upon an indictment for an assault occasioning actual bodily harm, and the judge must take that verdict or it will be a mistrial (*x*); so it is on an indictment for an assault and wounding and ill-treating, thereby doing actual bodily harm (*y*); so it is also on an indictment containing counts for an unlawful and malicious wounding, and for unlawfully and maliciously doing grievous bodily harm (*z*); and again, upon an indictment for assaulting and carnally knowing a girl between ten and twelve years old and abusing (*a*).

Evidence.

On a charge of assaulting a policeman in the execution of his duty, in the course of arresting him on suspicion of felony, it is not a proper question to be put by the prosecution to the policeman—What do you know had been the prisoner's previous character? But the policeman might have stated that he entertained a suspicion that the prisoner had been guilty of felony on what he thought were good and reasonable grounds, and it was open to the prisoner's counsel to cross-examine him as to the grounds of his suspicion (*b*).

(4) *Assaults aggravated by intent to commit a Crime.*

By 24 & 25 Vict. c. 100, s. 38, whosoever shall assault any person with intent to commit a felony shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the

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(*t*) This offence, under 3 Geo. 4, c. 126, s. 139, is punishable summarily by a forfeiture of 10*l.*; but that provision does not destroy the right of indicting at common law. See p. 469.

(*u*) *Hartley* v. *Hindmarch*, 35 L. J., M. C. 255; L. R., 1 C. P. 553.

(*x*) *Reg.* v. *Yeadon*, L. & C. 81; 31 L. J., M. C. 70.

(*y*) *Reg.* v. *Oliver*, Bell, C. C. 287; 30 L. J., M. C. 12.

(*z*) *Reg.* v. *Taylor*, 38 L. J., M. C. 106; L. R., 1 C. C. R. 194.

(*a*) *Reg.* v. *Guthrie*, 39 L. J., M. C. 95; L. R., 1 C. C. R. 241.

(*b*) *Reg.* v. *Turberfield*, 34 L. J., M. C. 20; L. & C. 495.

Aggravated Assaults.

discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour (*c*).

Assault with intent to commit a felony.

By sect. 62, whosoever shall attempt to commit the abominable crime of buggery with mankind or animal, or shall be guilty of an assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than [five] (*d*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour. As to attempts generally, see *post*, p. 491.

Indecent assaults with men.

Indictments.

In indictments for assaults with intent to commit felony, the question of intent is peculiarly for the consideration of the jury, who may negative the intent, and yet find the prisoner guilty of a common assault. If it appears at the trial of an indictment for an assault with intent to commit a felony that the offence of felony, *e. g.*, rape, was completed, the prisoner is not, by reason thereof, entitled to be acquitted, but the court may, in its discretion, discharge the jury from giving a verdict on such indictment, and direct the person to be detained, in order that an indictment for the felony may be preferred against him at the same session, or if that is impracticable, from the discharge of the grand jury, in order that he may be again taken before a magistrate, who, on hearing the evidence, will recommit the prisoner, and bind the parties over to prosecute at the next sessions or assizes (*e*).

In order to spur injured parties, when a felony has been committed, to bring the offender to trial for the sake of public justice, the civil remedy by action would be stayed by the court in the exercise of its discretion till *after* conviction or acquittal (*f*).

Indictment for an Assault with intent to ravish.

That A. B., on the ——— day of ———, A.D. ———, in and upon one C. D. (*g*) did make an assault, and her the said C. D. did then and there beat, wound and ill-treat, with intent her the said C. D. then and there against her will (*h*), feloniously to ravish and carnally know, and other wrongs to the said C. D. then and there did, against the form of the statute, &c., and against the peace, &c. [*Add a count for a common assault*] (*i*).

(*c*) See *ante*, p. 480.

(*d*) 27 & 28 Vict. c. 47, s. 2.

(*e*) 14 & 15 Vict. c. 100, s. 12, *post*, p. 492.

(*f*) *Wells* v. *Abraham*, 41 L. J., Q. B. 306; L. R., 7 Q. B. 554, per *Blackburn*, J.; *Crosby* v. *Leng*, 12 East, 410; *Peddell* v. *Rutter*, 8 C. & P. 337; *Marsh* v. *Keating*, 1 Bing. N. C. 217, in error, Dom. Proc.; *White* v. *Spettigue*, 14 L. J., Exch. 99.

(*g*) If the female be a child *under* ten years of age, add here "a woman child under the age of ten years, to wit, of the age of nine years."

(*h*) If *under* the age of ten years, lay the intent to be "with intent her the said C. D. then and there unlawfully and feloniously to carnally know and abuse."

(*i*) It is sufficient if the defendant is found guilty of the "*misde-*

(5) *Offences in the nature of Assaults against Women and Children.*

Procuring women or girls to have carnal connexion.

By 24 & 25 Vict. c. 100, s. 49, whosoever shall by false pretences, false representations or other fraudulent means procure any woman or girl under the age of twenty-one years to have illicit carnal connexion with any man shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, in common gaol or house of correction (*k*).

To conspire to commit this offence is an offence at common law (*l*).

Indictment.

For that A. B., on the ——— day of ———, A.D.———, by falsely pretending to C. D. that [*set out false pretences, &c.*] did procure the said C. D. to have illicit carnal connexion with a certain man, to wit ——— (*or* to the jurors unknown), she the said C. D. being at the time of such procurement as aforesaid a girl under the age of twenty-one years, whereas in truth and in fact [*negative the pretences*], against the form, &c.

Carnally knowing a girl between ten and twelve years of age.

By sect. 51, whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years (*m*), or to be imprisoned for any term not exceeding two years, with or without hard labour in the common gaol or house of correction (*n*).

The prisoner may be convicted, though the connexion was by force and against the girl's will (*o*).

A conviction of an attempt to commit this offence may be had on an indictment for the offence (*p*).

Proof of carnal knowledge is to be deemed complete upon proof of penetration only (*q*).

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meanour and offence in the indictment specified;" *R.* v. *Powell*, 2 B. & Ad. 75.

Though attempting carnally to know a girl between ten and twelve years old is not an assault if she consent, it is a misdemeanour which may be thus indicted: "unlawfully did put and place the private parts of him the said ——— against the private parts of her the said ———; she the said ——— then and there being above the age of ten years and under the age of twelve years, and did thereby then and there unlawfully attempt and endeavour carnally to know and abuse the said ———, against the peace, &c." *Reg.* v. *Martin*, 9 C. & P. 215.

(*k*) 24 & 25 Vict. c. 100, s. 69.
(*l*) *Reg.* v. *Mears*, 2 Den. C. C. 79; 20 L. J., M. C. 159.
(*m*) 27 & 28 Vict. c. 47, s. 2.
(*n*) Sect. 69.
(*o*) *Reg.* v. *Neale*, 1 Den. C. C. 37.
(*p*) 14 & 15 Vict. c. 100, s. 9.
(*q*) Sect. 63.

Offences against Women and Children.

Punishment for indecent assaults, &c.

By sect. 52, whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, in common gaol or house of correction (*r*).

There can be no indecent assault when the girl consents, if she be of an age capable of giving consent (*s*); but it is a misdemeanour to attempt to carnally know a girl under twelve years of age, though she consents (*t*).

Count for carnally knowing a Girl above ten and under twelve.

For that A. B., on the ——— day of ———, A.D. ———, in and upon C. D., then being a girl of the age of ten years and under twelve years, to wit, of the age of eleven years, unlawfully did make an assault, and her the said C. D. did then unlawfully carnally know and abuse, against the form, &c.

Count for Indecent Assault.

For that A. B., on the ——— day of ———, A.D. ———, in and upon C. D. did unlawfully and indecently make an assault, and her the said C. D. did then beat, wound and ill-treat, and other wrongs to the said C. D. did to the great damage of the said C. D., against the form, &c.

Procuring drugs, &c. to cause abortion.

By 24 & 25 Vict. c. 100, s. 59, whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five (*u*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

The drug procured must be noxious of its own nature (*x*). It is immaterial whether the woman, for whom the noxious thing is procured, intended to use it or not if the defendant intended it should be so used (*y*).

Count for procuring Drug, to be used with intent to procure Miscarriage.

For that A. B., on the ——— day of ———, A.D. ———, unlawfully did procure a certain noxious thing, to wit, savin, he the said A. B. then well knowing that the same was intended to be unlawfully used, with

(*r*) Sect. 69.
(*s*) *Reg.* v. *Johnson*, 34 L. J., M. C. 192.
(*t*) *Reg.* v. *Martin*, 9 C. & P. 215.
(*u*) 27 & 28 Vict. c. 47, s. 2.
(*x*) *Reg.* v. *Isaacs*, L. & C. 220; 32 L. J., M. C. 52.
(*y*) *Reg.* v. *Hillman* L. & C. 343; 33 L. J., M. C. 60.

Acts causing Danger to Life or Bodily Harm.

intent to procure the miscarriage of a certain woman, to wit, Mary N———, against the form, &c.

(6) *Acts causing Danger to Life or Bodily Harm.*

Doing or omitting anything to endanger passengers by railway.

By 24 & 25 Vict. c. 100, s. 34, whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

This section applies to a line of railway completed and used for the conveyance of materials and workmen by trucks and engines but not yet opened to the public for traffic, and the offence is complete if the truck or other obstruction was placed so as to obstruct the passage of any carriage and endanger the safety of persons carried thereon, though its position was discovered, and it was removed before any accident occurred (*y*).

By 24 & 25 Vict. c. 97, s. 36, whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Altering the position of the arms of a semaphore signal from "all right" to "caution" and "danger," and the lights of distant signals on the line in a corresponding manner, so as to cause the driver of a goods train to slacken speed so as to be ready at any moment to stop the train, is a causing the train to be obstructed within the meaning of the section (*z*).

And to make a signal by holding up arms, so as to cause the driver of the train to slacken his speed from twenty miles an hour to four miles, is to cause the train to be obstructed within the meaning of the section (*a*).

Indictment.

For that A. B., on the ——— day of ———, A.D.———, by a certain unlawful act, to wit, by altering the signals upon a certain line of railway running from ——— to ———, called the ——— Railway, without lawful authority or excuse, did unlawfully cause to be endangered the safety of certain persons then being conveyed in and upon the said railway, against the form, &c.

Drivers of carriages injuring persons by furious driving.

By sect. 35, whosoever, having the charge of any carriage or vehicle, shall, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of

(*y*) *Reg.* v. *Bradford*, 29 L. J., M. C. 171; Bell, C. C. 268.
(*z*) *Reg.* v. *Hadfield*, L. R., 1 C. C. R. 253; 39 L. J., M. C. 131.
(*a*) *Reg.* v. *Hardy*, 40 L. J., M. C. 62; L. R., 1 C. C. R. 278.

a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. *Furious Driving.*

(7) *Making Gunpowder to commit Offences, and searching for the same.*

By 24 & 25 Vict. c. 100, s. 64, whosoever shall knowingly have in his possession, or make or manufacture, any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this act mentioned, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. Making or having gunpowder, &c. with intent to commit any felony against this act.

The 24 & 25 Vict. c. 97, s. 51, is in the same terms, the intent under that section being to commit any offence against that act.

Count for having Gunpowder, with intent to commit a Felony.

For that A. B., on the ——— day of ———, A.D. ———, unlawfully and knowingly had in his possession ——— ounces of gunpowder, with intent by means of the said gunpowder to commit a certain felony, in the statute of the 24 & 25 Vict. c. 100, mentioned, to wit, the felony of destroying, by the explosion of gunpowder, a certain building at ——— called ———, being the county gaol for the said county of ———, with intent then and there to commit murder.

(8) *General Provisions as to Punishment, Venue, Costs, &c., in respect of Prosecutions for Offences against the Person.*

By 24 & 25 Vict. c. 100, s. 67, in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanour punishable under this act shall be liable to be proceeded against, indicted, and punished as a principal offender. Punishment of principals in the second degree, and accessories.

By sect. 68, all indictable offences mentioned in this act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be Offences committed within the jurisdiction of the admiralty.

General Provisions as to Offences against the Person.

apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas:" provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces.

Hard labour in gaol or house of correction.

By sect. 69, whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Solitary confinement and whipping.

By sect. 70, whenever solitary confinement may be awarded for any offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of any imprisonment, or of any imprisonment with hard labour, which the court may award, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any offence under this act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

Fine, and sureties for keeping the peace; in what cases.

By sect. 71, whenever any person shall be convicted of any indictable misdemeanour punishable under this act, the court may, if it shall think fit, in addition to or in lieu of any punishment by this act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this act otherwise than with death the court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized; provided that no person shall be imprisoned for not finding sureties under this clause for any period exceeding one year.

Guardians and overseers may be required to prosecute in certain cases of offences against this act.

By sect. 73, where any complaint shall be made of any offence against section twenty-six of this act, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place, in which the offence shall be charged to have been committed, such guardians or overseers, as the

General Provisions.

case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and, where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor, may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute.

Costs of prosecution.

Clerk of guardians may be bound over to prosecute.

By sect. 74, where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence.

On a conviction for assault the court may order payment of the prosecutor's costs by the defendant.

By sect. 75, the court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale, shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until payment of such sum shall thereupon cease.

Such costs may be levied by distress.

By sect. 77, the court before which any misdemeanour indictable under the provisions of this act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

The costs of the prosecution of misdemeanours against this act may be allowed.

Section 3.

ATTEMPTS TO COMMIT OFFENCES.

Attempts.

Where a person is charged with any felony or misdemeanour if on the trial it appears *to the jury* upon the evidence that the defendant did not *complete the offence* charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted; but *the jury* shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanour charged, but is

Upon an indictment for an offence, jury may find a verdict of

guilty of attempting to commit it.

guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for *attempting to commit the particular felony or misdemeanour charged in the said indictment;* and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanour for which he was so tried (*b*).

Thus, upon an indictment for breaking and entering a house with intent to steal; where the prisoner was disturbed whilst he was in the act of making a hole in the roof by which to enter, he was convicted of an attempt under the above section (*c*).

Though a man cannot be convicted of attempting to steal goods from a person who has not such goods, or in a place where such goods are not, yet under such circumstances he may assault such person *with intent* to steal, or may attempt to break into a house *with intent to steal.*

An attempt to commit a felony must be evidenced by a sufficient proximate act towards the commission of the actual offence (*d*); so of an attempt to obtain money by false pretences (*e*); and an attempt by false pretences to steal from a person the money of such person is good (*f*).

By means of a false pretence to get sums credited in an account is a sufficient proximate act towards obtaining the money (*g*).

Upon an indictment for an attempt to commit the felony of having carnal knowledge of a girl under ten years of age, the consent of the child is immaterial (*h*), just as it would have been if the indictment had been for the complete offence.

As to an attempt to commit the crime of buggery and its punishment, see 24 & 25 Vict. c. 100, s. 62, *ante*, p. 485.

As to an attempt to have carnal knowledge of a girl under twelve years of age, see 24 & 25 Vict. c. 100, s. 52, *ante*, p. 487.

Conviction of misdemeanour on indictment for felony.

If upon the trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts unless the court before which such trial may be had shall think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person

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(*b*) 14 & 15 Vict. c. 100, s. 9.
(*c*) *Reg.* v. *Bain*, 31 L. J., M. C. 88; L. & C. 129.
(*d*) *Reg.* v. *Cheesman*, 31 L. J., M. C. 89; L. & C. 146.
(*e*) *Reg.* v. *Garrett*, Dears. C. C. 232; 23 L. J., M. C. 20; *Reg.* v. *Eagleton*, 24 L. J., M. C. 158; Dears. C. C. 515.
(*f*) Dears. C. C. 653; 25 L. J., M. C. 92.
(*g*) *Reg.* v. *Eagleton*, *ubi sup.*
(*h*) *Reg.* v. *Beale*, 35 L. J., M. C. 60; L. R., 1 C. C. R. 10.

may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour (*h*). Therefore if upon an indictment for an attempt to commit a felony, which is of itself a misdemeanour if the facts proved in evidence amount to proof of the commission of the felony, the prisoner is not necessarily to be acquitted.

Attempts to commit Crimes.

Section 4.

of offences against bankruptcy law.

The second part of the Debtors Act, 1869 (*i*), deals with the punishment of fraudulent debtors, which, by sect. 20, repeals the 5 & 6 Vict. c. 38, so far as it excludes from the jurisdiction of justices in general or quarter sessions offences against the bankrupt laws, and enacts, that "every offence under this act shall be deemed to be within the jurisdiction of such justices and recorders."

Bankruptcy offences.

By the 18th section, every misdemeanour under the second part of this act shall be deemed to be an offence within the 22 & 23 Vict. c. 17, the act to prevent vexatious indictments for misdemeanours (*k*).

Vexatious Indictments Act applied.

And by the same section, when any person is charged with any such offence before any justice or justices, such justices or justice shall take into consideration any evidence adduced before him or them tending to show that the act charged was not committed with a guilty intent.

Mens rea.

By Part II., sect. 11, any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall in each of the cases following be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; that is to say:—

1. If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intention to defraud. As to this offence the bankrupt would probably have, up to and until the close of his last examination, a *locus pœnitentiæ* for the purpose of supplying any information withheld by him at any prior examination (*l*).

Not discovering to the trustee all his property.

(*h*) 14 & 15 Vict. c. 100, s. 12.
(*i*) 32 & 33 Vict. c. 62.
(*k*) *Ante*, p. 107, *post*, p. 497.
(*l*) See *Nash* v. *The Queen*, 4 B. & S. 935; 33 L. J., M. C. 94.

Misdemeanours under the Debtors Act, 1869.

2. If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud.

Not delivering up to the trustee his property.

3. If he does not deliver up to such trustee, or as he directs, all books, documents, papers and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intention to defraud.

Not delivering up to trustee his books, &c.

Concealing his property or debts.

4. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debts due to or from him, unless the jury are satisfied that he had no intent to defraud.

As to this fourth offence, though a married woman, not a trader by custom and not having separate property, be adjudicated a bankrupt, she cannot be indicted under this section for concealing her property, inasmuch as the property continues to be her husband's, notwithstanding his absence from the country, and that she has traded as a *feme sole* (*m*); but if she had traded before marriage, and incurred debts, and had property to which she was entitled to her separate use, she might probably be made bankrupt, and her separate property be thus made liable to satisfy her debts under the 33 & 34 Vict. c. 93, s. 12.

The venue should be laid and trial had where the concealment of the goods, &c. took place, although the final examination took place in another jurisdiction (*n*).

Removing any part of his property.

5. After the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of ten pounds or upwards.

Making omission in statement relating to his affairs.

6. If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud.

Omitting to inform trustee of any proof of false debt.

7. If, knowing or believing that a false debt has been proved by any person under the bankruptcy or liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof.

Preventing the production of any book, &c.

8. If, after the presentation of a bankruptcy petition against him or the commencement of the liquidation, he prevents the production of any book, document, paper or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law.

(*m*) *Reg.* v. *Robinson*, 36 L. J., M. C. 78; L. R., 1 C. C. 80.
(*n*) *R.* v. *Evans*, 1 Moo. C. C. 70.

Bankruptcy Offences.

9. If, after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals or destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law. Mutilating books, &c.

10. If, after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or defeat the law. Making false entry in any book, &c.

11. If, after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently parts with, alters or makes any omission, or is privy to the fraudulently parting with, altering or making any omission in any document affecting or relating to his property or affairs. Parting with or making omission in any book, &c.

12. If, after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or at any meeting of his creditors within four months next before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses. Attempting to account for any part of his property by fictitious losses or expenses.

13. If, within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same. Obtaining property on credit by fraud.

14. If, within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud. Being a trader and carrying on business obtaining property on credit by fraud.

15. If, within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, pawns, pledges or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud. Pawning, &c. property obtained on credit and not paid for.

16. If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors, or any of them, to any agreement with reference to his affairs, or his bankruptcy or liquidation. Fraudulently obtaining consent of his creditors to bankruptcy, &c.

With respect to the 14th and 15th offences, the word trader is to have the same meaning as that word has in the Bank- Trader, what.

Bankruptcy Offences.

ruptcy Act, 1869; and by sect. 4 of the later act, the first schedule of such act gives the description of trader, and describes them as alum makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cowkeepers, dyers, fullers, keepers of inns, taverns, hotels or coffeehouses, limeburners, livery-stable keepers, market gardeners, millers, packers, printers, sharebrokers, shipowners, shipwrights, stockbrokers, stockjobbers, victuallers, warehousemen, wharfingers, persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, persons insuring ships or their freight or other matters against perils of the sea, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise in gross or by retail, and persons who either for themselves or as agents or factors for others seek their living by buying and selling, or buying and letting for hire goods or commodities, or by the workmanship or the conversion of goods or commodities; but a farmer, grazier, common labourer or workman for hire shall not, nor shall a member of any partnership, association or company which cannot be adjudged bankrupt under this act, be deemed as such a trader for the purposes of this act.

Trader, what.

Creditor making false claim or proof, declaration, &c.

By 32 & 33 Vict. c. 62, s. 14, if any creditor in any bankruptcy or liquidation by arrangement or composition with creditors in pursuance of the Bankruptcy Act, 1869, wilfully and with intent to defraud makes any false claim, or any proof, declaration or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanour, punishable with imprisonment not exceeding one year, with or without hard labour.

By sect. 13, any person shall in each of the cases following be deemed guilty of a midemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour:—

Obtaining credit by fraud.

(1.) If in incurring any debt or liability he has obtained credit under false pretences or by means of other fraud;

Giving away, &c. property with intent to defraud his creditors.

(2.) If he has, with intent to defraud his creditors or any of them, made or cause to be made any gift, delivery or transfer of or any charge on his property;

Concealing property since or before unsatisfied judgment.

(3.) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

Form of indictment.

By sect. 19, in an indictment for an offence under this act it shall be sufficient to set forth the substance of the offence charged in the words of this act, specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication,

Bankruptcy Offences.

or any proceedings in, or order, warrant or document of any court acting under the Bankruptcy Act, 1869.

Formal defects in bankruptcy proceedings.

By 32 & 33 Vict. c. 71, s. 82, no proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such court.

Court may order trustee to prosecute.

By 32 & 33 Vict. c. 62, s. 16, where a trustee in any bankruptcy reports to any court exercising jurisdiction in bankruptcy, that in his opinion a bankrupt has been guilty of any offence under this act, or where the court is satisfied, upon the representation of any creditor or member of the committee of inspection, that there is ground to believe that the bankrupt has been guilty of any offence under this act, the court shall, if it appears to the court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence.

Costs of prosecution ordered by court.

By sect. 17, where the prosecution of the bankrupt under this act is ordered by any court, then, on the production of the order of the court, the expenses of the prosecution shall be allowed, paid and borne as expenses of prosecutions for felony are allowed, paid and borne.

Misdemeanours within Vexatious Indictments Act (22 & 23 Vict. c. 17).

Justices to consider the guilty intent before committal.

By sect. 18, every misdemeanour under the second part of this act shall be deemed to be an offence within and subject to the provisions of the act of the session of the twenty-second and twenty-third years of the reign of her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanours," and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to show that the act charged was not committed with a guilty intent.

Punishment under this act optional where another act or the common law meets the case.

By sect. 23, where any person is liable under any other act of parliament, or at common law, to any punishment or penalty for any offence made punishable by this act, such person may be proceeded against under such other act of parliament, or at common law, or under this act, so that he be not punished twice for the same offence.

Evidence.

A bankrupt's own examination before the Court of Bankruptcy, taken down in writing and signed by him, is admissible against him to prove a criminal charge afterwards made against him, if the examination is taken in strict conformity with the 12 & 13 Vict. c. 106, s. 117, which enacts, "that the bankrupt may be examined by the court touching all matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money or debts," for the examination is made lawful; and one of the consequences is, that what a person says in a lawful examination, may be

Bankruptcy Offences.

Bankrupt's examination, evidence against him.

received in evidence against him (*p*); and if the examination be taken under the statute, though the process to procure the attendance of the witness in bankruptcy may not have been regular or not be proved at the trial as in *Reg.* v. *Widdop* (*q*); or if the examination go into matters outside the statutory power to inquire, but the bankrupt attends, and voluntarily submits to the examination, all such examination is subsequently evidence against him (*r*).

Computation of time.

By 32 & 33 Vict. c. 71, s. 114, where by this act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of such limited time the same shall be taken as exclusive of the day of such date or the happening of such event, and as commencing at the beginning of the next following day; and the act or proceeding shall be done or taken at latest on the last day of such limited time, according to such computation, unless such last day is a Sunday, Good Friday, or Monday or Tuesday in Easter week, or Christmas Day, or a day appointed for public fast, humiliation, or thanksgiving, or a day on which, in pursuance of a notification by the lord chancellor under this act, the court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being one of the days in this section specified.

Where by this act any act or proceeding is directed to be done or taken on a certain day, then if that day happens to be one of the days in this section specified, such act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being one of the days in this section specified.

Evidence of bankruptcy.

The London Gazette, containing the advertisement of the bankruptcy, is conclusive evidence that the person so adjudged bankrupt became a bankrupt before the date of the filing of the petition for adjudication, and that such petition was filed on the day on which the same is stated in the Gazette to bear date, unless within the time prescribed the bankrupt take proceedings to annul the adjudication (*s*).

Evidence of proceedings.

By sect. 106 of the same act, the registrar, or any other person presiding at a meeting of creditors under this act, shall cause minutes to be kept and duly entered in a book of all resolutions and proceedings of such meeting, and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, shall be received as evidence in all legal proceedings; and

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(*p*) *Reg.* v. *Scott*, D. & B. 47; 25 L. J., M. C. 128; *Reg.* v. *Cross*, D. & B. 68; *Reg.* v. *Robinson*, 36 L. J., M. C. 78; L. R., 1 C. C. R. 8.

(*q*) 42 L. J., M. C. 9.

(*r*) *Reg.* v. *Sloggett*, Dears. C. C. 656; 25 L. J., M. C. 93.

(*s*) *Reg.* v. *Levi*, L. & C. 597; 34 L. J., M. C. 174; *Reg.* v. *Robinson*, 36 L. J., M. C. 78; L. R., 1 C. C. R. 80.

until the contrary is proved every general meeting of the creditors in respect of the proceedings of which minutes have been so made shall be deemed to have been held and convened, and all resolutions passed thereat, or proceedings had, to have been duly passed and had (*t*).

Evidence of proceedings.

Any petition, or copy of a petition in bankruptcy, any order or copy of an order made by any court having jurisdiction in bankruptcy, any deed or copy of a deed of arrangement in bankruptcy, and any other instrument, affidavit, or document, made or used in the course of any bankruptcy proceedings, or other proceedings had under this act, may, if any such instrument as aforesaid, or copy of an instrument as aforesaid, appears to be sealed with the seal of any court having jurisdiction, or purports to be signed by any judge having jurisdiction in bankruptcy under this act, be receivable in evidence in all legal proceedings whatever (*u*).

In case of death of bankrupt or a witness.

In case of the death of the bankrupt or his wife, or of a witness whose evidence has been received by any court in any proceeding under this act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to (*v*). This provision must not be taken to abridge the right to make the examination of the bankrupt evidence against himself in any subsequent proceeding against him in his lifetime (*x*).

Every court, having jurisdiction in bankruptcy under this act, shall have a seal, describing such court in such manner as may be directed by order of the lord chancellor, and judicial notice shall be taken of such seal, and of the signature of the judge or registrar of any such court, in all legal proceedings.

Evidence of appointment of trustee by court.

By sect. 18, the appointment of a trustee shall be reported to the court, and the court, upon being satisfied that the requisite security has been entered into by him, shall give a certificate, declaring him to be trustee of the bankruptcy named in the certificate, and such certificate shall be conclusive evidence of the appointment of the trustee, and such appointment shall date from the date of the certificate. When the registrar holds the office of trustee, or when the trustee is changed, a like certificate of the court may be made declaring the person therein named to be trustee, and such certificate shall be conclusive evidence of the person therein named to be trustee.

The certificate of the registrar.

By sect. 125, par. 6, the certificate of the registrar, in respect of the appointment of any trustee in the case of a liquidation by arrangement, shall be of the same effect as a certificate of the court to the like effect in the case of a bankruptcy.

(*t*) 32 & 33 Vict. c. 71, s. 106.
(*u*) *Ibid.* s. 107.
(*v*) *Ibid.* s. 108.
(*x*) *Reg.* v. *Widdop*, 42 L. J., M. C. 9.

Indictment against a bankrupt.

Indictment against a Bankrupt by a Trader for obtaining Goods under the False Pretence of carrying on his Business.

——— } The jurors for our lady the Queen, upon their oath present, to wit. } that A. B. was a trader within the true intent and meaning of the laws in force relating to bankrupts, and a bankruptcy petition was presented by C. D. against the said A. B., so being then such trader as aforesaid, under and by force of the said bankrupt laws, and the said A. B. so being such trader on the ——— day of ———, A.D. ———, then being within four months next before the presentation of the said petition against the said A. B., unlawfully under the false pretence of carrying on business and dealing in the ordinary way of his trade, did obtain from ——— on credit divers goods and chattels, to wit ———, of the goods and chattels of the said ———, and the said A. B. has not paid for the same, with intent to defraud the said C. D., against the form of the statute in such case made and provided, and against the peace, &c.

Section 5.

Misdemeanours relating to the coin triable at Sessions.

The prosecutions for offences relating to the coin are almost universally conducted by the solicitor to the treasury, and the indictments prepared by them, and therefore only a few forms of indictments will be given in respect of these offences.

Exporting counterfeit coin.

By 24 & 25 Vict. c. 99, s. 8, whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel, or boat for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to imprisonment and solitary confinement, see sects. 39, 40, *post*, p. 507.

Uttering counterfeit gold or silver coin.

By sect. 9, whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

As to imprisonment and solitary confinement, see sects. 39, 40, *post*, p. 507.

Coinage Offences.

It is an uttering and putting off to put down on a counter a counterfeit shilling in payment of goods, though, on the shopman taking it up and saying it was bad, the person producing it quitted the shop and left the counterfeit coin on the counter (*y*). On a charge of uttering a counterfeit crown, knowing it to be counterfeit, an uttering of a counterfeit shilling, on a day subsequent to the offence charged, is admissible to show guilty knowledge (*z*).

An uttering, what.

Evidence of guilty knowledge.

By sect. 10, whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Uttering counterfeit gold or silver coin, accompanied by possession of other counterfeit gold or silver coin, or followed by a second uttering of counterfeit gold or silver coin.

As to imprisonment and solitary confinement, see sects. 39, 40, *post*, p. 507.

By sect. 11, whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years (*a*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Having three or more pieces of counterfeit gold or silver coin in possession, &c. with intent, &c.

As to imprisonment and solitary confinement, see sects. 39, 40, *post*, p. 507.

Where four electro-plated counterfeit crowns of the same date and mould, each crown being wrapped in a separate piece of paper, thirteen half-crowns of the same date and mould, and

(*y*) *Reg.* v. *Welch*, 20 L. J., M. C. 101.
(*z*) *Reg.* v. *Foster*, Dears. C. C. 456; 24 L. J., M. C. 134.
(*a*) 27 & 28 Vict. c. 47, s. 2.

Coinage Offences.

fourteen shillings of the same date and mould, all counterfeit, and each coin wrapped in a separate piece of paper, were found in different pockets of the prisoner's dress, those facts were considered sufficient evidence for the jury that the prisoner knew the coin to be counterfeit (*b*).

Evidence of guilty knowledge.

Uttering foreign coin, medals, &c. as current gold or silver coin, with intent to defraud.

By sect. 13, whosoever shall, with intent to defraud, tender, utter, or put off as or for any of the Queen's current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure, and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals so tendered, uttered, or put off being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

If the coin passed resembles the half sovereign in size and colour, and has impressed on one side the head of the Queen similar to a half sovereign, but with a different inscription, and from some cause no description could be given of the appearance of the reverse side, there is evidence to go to the jury that the coin resembled in size, figure and colour a half sovereign (*c*).

Uttering base copper coin.

By sect. 15, whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

Defacing the coin by stamping words thereon.

By sect. 16, whosoever shall deface any of the Queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour.

(*b*) *Reg.* v. *Jarvis*, Dears. C. C. 552; 25 L. J., M. C. 30.
(*c*) *Reg.* v. *Robinson*, 34 L. J., M. C. 176; L. & C. 604.

Coinage Offences.

Penalty for uttering counterfeit gold or silver coin of a foreign state, &c.

By sect. 20, whosoever shall tender, utter, or put off any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding six months, with or without hard labour.

Second offence of uttering counterfeit foreign coin.

By sect. 21, whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to imprisonment and solitary confinement, see sects. 39, 40, *post*, p. 507.

Persons counterfeiting foreign coin other than gold and silver coin.

By sect. 22, whosoever shall falsely make or counterfeit any kind of coin not being the Queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of a misdemeanour, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, for the first offence to be imprisoned for any term not exceeding one year, and for the second offence to be kept in penal servitude for any term not exceeding seven years and not less than [five] (*c*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Interpretation of terms.

Current gold and silver coin.

Copper coin.

False or counterfeit coin.

By sect. 1, in the interpretation of and for the purposes of this act, the expression "the Queen's current gold or silver coin," shall include any gold or silver coin coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's dominions, whether within the United Kingdom or otherwise; and the expression "the Queen's copper coin" shall include any copper coin and any coin of bronze or mixed metal coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's said dominions; and the expression "false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin," shall include any of the current coin which shall have been gilt, silvered, washed,

(*c*) 27 & 28 Vict. c. 47, s. 2.

Coinage Offences—Interpretation Clause.

coloured or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the Queen's current coin of a higher denomination; and the expression "the Queen's current coin," shall include any coin coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's said dominions, and whether made of gold, silver, copper, bronze or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this act, it shall include, not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person.

Current coin.

What shall be possession.

Evidence of guilty knowledge.

In order to prove the scienter, it may be shown that the prisoner, who was taken in a dwelling-house where coining moulds and dies were found, had thirteen days before passed a counterfeit half-crown (*d*).

Venue.

By sect. 28, where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing (*e*), or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, every such offender may be dealt with, indicted, tried and punished, and the offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within one such county or jurisdiction.

Evidence.

What shall be sufficient proof of coin being counterfeit.

By sect. 29, where, upon the trial of any person charged with any offence against this act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer, or other officer of her Majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.

Where the counterfeiting coin shall be complete.

By sect. 30, every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin, against the provisions of this act, shall be deemed to be complete, although the

(*d*) *Reg.* v. *Weeks*, 30 L. J., M. C. 141; L. & C. 18.

(*e*) This would not extend to an attempt or offer to tender, utter, &c., but this is met by 14 & 15 Vict. c. 100, s. 9, *ante*, pp. 491, 492.

coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected. *Completion of Offences.*

By sect. 31, it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence, against this act, and to convey or deliver him to some peace officer, constable or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law. Any person may apprehend any person committing any indictable offence against this act.

By sect. 35, in the case of every felony punishable under the act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour. Punishment of principal in the second degree, and accessories.

Accessories before the fact to the misdemeanour of uttering counterfeit coin, though absent at the time of the committing of the offence, may be indicted and convicted, as a principal in the misdemeanour according to the general rule (*f*).

By sect. 36, all indictable offences mentioned in this act, which shall be committed within the jurisdiction of the admiralty of England or Ireland, shall be deemed to be offences of the same nature, and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the same had been actually committed in that county or place, and in any indictment for any such offence, or for being accessory to any such offence, the venue in the margin shall be the same as if such offence had been committed in such county or place, and the offence itself shall be averred to have been committed "on the high seas;" and where any of the crimes and offences, or high crimes and offences, mentioned in this act, shall be committed at sea, and the vessel in which the same shall be committed shall be registered in Scotland, or touch at any part thereof, the courts of criminal law of Scotland may inquire, try and determine the same in the same manner as if such crime and offence, or high crime and offence, had been committed in Scotland; provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces. Offences committed within the jurisdiction of the admiralty.

By sect. 37, where any person shall have been convicted of any offence against this act, or any former act relating to the coin, and shall afterwards be indicted for any offence against Mode of charging a conviction for a previous offence.

(*f*) *Reg.* v. *Greenwood*, 21 L. J., M. C. 157.

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this act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court, and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say,) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

Evidence of previous conviction.

Mode of arraignment where previous conviction is charged.

Previous conviction provable in answer to evidence of good character.

So that where a man is charged with being unlawfully in possession of counterfeit coin, after having been previously convicted of unlawfully uttering counterfeit coin as a felony contrary to sects. 10, 11 and 12 of the act, the proper course is to leave the question of whether the prisoner was guilty of the subsequent offence, and take their verdict thereon before the previous conviction is proved (*g*).

(*g*) *Reg.* v. *Martin*, 39 L. J., M. C. 31; L. R., 1 C. C. R. 214.

Punishment of Coinage Offences.

By sect. 38, whenever any person shall be convicted of any indictable misdemeanour punishable under this act the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Fine and sureties for keeping the peace; in what cases.

Hard labour.

By sect. 39, whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Solitary confinement.

By sect. 40, whenever solitary confinement may be awarded for any offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.

Costs of prosecutions.

By sect. 42, in all prosecutions for any offence against this act in England, which shall be conducted under the direction of the solicitors of her Majesty's treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England which shall not be so conducted it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Indictment for uttering a Counterfeit Sovereign (h).

Berkshire, to wit. } The jurors of our lady the Queen, upon their oath present, that I. S., on the ——— day of ———, A.D. ———, at, &c., one piece of false and counterfeit coin, resembling [*resembling or apparently intended to resemble or pass for*] a piece of the Queen's current gold coin called a sovereign, unlawfully, falsely and deceitfully did utter (*i*) [*tender, utter, or put off*] to one J. N., *he the said*

(*h*) See sect. 9, *ante*, p. 500.

(*i*) This will suffice without alleging "tender in payment," and *vice versâ*, *R.* v. *Franks*, 2 Leach, C. C. 644; for the words of sect. 9 are, "tender, utter, or put off," in the disjunctive, which show there may be an "uttering" without a putting off. In *R.* v. *Franks*, 2 Leach, 644, on the words of 15 Geo. 2, c. 28, s. 2, "utter *or* tender in payment," an utter-

Coinage Offences.

I. S. at the time when he so uttered the said piece of false and counterfeit coin, then and there well knowing the same to be false and counterfeit* against the form of the statute, &c., and against the peace, &c.

[An indictment on sect. 15, for a similar offence relating to copper coin, may be easily framed from the above.]

Indictment for uttering a Counterfeit Sovereign, having at the same time a Counterfeit Shilling in Possession (*k*).

(As in last precedent to the*, then state): And that the said J. S. at the said time when he so uttered [*tendered, uttered, or put off*] the said piece of false or counterfeit coin as aforesaid, then and there had in his possession, besides the said piece of false or counterfeit coin so uttered, one other piece of false and counterfeit coin, resembling [*resembling or apparently intended to resemble or pass for*] a piece of the Queen's current silver [*gold or silver*] coin, called a shilling, against the form of the statute, &c., and against the peace, &c. (*l*).

Indictment for uttering Counterfeit Coin twice within Ten Days (*m*).

(As in first precedent to the*, then as follows): And that the said J. S. afterwards on the same day, that is to say, on the said ——— day of ——— in the year last aforesaid [*or afterwards and within the space of ten days then next ensuing, to wit, on the ——— day of ——— in the year last aforesaid*] at, &c., one other piece of false and counterfeit coin, resembling [*resembling or apparently intended to resemble or pass for*] a piece of the Queen's current silver [*gold or silver*] coin, called a shilling, unlawfully, falsely and deceitfully did utter [*tender, utter, or put off*] to

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ing was held indictable. The case was one of a Jew fruit-seller, who having received a good shilling in payment for fruit, returned a bad one pretending it to be that he had received. That trick was called "ringing the changes."

If an indictment on sect. 9 charges several utterings to different persons on the same day, in several counts, the sentence must be of separate imprisonment for each offence; and where two utterings were charged in *two* separate counts, and were proved as laid, but the judgment was *single, viz.*, for two years' imprisonment and hard labour, it was held bad; for want of two consecutive judgments, each of a year's imprisonment, *R.* v. *Robinson*, 1 Moo. C. C. 413. See *Ryalls* v. *The Queen*, 11 Q. B. 781, *ante*, p. 320.

If one of two persons in presence of the other utters a counterfeit coin, and other counterfeit coin is found on the other person, they may be jointly guilty under sect. 9, if both had a common intent of uttering and both knew of the possession; *Reg.* v. *Gerrish*, 2 M. & Rob. 219.

(*k*) See sect. 10, p. 501.

(*l*) A man and woman were indicted for uttering a bad shilling, they having another bad shilling in their possession at the time. The woman uttered when alone. The man had been her associate on that day and had other bad money upon him for the purpose of uttering. Held, that he could not be convicted with the woman, the actual utterer, and that she could not be convicted of more than the single offence of uttering, and not of the offence of having other bad money in *her* possession at the time of the uttering; *R.* v. *Else*, Russ. & Ry. 142. But where two persons went to a shop, and one having bad money, stood outside while the other went in and uttered a bad coin, having no other in her possession, both were held properly convicted of the second offence; for the uttering and possession were joint; *R.* v. *Skerrett*, 2 C. & P. 417. See *Reg.* v. *Gerrish*, *ubi sup.*

(*m*) Sect. 10, *ante*, p. 501.

the said J. N. [*or to one G. H.*], he the said I. S., at the time when he so uttered the said piece of false and counterfeit coin, then and there well knowing the same to be false and counterfeit, against the form of the statute, &c., and against the peace, &c. (*o*).

Indictment for having in Possession Three or more Pieces of Counterfeit Coin (*p*).

(Commencement as in first precedent). Four pieces of false and counterfeit coin, resembling [*resembling or apparently intended to resemble or pass for*] the Queen's current silver [*gold or silver*] coin called shillings, unlawfully, falsely and deceitfully had in his custody and possession, with intent to utter [*utter or put off*] the said pieces of false and counterfeit coin, he the said I. S. then and there well knowing the said pieces of false and counterfeit coin to be false and counterfeit, against the form of the statute, &c., and against the peace, &c. (*q*).

Section 6.

COMPOUNDING FELONY.

Offence at common law.

The agreeing to receive money in consideration of compounding a charge of felony is a high misdemeanour, subjecting the party who commits it to imprisonment and fine (*r*). Formerly, it was thought to constitute the offender an accessory to the original crime; but this construction has not prevailed in modern times (*s*). It is also a misdemeanour to receive money for compounding a prosecution for misdemeanour, or a criminal information, without leave of the court in which the proceeding is depending (*t*); but that permission is sometimes granted in cases of personal injury (*u*). The compounding penal actions

(*o*) The two facts of uttering twice on the same day (or within ten days) must be united in one count of the indictment as above, as a single charge; *R.* v. *Tandy*, 2 Leach, C. C. 835. See *id.* 923, *R.* v. *Martin*. Judgments for separate utterings must be separate, *ante*, p. 508, n. No conclusion of law, as that the offender is "a common utterer," need be stated; *R.* v. *Smith*, 2 B. & P. 127.

(*p*) Sect. 11, *ante*, p. 501. See *Reg.* v. *Gerrish*, 2 M. & Rob. 220, *ante*, p. 508.

(*q*) As to what is "custody and possession," see 24 & 25 Vict. c. 99, s. 1, *ante*, p. 504. Guilty knowledge is proved *inter alia* by evidence of former utterings of bad money; *R.* v. *Whiley*, 2 Leach, 983. See *Reg.* v. *Weeks*, *ante*, p. 504. The above section 11 makes the *having possession* of counterfeit coin, with intent to utter it, an offence, which it was not at common law, *R.* v. *Stewart*, Russ. & Ry. 288; *R.* v. *Heath*, *id.* 184; though to procure it with that intent was a misdemeanour at common law; *R.* v. *Fuller*, *id.* p. 308. It seems that the offender's turning out to be the coiner, would not avail against the charge under this enactment of having in possession with intent to utter, though it did against the common law misdemeanour of procuring; Archb. Cr. Pl. & Ev. 16th ed. 702.

(*r*) 1 Hale, 546, 619; 2 Hale, 400.

(*s*) 4 Bla. Com. 134.

(*t*) *Collins* v. *Blantern*, 2 Wils. 341, 349; *Edgecomb* v. *Ross*, 5 East, 298, 302.

(*u*) See *ante*, p. 478, and *ante*, Chap. V., Sect. 3, p. 180.

Compounding a Felony.

without leave of the court was made punishable by the statute 18 Eliz. c. 5, ss. 3 and 4 (*x*), with the forfeiture of 10*l.*, half to the party grieved and half to the crown, with exposure in the pillory (now abolished). But 18 Eliz. c. 5, does not apply to informations for offences cognizable only before magistrates; and, therefore, an indictment for compounding such an offence was holden bad in arrest of judgment (*y*).

Indictment at Common Law for compounding a Felony.

That A. B. on the ——— day of ———, A.D. ———, at, &c. one silver spoon, of the goods and chattels of one C. D. then and there being found, feloniously did steal, take and carry away, against the peace of our lady the Queen, her crown and dignity. And that the said C. D. well knowing the premises, but unlawfully and unjustly contriving and intending to prevent the due course of law in this behalf, and to procure the said A. B. to escape with impunity, afterwards, to wit, on the ——— day of ———, A.D. ———, unlawfully and unjustly, and for the sake of wicked lucre, did compound the said felony with the said A. B., and did then and there exact, receive and have of the said A. B. five pounds in monies numbered for and as a reward for compounding for the said felony, and for desisting from all prosecution of the said A. B. for the felony aforesaid, and that the said C. D. on the said day did thereupon desist and from that time hitherto hath desisted from all prosecution of the said A. B. for the felony aforesaid, to the great hinderance of public justice, and against the peace, &c. [See 4 Wentw. 327.]

Offence by statute.

By 24 & 25 Vict. c. 96, s. 101, whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanour have been stolen, taken, obtained, extorted, embezzled, converted or disposed of as in this act before mentioned, shall, unless he shall have used all due diligence to cause the offender to be brought to trial for the same, be guilty of felony; and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than [five] (*z*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of eighteen years, with or without whipping.

Indictment for taking a Reward for the Recovery of Stolen Property.

That I. S. at, &c., corruptly and feloniously did take and receive from ———, certain money and reward, to wit, the sum of ——— of the monies of the said ———, under pretence [*or* upon account] of then and there helping the said I. N. to certain goods and chattels [*if* "money" *or* "valuable security" *state it accordingly*] of him the said ———, before then feloniously stolen, taken and carried away [*if obtained by a misdemeanour, say* "obtained, converted or disposed of"], the said I. S. not having used all due diligence to cause the said person by whom the said goods and

(*x*) See *R.* v. *Stone*, 4 C. & P. 379; *R.* v. *Gotley*, R. & Ry. 84; *R.* v. *Crisp*, 1 B. & Ald. 282; *Reg.* v. *Best*, 9 C. & P. 368.
(*y*) *R.* v. *Crisp*, 1 B. & Ald. 282.
(*z*) 27 & 28 Vict. c. 47, s. 2.

chattels were so stolen, taken and carried away [*or* obtained, converted or disposed of] to be apprehended and brought to trial, as aforesaid (*a*), for the same, against the form of the statute, &c., and against the peace, &c. *Compounding a Felony.*

The offence is complete if the jury find that the prisoner took the money of a person whose goods have been stolen, knowing the thieves, and assisting the person robbed as his agent and at his request in endeavouring to purchase the stolen property from them, not meaning to bring them to justice (*b*).

As in practice, indictments on 18 Eliz. c. 5, s. 4, for compounding an offence against a penal statute, and for taking money to refrain from laying an information, are seldom tried at sessions, the above form is inserted as of more common occurrence.

Where a felony has been committed, in order to spur the injured parties to bring the offender to justice, the civil remedy by action will be stayed by the court in the exercise of its discretion till after the conviction or acquittal of the offender (*c*).

Section 7.

CONSPIRACY.

Since 5 & 6 Vict. c. 38, a court of sessions of the peace can still try a conspiracy to commit an offence which it would have jurisdiction to try if committed by one person (*d*). It may therefore be useful to annex some short remarks on this offence. Jurisdiction of sessions of the peace.

The offence of conspiracy is more difficult to be ascertained precisely than any other for which an indictment lies; and is, indeed, rather to be considered as governed by positive decisions than by any consistent and intelligible principles of law. It consists, according to all the authorities, not in the accomplishment of any unlawful or injurious purpose, nor in any one act moving towards that purpose; but in the actual concert and agreement of two or more persons to effect something, which *being so concerted or agreed*, the law regards as the object of an indictable conspiracy (*e*). There are two classes of cases in which the criminality of such agreement is perfectly intelligible and obvious; first—where the object proposed would, if Offence of conspiracy.

(*a*) The law does not authorize a private person to forego a prosecution on any terms; *Reg.* v. *Daly*, 9 C. & P. 342.

(*b*) *Reg.* v. *Pascoe*, 1 Den. C. C. 456.

(*c*) *Wells* v. *Abrahams*, 41 L. J., Q. B. 306, per *Blackburn*, J., and cases there cited.

(*d*) See *ante*, p. 9.

(*e*) When parties have once agreed to cheat a particular person of his money, though they may not then have fixed on any means for that purpose, the offence of conspiracy is complete. Per *Bayley*, J., *R.* v. *Gill*, 2 B. & A. 205. See, however, p. 348, n. (*k*). As to *R.* v. *Gill*, see *Reg.* v. *King*, 13 L. J. (M. C.) 119 (E. 1844); *R.* v. *Blake*, *id.* 131.

Conspiracy.

Conspiracy to commit an indictable offence.

accomplished, be a criminal offence in all parties acting in it,—to which class the power of sessions in many cases yet extends; and, second—where, though the ultimate object may be lawful, the means by which the parties, conspirators, propose to effect their purpose, necessarily involve in them an indictable offence (*e*). Of the first kind are conspiring to commit a felony, or conspiring to obtain money under false pretences, &c.; where the object, if carried into effect, would be a substantive offence, and where, therefore, *concert* is indictable as an *act* in itself tending to produce it. Of the second kind, is a conspiracy to support a cause, in itself just, by false testimony; and the same principle would apply here; for, whether the concerted offence be the end or the means, it is equally an offence, which, if consummated, would subject the offenders to the visitation of criminal justice. But it is not easy to understand on what principle conspiracies have been holden indictable where neither the end nor the means are, in themselves, regarded by the law as criminal, however reprehensible in point of morals. *Mere concert is not in itself a crime;* for associations to prosecute felons, and even to put laws in force against political offenders, have been holden legal (*f*). If, then, there be no indictable offence in the object, no indictable offence in the means, and no indictable offence in the concert, in what part of the conduct of the conspirators is the offence to be found? Can several circumstances, each perfectly lawful, make up an unlawful act? And yet such is the general language held on this subject, that at one time the immorality of the object is relied on; at another the evidence of the means; while, at all times, the concert is stated to be the essence of the charge; and yet that concert, independent of an illegal object or illegal means, is admitted to be blameless.

The utmost limit of the modern doctrine of conspiracy seems to be reached in the decisions respecting concerted disapprobation of a performer or a piece at a theatre. The case of Macklin is well known, on whose prosecution several persons were committed for hissing him on his appearance in one of Garrick's favourite characters; and, in accordance with this precedent, Sir *James Mansfield* is said to have expressed

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(*e*) "An indictment for conspiracy ought to show, either that it was for an unlawful purpose, or to effect a lawful purpose by an unlawful means," per Lord *Denman*, *R.* v. *Seward*, 1 A. & E. 711; 3 Nev. & Man. 557; but he is reported to have since said, that "this antithesis is not very correct," *Reg.* v. *Peck*, 9 A. & E. 690. However, where the indictment was for conspiring to indict and prosecute G. for a crime liable to capital punishment, and then stated that "according to the conspiracy" the defendants did afterwards falsely indict him, it was held unnecessary to lay a conspiracy to indict falsely, as the conspiracy was completely formed and actually carried into execution; *R.* v. *Spragge*, 2 Burr. 999, cited by Lord *Denman*, 3 Nev. & Man. 562; 1 Ad. & E. 714.

(*f*) *R.* v. *Murray*, tried before *Abbott*, C. J., at Guildhall, 1823; Dick. Q. S., ed. Talf., p. 349.

himself in the case of *Clifford* v. *Brandon* (*g*), in the following terms:—"The audience have certainly a right to express by applause or hisses the sensations of the moment: and nobody has ever hindered or would ever question the exercise of that right. But, if any body of men were to go to the theatre with the settled intention of hissing an actor or damning a piece, there can be no doubt such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment." In this case, the act is lawful; the means are lawful; the motive may be even laudable, as if a notoriously immoral piece were announced, and the parties determined to oppose it; and yet the concert alone makes the crime. It is extremely difficult to understand this, unless concert be a crime. *Conspiracies.*

Without, therefore, attempting the hopeless task of deducing all the instances in which, according to the authorities, indictments will lie for conspiracies, from any fixed principles, we will enumerate the most important heads of offence on which convictions have been supported.

It may, then, be taken on the authorities, that indictments will lie for the following conspiracies, again premising that a *session of the peace* can only try a conspiracy to effect some crime which if *committed by one person* it has power to try. Jurisdiction of quarter sessions.

1. All conspiracies (even by bare words) (*h*) to commit felony or indictable misdemeanours, whether the object be effected or not, and whether or not any steps beyond the conspiracy be taken towards its completion (*i*), or to prevent a prosecution for felony (*k*), or for a misdemeanour (*l*), or to get rid of an information pending (*m*), are indictable, and the crime of conspiracy remains though one of a series of the overt acts done in carrying out the conspiracy constituted a felony (*n*). Thus, an agreement to go into a preserve in the night time, and armed with offensive weapons in search of game, is an indictable conspiracy (*o*).

A conspiracy by means of inducing a man by a trick to suppose an article such as a penholder not to contain a pen, as by pretending to withdraw it, and not doing so, and thus inducing the man proposed to be cheated, to bet with a co-conspirator that it does not, and so to lose his bet, is none the less an offence because the man cheated supposed that he was cheating some one else (*p*).

(*g*) 2 Camp. 369.
(*h*) Stra. 195.
(*i*) *R.* v. *Pollman*, 2 Camp. 229; *R.* v. *Roberts*, 1 Camp. 399.
(*k*) 14 Ves. 65.
(*l*) *Reg.* v. *Harrop*, 6 Cox, C. C. 167.
(*m*) *R.* v. *Roberts*, 2 B. & A. 367.
(*n*) *Reg.* v. *Button*, 11 Q. B. 929; 18 L. J., M. C. 19.
(*o*) *Reg.* v. *Rowlands*, 2 Den. C. C. 364; 21 L. J., M. C. 81: overruling *R.* v. *Turner*, 13 East, 228, to the contrary; but this conspiracy would not be triable at sessions.
(*p*) *Reg.* v. *Hudson*, Bell, C. C. 263; 29 L. J., M. C. 145.

Conspiracies.

2. All conspiracies to effectuate a purpose, whether lawful or unlawful, by means involving crime; as a conspiracy to prosecute any one by false witnesses, which was, in fact, the only crime treated as a conspiracy by the old writers, and from which the law has gradually been extended by the courts (*p*). So also conspiracies to effect an unlawful purpose by lawful means; thus, to conspire to indict a person for keeping a gaming house, with intent to extort money, is an indictable offence, though the charge be true (*q*).

To injure the public.

3. Conspiracies tending directly to injure the public or any large body of men; as to raise the prices of the funds by false rumours (*r*); or by magistrates to present a false certificate that a road, under indictment, is in repair (*s*). A conspiracy to fabricate false shares in a joint stock company, and sell them as good shares (*t*); by traders to defeat their creditors, by disposing of their goods in contemplation of bankruptcy (*u*); by bankers to defraud their shareholders by publishing false balance sheets (*x*). Conspiracies by parish officers to procure by sinister means unsuitable marriages between paupers, in order to discharge one parish and charge another, have been held indictable, not only on the ground of the injury done to the parish charged, but of the profanation of the marriage tie (*y*). But where a young man belonging to one parish had gotten with child a young woman belonging to another, and the parish officers of the woman's parish gave the man two guineas to marry her, with the consent of his father, and both parties were willing to marry, it was holden by *Buller*, J., that no indictment for conspiracy could be supported (*z*).

To effect an object by unlawful means.

Affecting trades.

4. Conspiracies affecting public trades; as combinations to prevent an individual from exercising his particular trade (*a*), or among workmen to raise their wages; but now the purposes of any trade union shall, not by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise (*b*). And now no person shall be

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(*p*) 3 Inst. 143.

(*q*) *R.* v. *Hollingberry*, 4 B. & C. 329. See 33 Edw. 1, st. 2; 1 Hawk. c. 27, s. 2; *R.* v. *Best*, 2 Ld. Raym. 1169; see *R.* v. *Pollman*, 2 Camp. 229.

(*r*) *R.* v. *De Berenger*, 3 M. & S. 67.

(*s*) *R.* v. *Mawbey*, 6 T. R. 619—638, but this offence would not be triable at sessions.

(*t*) *Reg.* v. *Mott*, 2 C. & P. 521.

(*u*) *Reg.* v. *Hale*, 1 F. & F. 33.

(*x*) *R.* v. *Esdaile*, 1 F. & F. 313.

(*y*) *R.* v. *Tarrant*, 4 Burr. 2106; *R.* v. *Herbert*. 1 East, P. C. 461; *R.* v. *Compton*, Cald. 246; *R.* v. *Seward*, 1 A. & E. 706; 3 Nev. & Man. 557.

(*z*) *R.* v. *Fowler*, 1 East, P. C. 461; and see *R.* v. *Seward*, 1 A. & E. 706.

(*a*) *R.* v. *Eccles*, 1 Leach, C. C. 274, as cited by Lord *Ellenborough*, 13 East, 231.

(*b*) 34 & 35 Vict. c. 31.

Conspiracies affecting Trades.

liable for any punishment for doing or conspiring to do any act on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinafter specified, and is done with the object of coercing, as hereinbefore mentioned. Those acts are—

1. Use violence to any person or any property.

2. Threaten or intimidate any person in such manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace.

3. Molest or obstruct any person with a view to coerce such person.

(1.) Being a master to dismiss or to cease to employ any workman, or being a workman to quit any employment or to return work before it is finished:

(2.) Being a master not to offer, or being a workman not to accept, any employment or work:

(3.) Being a master or workman to belong or not to belong to any temporary or permanent association or combination:

(4.) Being a master or workman to pay any fine or penalty imposed by any temporary or permanent association or combination:

(5.) Being a master to alter the mode of carrying on his business, or the number or description of any persons employed by him.

A person shall, for the purposes of this act, be deemed to molest or obstruct another person in any of the following cases, that is to say,—

(1.) If he persistently follow such person about from place to place:

(2.) If he hide any tools, clothes or other property owned or used by such person, or deprive him or hinder him in the use thereof:

(3.) If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follow such person in a disorderly manner in or through any street or road. Nothing in this section is to prevent any person from being liable under any other act or otherwise (*c*).

All offences under this act are, however, to be prosecuted under 11 & 12 Vict. c. 43 (*d*), but appeals from orders or convictions made thereunder are to the quarter sessions (*e*).

(*c*) 34 & 35 Vict. c. 32, s. 1.
(*d*) *Ibid.* s. 2.
(*e*) *Ibid.* s. 3.

To injure another by an act not indictable.

Concerted schemes to cheat by pretences of one being a merchant and the other a broker, and so to sell unwholesome and useless provisions in barter for articles of value (*d*); and schemes to carry on an extensive system of swindling (*e*) are indictable but not triable at sessions.

5. Conspiracies wrongfully to prejudice another by the use of some falsity, though neither the injury nor the falsity would be indictable in themselves; and this, whether the injury be calculated to affect the person, the property, or the character (*f*). An agreement by brokers before a sale by auction that one only should bid for each article sold, and that all articles thus bought by any of them should be sold amongst themselves at a fair price, and the difference between the auction price and the fair price divided amongst them (*g*). A conspiracy to destroy the reputation of an individual by imputing mere immorality (*h*); to charge a man falsely as the father of a bastard child (*i*); to set up a fictitious claim to an estate, and marry under feigned names in order to give a colour to the title (*k*); to procure a marriage with a minor by a licence obtained by a false oath (*l*); by unlawful devices to marry a girl in order to get her fortune (*m*); and to defraud an individual of money by wilfully misrepresenting facts or concealing truth, as, for instance, for two partners of a large firm to falsify books so as to show fictitious debts, so that upon a dissolution of the partnership they would get a larger share than they would be entitled to out of the partnership assets; or again, to procure a person to buy some horses, by asserting that the horses had been the property of a lady deceased, and were at the time the property of her sister, and had never been the property of a horse dealer, all these statements being false, and the defendants knowing that nothing but a belief in their truth would have induced the prosecutor to make the purchase (*n*); or to cheat and defraud a man by selling him an unsound horse (*o*). Thus, where two conspired by falsely representing to the vendor of a horse that it was unsound and a roarer, and that the vendee had been obliged to sell it for a much less sum than the

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(*d*) *R.* v. *Macarty*, 2 Ld. Raym. 1179. See 2 East, P. C. 824; and *Reg.* v. *Orbell*, 6 Mod. 42.

(*e*) *R.* v. *Roberts*, 1 Camp. 399.

(*f*) Hawk. b. 1, c. 72, s. 2; *R.* v. *Eccles*, 1 Lea. 274; *Reg.* v. *Timothy*, 1 F. & F. 39.

(*g*) *Levi* v. *Levi*, 6 C. & P. 239.

(*h*) 1 Bla. Rep. 392.

(*i*) *R.* v. *Armstrong*, 1 Vent. 304.

(*k*) *R.* v. *Robinson*, 1 Leach, 39.

(*l*) *R.* v. *Serjeant*, R. & M. 352.

(*m*) *Wade* v. *Broughton*, 3 Ves. & B. 173.

(*n*) *Reg.* v. *Kenrick*, 5 Q. B. 49; 12 L. J., M. C. 135.

(*o*) *Ibid.*, overruling *R.* v. *Pywell*, 1 Stark. 402; *see Reg.* v. *Rowlands*, 2 Den. C. C. 364; 21 L. J., M. C. 81; *R.* v. *Gill*, 2 B. & A. 204.

purchase-money, to induce the vendor to take such less sum in payment for the horse, it was held that, although the payment of such smaller sum was no satisfaction of the larger sum, and payment in full by the vendor might still be enforced, the defendants were guilty of an indictable conspiracy (*p*). To sell goods by false statements.

6. Conspiracies to effect any flagrant immorality, as the seduction of a young lady from her father (*q*); to procure by fraudulent means a child of the age of fifteen to have illicit carnal connexion with a man (*r*). To effect an immoral act.

7. Conspiracies to express a preconcerted disapprobation of an actor or dramatic performance exhibited on the public stage (*s*).

The offence of conspiracy, from its nature, cannot be committed by one alone; and, therefore, a husband and wife cannot be indicted for conspiracy without others (*t*). But if H. is indicted for that he with A. and with many others conspired, &c., and the bill is found against one only, he may be convicted of conspiring with his associates while they remain untried (*u*). And even where the other defendant has pleaded and is alive, but has not been tried, a verdict of guilty of conspiring with him may be sustained, and judgment given on it, although it is possible that he may afterwards be acquitted (*x*). A man may also be convicted of conspiracy with persons unknown, if the evidence will sustain such an allegation (*y*). If a conspiracy be formed and a person joins it afterwards, he is equally guilty with the original conspirators (*z*). Counts for other misdemeanours may be joined with counts for conspiracy; and, in fact, counts alleging the commission of an offence are often added to others for a conspiracy to effect it. Of the indictment.

Where the object of a conspiracy is in itself illegal, it is not necessary to state the means by which it was proposed to accomplish the purpose (*a*), they being "matter of evidence to prove the charge, and not the crime itself" (*b*). An indictment for a conspiracy to obtain goods by false pretences should show

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(*p*) *Reg.* v. *Carlisle*, Dears. C. C. 341; 23 L. J., M. C. 109.
(*q*) *R.* v. *Lord Grey*, 3 St. Tr. 519; East, P. C. 460.
(*r*) *Reg.* v. *Mears*, 2 Den. C. C. 79; 20 L. J., M. C. 59.
(*s*) *Clifford* v. *Brandon*, 2 Camp. 369, *ante*, p. 511; *Gregory* v. *The Duke of Brunswick*, 6 M. & G. 953; 13 L. J., C. P. 34.
(*t*) Hawk. b. 1, c. 72, s. 8.
(*u*) *Herne's case*, cited and acted on in *R.* v. *Kinnersley*, Stra. 193. On motion in arrest of judgment, on the ground that H. could not have conspired with A., the court gave judgment against H., saying it was found that he did conspire *cum multis aliis*, and that it might be so laid.
(*x*) *R.* v. *Cooke*, 5 B. & C. 538.
(*y*) *R.* v. *Scott*, 3 Burr. 1262. See *Reg.* v. *Caspar*, 2 Moo. C. C. 101.
(*z*) *Reg.* v. *Murphy*, 8 C. & P. 297.
(*a*) *R.* v. *Eccles*, Leach, C. C. 274; 13 East, 230.
(*b*) Per *Buller*, J., in *R.* v. *Eccles*, 1 Leach, C. C. 277; and see Stra. 193; 1 Vent. 304.

Conspiracies.

to whom the goods belonged, and is bad if it does not (*d*). And it has even been holden that an indictment charging the defendants with conspiring "by divers false pretences and subtle means and devices to obtain from A. divers large sums of money, and to cheat and defraud him thereof," is sufficient, without specifying any of the "pretences, means or devices" (*e*).

Form of indictment.

A conviction upon an indictment tried at quarter sessions which charged conspiracy by divers false pretences against the form of the statute, in such case made to defraud A. B. of his monies, was upheld on the ground, that after verdict the jury must be taken to have found the defendant guilty on facts which showed that the offence was cognizable by the sessions (*f*). As the gist of the offence is the conspiracy, even where the object of it is in itself illegal, it is never necessary in such a case, though usual, to state any *overt act* done in pursuance of the conspiracy; and counts omitting such statement should always be inserted (*g*). But when it is relied on for a prosecution, that a particular proceeding is a conspiracy, because it is to be carried into effect by *unlawful means*, such illegal means and overt acts must be stated as, if proved, will amount to an offence (*h*).

Vexatious Indictments Act.

By the Vexatious Indictments Act (22 & 23 Vict. c. 17), no bill of indictment for conspiracy shall be presented to or found by any grand jury, unless the prosecutor, or other person presenting such indictment, has complied with the conditions imposed by that act (*i*).

Death of one defendant before trial.

If one of two persons indicted for conspiracy dies between indictment found and trial had, and the trial goes on notwithstanding, as against both, without any suggestion of death being entered on the record, it is no ground of *venire de novo* as for a mistrial (*k*).

General Outline of an Indictment for Conspiracy.

That A. B. [*here state the names of all the defendants*] being persons of evil minds and dispositions, on the ——— day of ———, A.D. ——, unlawfully and wickedly [*or, if the conspiracy be malicious, say "falsely and*

(*d*) *Reg.* v. *Parker*, 3 Q. B. 292; 11 L. J., M. C. 102. See *Reg.* v. *Bullock*, 1 Dears. C. C. 653; 25 L. J., M. C. 92.

(*e*) *R.* v. *Gill*, 2 B. & A. 204; *Reg.* v. *Gompertz*, 9 Q. B. 824; 16 L. J., Q. B. 121; *Sydserf* v. *The Queen*, 11 Q. B. 245; *Latham* v. *Reg.*, 5 B. & S. 635; 33 L. J., M. C. 197; *Reg.* v. *Hudson*, Bell, C. C. 267; 29 L. J., M. C. 145; *Reg.* v. *Rowlands*, 2 Den. C. C. 364; 21 L. J., M. C. 81.

(*f*) *Latham* v. *Reg.*, 5 B. & S. 635; 33 L. J., M. C. 197; *Reg.* v. *Goldsmith*, 42 L. J., M. C. 94; L. R., 2 C. C. R. 74; see *post*, p. 532.

(*g*) *Id.*; *Reg.* v. *Best*, 2 Ld. Raym. 1167; *R.* v. *Eccles*, 1 Leach, 274; *R.* v. *Kinnersley*, Stra. 193.

(*h*) See *R.* v. *Seward*, per Lord *Denman*, C. J., 1 A. & E. 714; and per *Williams*, J., *id.* 716.

(*i*) See *ante*, pp. 107, 108; and see also 30 & 31 Vict. c. 35, s. 1, *ante*, p. 108.

(*k*) *Reg.* v. *Kenrick*, 5 Q. B. 49; 12 L. J., M. C. 135.

maliciously"] did conspire, combine, confederate, and agree together (*l*) to [*here state the object of the conspiracy, according to the substance of the facts*]. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., in pursuance of and according to the said conspiracy, combination, confederacy, and agreement between them the said A. B., &c. as aforesaid, had, did (*m*) on, &c., at, &c. [*the place where the overt act took place*] [*here set out the overt acts of conspiracy*] against the peace of our said lady the Queen, her crown and dignity. [*Add a second count, stopping at the statement of the conspiracy, omitting the overt acts, and concluding as above. Add a third count, as general as possible, upon the principle laid down in* 2 *B. & A.* 204.]

Indictment for a Conspiracy to make a great Riot and to demolish Walls, Buildings, and Fences.

Forms of indictment.

That A. B. [*naming the other defendants*] together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, heretofore, to wit, on the ——— day of ———, A.D. ——, &c. with force and arms, at, &c. aforesaid, did unlawfully conspire, combine, confederate, and agree together unlawfully, riotously, and routously, to break down, pull down, prostrate, demolish, and destroy a certain wall, and certain other erections, buildings, posts, pales, rails, and fences of one C. D. there then erected, standing and being near a certain dwelling-house and premises of the said C. D. there situate. And the jurors, &c. that in pursuance of the said conspiracy, combination, confederacy, and agreement so as aforesaid had, they the said A. B. &c. afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, with force and arms, did unlawfully, riotously, and routously assemble and meet together, near to the said dwelling-house and premises of the said C. D. and near to the dwelling-houses and premises of divers other liege subjects of our said lady the Queen, there, and, being so assembled and met together, then and there unlawfully, riotously, and routously did make a great noise, riot, disturbance, and affray, and staid and continued there, making such noise, riot, disturbance, and affray, for a long time, to wit, for the space of five hours, and thereby for and during all that time, there greatly disturbed, disquieted, terrified, and alarmed the said C. D. and his wife and family in the peaceable possession and enjoyment of his said dwelling-house and premises, and also greatly disturbed, disquieted, terrified, and alarmed the said other liege subjects of our said lady the Queen, inhabiting and residing in the said dwelling-house and premises, and then and there unlawfully, riotously, and routously did break down, pull down, prostrate, demolish, and destroy great part of the said wall, to wit, twenty perches of the said wall, then and there standing and being, and the materials thereof, to wit, five hundred bricks, of a large value, to wit, &c. unlawfully, riotously, routously, and wantonly, did cast and scatter into and about the Queen's common and public highway there, to the great damage and terror of her Majesty's subjects, and against the peace, &c.

And the jurors, &c. that the said A. B. &c. together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, heretofore to wit, on, &c. aforesaid, with force and arms, at, &c. aforesaid, did unlawfully conspire, combine, confederate and agree together unlawfully to break down, demolish, prostrate, and destroy certain other erections, buildings, posts, pales, rails, and fences there then standing and being the property of and belonging to her said Majesty's subjects there then inhabiting and residing, against the peace, &c.

(*l*) The fact of conspiracy need not be directly proved, but may be collected and inferred from collateral circumstances; *Reg.* v. *Parsons*, 1 Bla. R. 392; and it may be proved by the prisoners' expressions, though without further overt act, *R.* v. *Kinnersley*, Stra. 193.

(*m*) See above, as to overt acts.

Conspiracies.

And the jurors, &c. do further present, that the said A. B. &c. together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, being respectively rioters, routers, and disturbers of the peace of our said lady the Queen, heretofore, to wit, on, &c. aforesaid, with force and arms, at, &c. did unlawfully, riotously, and routously assemble and meet together, to disturb the peace of our said lady the Queen, near to the dwelling-houses of divers other liege subjects of our said lady the Queen; and being so assembled and met together there, then and there unlawfully, riotously, and routously, did make a great noise, disturbance, and affray, and staid and continued there, making such riot, noise, disturbance, and affray, for a long space of time, to wit, &c. and thereby for and during all that time, there greatly disturbed, disquieted, terrified, and alarmed the said last-mentioned subjects in the peaceable possession, use, occupation, and enjoyment of their said dwelling-houses, and then and there unlawfully, riotously, and routously, did break down, pull down, and prostrate, demolish, and destroy a great part, to wit, twenty perches of a certain other wall, and certain other erections, buildings, posts, pales, rails, and fences, to wit, twenty other erections, &c. of the said C. D. there then standing and being, and the materials thereof, containing divers, to wit, five hundred other bricks, &c. of the said C. D. of a large value, to wit, &c. unlawfully, riotously, routously, and wantonly, did cast and scatter into and about the said common and public highway there, to the great damage and terror of the said C. D. and her Majesty's other liege subjects, against the peace, &c.

Indictment for Conspiracy to obtain Money by False Pretences (n).

First Count. That T. K. senior, and T. K. the younger, being evil-disposed persons, and seeking to get their living by various subtle, fraudulent, and dishonest practices, on the ——— day of ———, A.D. ——, at, &c. together with divers other evil-disposed persons unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together by divers false pretences and subtle means and devices to obtain and acquire to themselves of and from one G. W. F. (*o*) divers large sums of money of the monies of the said G. W. F., and to cheat and defraud him thereof to the great damage, &c.

2nd Count, laid a conspiracy to acquire to K. sen.

3rd Count, to acquire to K. jun.

Indictment for conspiring to disturb a Party in the Possession of his Lands, and to deprive him of them (p).

That James Stamp Sutton Cooke, J. R. Mills, Richard Sutton Cooke, and divers other persons to the jurors aforesaid as yet unknown, being persons of evil minds and dispositions, on, &c., with force and arms, at, &c. unlawfully and wickedly did conspire, combine, confederate, and agree together unlawfully and unjustly to disturb, molest, and disquiet Sir George Jerningham, Bart. in the peaceable and quiet possession, occupation, and enjoyment of certain manors, messuages, lands and hereditaments and premises, situate and being in the said county of S. of which he the said Sir G. J. then was, and for a long time had been, peaceably and quietly possessed; and also to deprive him of certain issues and profits arising, issuing, and accruing therefrom, and of the rents, issues, and profits of certain other lands, messuages, and premises, situate and being in the said county, whereof certain persons then were in peaceable and

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(*n*) A conviction on this count was upheld in *Reg.* v. *Kenrick*, 5 Q. B. 49; 12 L. J., M. C. 135. There was another count for false pretences which was bad.

(*o*) See *King* v. *The Queen* (in error), 7 Q. B. 782, 795.

(*p*) Found at Stafford Summer Assizes, 1823. Removed into K. B. See *R.* v. *Cooke*, 2 B. & C. 618; 5 *id.* 538; 4 Dowl. & Ry. 114; 7 *id.* 673.

Forms of Indictment.

quiet possession as tenants of the said Sir G. J. by unlawful means and devices.—First overt act, that the said J. S. S. C. in pursuance of the said unlawful and wicked conspiracy, combination, confederacy, and agreement, and for carrying the same into effect, did afterwards, to wit, on, &c. with force and arms, at, &c. break and enter a certain messuage, called Stafford Castle, situate in the county aforesaid, whereof the said Sir G. J. had long been, and then was, in the peaceable and quiet possession.—Second overt act, that J. S. S. C. on, &c. at, &c. did falsely, fraudulently, and wilfully affirm to W. H. C. and divers other persons, that he the said J. S. S. C. had been appointed agent to the said R. S. C. his brother, by the house of peers; whereas, in truth, he had not been appointed agent to the said R. S. C. by the house of peers, as he the said J. S. S. C. then and there well knew.—Third overt act, that in further pursuance, &c. said J. R. M. on, &c. at, &c. did unlawfully pretend and assume to hold a court leet and court baron of the manor of F. in the said county, as the steward thereof to R. S. C. whom he then and there represented to be lord of the said manor, the said Sir G. J. then being in the peaceable occupation of the said manor as J. R. M. then and there well knew, to the great damage of Sir G. J., &c. and *contra pacem.*

2nd Count exactly similar, without overt acts.

3rd Count.—That defendants and ten other persons, on, &c. with force and arms, at &c. did conspire, &c. *to cause and procure a large number of timber trees*, growing and being in certain lands, situate in the said county of S., and then and long before in the peaceable possession of certain tenants of the said Sir G. J., and the same then being the property of the said Sir G. J., unlawfully and against the will of the said Sir G. J. cut down, felled, and prostrated, and to get the same into their possession, and convert and dispose of the timber thereof to their own use.—Overt act, that J. S. S. C. on, &c. at, &c. did obtain and procure divers labourers to cut down, fell, and prostrate divers of the said trees, and the said labourers did accordingly then and there, by his directions, with force and arms, unlawfully and violently break and enter divers, to wit, twenty closes wherein the said trees were growing and being as aforesaid, and unlawfully cut down, fell, and prostrate divers, to wit, one hundred of the said trees, and did take and carry away the same, to the great damage, &c.

4th Count.—Exactly the same without overt acts.

5th Count.—Did conspire, &c. unlawfully and wickedly to cheat, defraud, and impoverish M. P., W. R., J. D., and divers other persons, who then and there lawfully held and enjoyed divers messuages, lands, and tenements, situate and being in the county aforesaid, as tenants thereof to the said Sir G. J. and unlawfully and fraudulently to obtain from them divers large sums of money, by causing to be believed by the said tenants that the said R. S. C. had a claim of title to the said messuages, lands, and tenements, which was admitted, received, and allowed by the said Sir G. J. the landlord of the said tenements, to be good and valid; whereas, in truth and in fact, they the said [defendants] then and there well knew that the said R. S. C. had not a claim of title to the said messuages, lands, and tenements, or any of them, admitted, received, or allowed by the said Sir G. J. to be good and valid.

Overt act by J. S. S. C., that he, on, &c. at &c. did falsely, fraudulently, and wilfully misrepresent to the said J. D. then being a tenant of said Sir G. J. of certain of the said messuages, lands, and tenements, and then owing certain rent in respect of the same; and to J. K. the son of the said W. R. who then held certain monies of his father, who then was tenant of certain of the said messuages, &c. of the said Sir G. J. and then and there owed rent for the same; that he the said J. S. S. C. then had in his possession a letter of the said Sir G. J. recognizing the justice of the claim of the said R. S. C. to the said messuages, &c.; whereas, in truth and in fact, the said J. S. S. C. had not in his possession a letter, &c. [*repeating as above*], as he the said J. S. S. C. then well knew, and thereby he the said J. S. S. C. did falsely and fraudulently then and there receive and obtain

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from the said J. D. a large sum of money, to wit, the sum of £——— of his monies; and from the said J. K. a large sum of his money, to wit, the sum of £——— of the monies of his said father W. R.

Second overt act by J. S. S. C., that he did offer to M. P. then being tenant of the said Sir G. J. of certain messuages, &c. to obtain for her a lease of the premises of which she was then so tenant, from the said R. S. C.; and thereupon he the said J. S. S. C. then and there in pursuance of the said last-mentioned conspiracy, combination, confederacy, and agreement, falsely and fraudulently asserted to the said M. P. that the said Sir G. J. had given up all title to the estate whereof the said premises conveyed by the said M. P. were parcel; and also, that he the said J. S. S. C. had a letter from the said Sir G. J. to prove that he had so given up all title to the said estate, whereas, in truth and in fact, the said Sir G. J. had not given up all title to the said estate, as he the said J. S. S. C. well knew; and whereas, in truth and in fact, the said J. S. S. C. had not a letter from the said Sir G. J. to prove that he had given up such title. To the evil example, &c.

6th Count.—Exactly similar to 5th, but without overt acts.

7th Count.—Did conspire, &c. by unlawful and vexatious distresses and threats of the power of the said R. S. C. under the title of Lord Stafford, to molest, disturb, and disquiet divers persons, who then and there lawfully held and enjoyed divers messuages, lands, &c. situate in the said county, as tenants thereof to the said Sir G. J. [Overt act by J. S. S. C., that he "did unlawfully and fraudulently issue and sign as agent to the said R. S. C. by the title of Lord S. a certain warrant of distress for rent on the premises occupied by one Philip Seckerson, a parcel of the messuages, &c. last aforesaid, as tenant thereof to the said Sir G. J., under and by colour whereof the goods of the said P. S. on the said premises, being of great value, to wit, &c. were afterwards, to wit, on, &c. at, &c. taken and seized as for and in the name of a distress for rent pretended to be due to the said R. S. C. under the title of Lord S. for the said premises."] To the evil example, &c.

8th Count.—Exactly similar, without overt acts.

Punishment.

The punishment of conspiracy, at the present day, is fine and imprisonment, in the discretion of the court. Where any person is convicted of any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice, the court may sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment (*q*).

Costs of prosecution.

Costs of prosecutions for conspiracy to charge any person with any felony, or to indict any person of any felony, or to commit any felony, are allowed by 14 & 15 Vict. c. 55, s. 2.

Section 8.

Offences relating to children or servants.

Neglect of, and cruelty to,

A mother or other person having the means, who has the care and custody of a child of tender years, and unable to pro-

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(*q*) 14 & 15 Vict. c. 100, s. 29.

Neglect of Children.

vide itself with food or clothing, is bound to provide it with necessary food and clothing; and if such person neglects or omits so to do, and the health of the child suffers actual injury, such person is guilty of a misdemeanour at common law. The possession of means must be shown (*r*); but it is not sufficient evidence of means, in the absence of proof of actual means, to show merely that by an application to the relieving officer of the poor law union in which she resided, she might have obtained relief adequate to the due support and maintenance of herself and child, and that she had not done so (*s*). And, further, it is necessary that the child's health should have suffered by the neglect, and it is not sufficient to show an injury to some but not to any serious extent (*t*). It is said to be indictable to abandon a child, with the intent that it should be found and taken care of as casual poor; but to put a child in the bottom of a dry ditch among some nettles, which covered it at some distance from the public road but close by a private waggon-track, where it was found by accident by a person going into the field to catch sheep, is not an abandonment and exposure with such intent (*u*). In an indictment at common law, if the desertion of the child is alleged to be with intent to burden the inhabitants of a parish with its charge and maintenance, it must be alleged that the child was not legally settled in the parish (*x*). If mere nonfeasance is charged as the neglect of the mother in her maternal duty, the indictment must allege that the child was of such an age, or in such a situation, or so feeble as to be unable to take care of itself (*y*).

children, servants, or paupers.

Neglect by masters, &c. of apprentices or servants, or injuries done to the latter.

By 24 & 25 Vict. c. 100, s. 26, whosoever, being legally liable either as a master or mistress to provide for any apprentice or servant necessary food, clothing or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Prosecutors, who.

A prosecution under this section may by order of justices be conducted by the guardians of the union or place, or by the overseers where there are no guardians, the costs to come out of the common fund or poor rate, as the case may be, and

(*r*) *Reg.* v. *Hogan*, 2 Den. C. C. 277; 20 L. J., M. C. 219.
(*s*) *Reg.* v. *Chandler*, 1 Dears. C. C. 453; 24 L. J., M. C. 109.
(*t*) *Reg.* v. *Philpot*, Dears. C. C. 179; 22 L. J., M. C. 113.
(*u*) *Reg.* v. *Renshaw*, 11 Jur. 615.
(*x*) *Reg.* v. *Cooper*, 1 Den. C. C. 459; 18 L. J., M. C. 168.
(*y*) *Reg.* v. *Waters*, 1 Den. C. C. 356; 18 L. J., M. C. 53.

Neglect of Children.

the clerk of the guardians or one of the overseers may be bound over to prosecute (*z*).

Exposing children.

By 24 & 25 Vict. c. 100, s. 27, whosoever shall unlawfully abandon or expose any child being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a *misdemeanour*, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years (*a*), or to be imprisoned for any term not exceeding two years, with or without hard labour.

To pack an illegitimate child in a hamper, and send it by train to the address of its father, is an offence within the section, although it be carefully packed and directed with care and carriage paid, and the child suffered no hurt from the journey (*b*).

When any parent shall wilfully neglect to provide adequate food, clothing, medical aid or lodging for his child, being in his custody, under the age of fourteen years, whereby the health of such child shall have been or shall be likely to be seriously injured, he may be summarily convicted before two justices (*c*).

It has been held, that a married woman living with her husband is not indictable for not supplying her illegitimate child with sufficient food, unless she neglected doing so, after her husband had supplied her with food to give to it, or money to buy such food for its use, for in these cases she is in the nature of servant to him, and nothing turns on her character as mother (*d*).

Costs of prosecutions to be allowed.

By 24 & 25 Vict. c. 100, s. 77, the court, before which any misdemeanour indictable under the provisions of this act shall be prosecuted or tried, may allow the costs of the prosecution in the same manner as in cases of felony. And every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

Indictment at Common Law against a Mistress for not providing sufficient Food for a Servant, keeping her without proper Warmth, &c. (*e*).

Form of indictment.

That one E. R., the wife of S. R., unlawfully and maliciously contriving and intending to hurt and injure one E. W., being a servant to her the

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(*z*) Sect. 73.
(*a*) 27 & 28 Vict. c. 47, s. 2.
(*b*) *Reg.* v. *Falkingham*, 39 L. J., M. C. 47; L. R., 1 C. C. R. 222.
(*c*) 31 & 32 Vict. c. 122, s. 37.
(*d*) *R.* v. *Saunders*, 7 C. & P. 277.
(*e*) This is the indictment against Elizabeth Ridley, 2 Camp. 650; but with the additions suggested by *Lawrence*, J., as necessary to sustain it. See 3 Ch. Cr. L. 1st ed. 861; and *R.* v. *Friend*, Russ. & Ry. C. C. 20. Unless the child be of tender years, unable to provide for itself, and is under the control of the defendant, so as to be unable to take any steps by leaving the service, or remonstrating or complaining to a magistrate, mere nonfeasance respecting her would be a mere breach of contract, and not indictable; see *R.* v. *Ridley*, and *R.* v. *Friend*.

Exposing Children.

said E. R., and an infant *of tender years, to wit, of the age of —— years, under the dominion and control of the said E. R.*, and unable to provide for herself, heretofore, to wit, on the —— day of ——, A.D. ——, and on divers other days and times as well before as after that day, unlawfully, wilfully, and maliciously did omit, neglect, and refuse to provide for, and give and administer to the said E. W. sufficient meat and drink necessary for sustenance, support, and nourishment of the body of her the said E. W., and did then and there expose the said E. W. to the cold and inclemency of the weather, as well within as without the house wherein the said E. R. then dwelt, and kept the said E. W. without sufficient and proper warmth necessary for the health of her the said E. W., to wit, at, &c., [the said E. R. on the several days and times, and during all the times aforesaid, living separately and apart from the said S. R. her husband, to wit, at, &c.] (*f*), contrary to the duty of her the said E. R., as the mistress of the said E. W. in that behalf, by reason of all which premises she the said E. W. afterwards, to wit, on, &c. became and was, and for a long time, to wit, the space of six months, then next following, continued to be very weak, sick, and ill, and greatly consumed and emaciated in her body, to wit, at, &c. aforesaid, to the great damage of the said E. W., and against the peace, &c.

Indictment against Mistress under 24 & 25 Vict. c. 100, s. 26.

Forms of indictments.

That A. B., on the —— day of ——, A.D. ——, was the mistress of C. D., and the said C. D. was the servant of the said A. B., and the said A. B. was then liable as such mistress to provide for the said C. D. necessary food (clothing or lodging), and the said A. B. unlawfully, wilfully, and without lawful excuse neglected to provide the same, so that the health of such servant was (or was likely to be) permanently injured, contrary to the form of the statute, and against, &c.

Indictment at Common Law for neglecting to provide an Apprentice of tender Years with sufficient Food, Clothing, Bedding, and other Necessaries.

That T. F. did take and receive one S. Q. into the dwelling-house of the said T. F. as an apprentice of the said T. F., to be by him treated, maintained, and supported as an apprentice of him the said T. F., and did for a long time have and keep her in the said house as such apprentice as aforesaid, and that on the —— day of ——, A.D. ——, and on divers other days and times, as well before as after that day, and during the said time he so had and kept her in the said house as such apprentice,

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(*f*) Where the offender is a married woman, living with her husband, it is necessary to state (and prove) instead of the matter above placed within brackets, either that the child was imprisoned by her, which is sufficient to show her duty to provide it with food (*Reg.* v. *Edwards*, 8 C. & P. 611), or to allege as follows:—"the said —— husband of the said —— on the several days and times, and during all the times aforesaid, having provided the said —— with sufficient meat, drink, and victuals necessary for the maintenance, support, and nourishment of the body of the said ——, and with sufficient firing, covering, bedding, and other necessaries proper and requisite for sustaining, supporting, maintaining, clothing, and resting the body of the said ——, and covering the same from the cold and inclemency of the weather;" for her crime is the wilfully neglecting to deliver the food to the child after the husband had provided it (*R.* v. *Saunders*, 7 C. & P. 279). A mother would be liable for the consequences of not suckling her unweaned infant if she is able to do so; though if she be married, her husband would be bound to provide food for an older child. See per *Patteson*, J., *Reg.* v. *Edwards*, *ubi sup.*

Neglect of Children, &c.

the said T. F. did unlawfully and injuriously, and without the consent of the said S. Q. and against her will, and maliciously and unlawfully intending to hurt and injure the said S. Q., she the said S. Q. being such apprentice to the said T. F. as aforesaid, and then and there being an infant of tender years, to wit, of the age of ——— years, and under the dominion and control of the said T. F. and unable to provide for herself, did neglect and refuse to find and provide for and to give and administer to her, being so had and kept as such apprentice as aforesaid, sufficient meat, drink, victuals, wearing apparel, bedding, and other necessaries proper and requisite for the sustenance, support, maintenance, clothing, covering, and resting the body of the said S. Q., by means whereof she became emaciated and nearly starved to death, and the constitution and frame of her body was greatly hurt and impaired, to the great damage, &c. and against the peace, &c. (*c*).

Indictment at Common Law for cruelly beating and ill-treating an Apprentice, and keeping her from necessary Food.

Ill-treating an apprentice.

That A. B., on the ——— day of ———, A.D. ——, in and upon one E. D., a female child of the age of ten years or thereabouts, being the servant and apprentice of the said A. B., and in the peace of God and our said lady the Queen then and there being, did make an assault, and with certain rods, whips, sticks, and cords, her the said E. D. did then and there violently, cruelly, and immoderately beat, scourge, and strike, and did then and there pull and strip, and force and compel the said E. D. to pull and strip from off the body of her the said E. D. certain clothes and wearing apparel, wherewith the said E. D. was then and there clothed and covered, so that the said E. D. was then and there nearly naked and uncovered, and her, the said E. D., as well whilst she was so covered and clothed with the said clothes and wearing apparel, as whilst she was so nearly naked and uncovered, did force and compel to work and labour violently, immoderately, and beyond her strength, in the business of the said A. B. as a silk weaver, for the space of twelve hours then next following; and her the said E. D. so working and labouring as aforesaid, did then and there shut up, confine, and keep in a certain room there for all the time aforesaid, without giving or affording to her the said E. D., or permitting her to have or procure sufficient meat, drink, and food, for her nourishment and support during that time, and other wrongs, &c., against the peace, &c. [*Add count for common assault.*]

Indictment under 24 *&* 25 *Vict. c.* 100, *c.* 26, *against Master of Apprentice.*

That A. B., on the ——— day of ———, A.D. ——, was the master of C. D., and the said C. D. was the apprentice of the said A. B., and the said A. B. was then legally liable as such master to provide necessary food (clothing or lodging) for the said C. D., and the said A. B. wilfully and without lawful excuse did unlawfully refuse to provide necessary food, so that the health of the said C. D. has been (or is likely to be) permanently injured, against the form of the statute and the peace, &c.

(*c*) See *R.* v. *Friend*, R. & Ry. 20, cited by *Lawrence*, J., in 2 Camp. 651.

Section 9.

Of obtaining money by false pretences.

By 24 & 25 Vict. c. 96, s. 88, whosoever shall by any false pretence obtain from any person any chattel, money or valuable security with intent to defraud shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Obtaining any chattel, money, &c. by false pretences.

The intervention of a contract to supply the goods which are afterwards supplied, which contract, as well as the performance of it are obtained by means of false pretences, does not prevent the goods being obtained by false pretences (*d*). So the obtaining a loan on mortgage, on the false pretence that a house was built on a certain piece of land, the lease of which the defendant deposited by way of equitable mortgage, giving also a bond for the money, is within the statute (*e*). And it is immaterial that the goods at the time of the contract being made should not be in existence, and if the contract be to make and deliver the goods, it is sufficient if the false pretence be continuing until the goods are made and delivered, and it is a question for the jury whether the pretence did so continue (*f*). But where, by a false pretence that a man was a naval officer, the prosecutrix made a contract with him for weekly board and lodging, and he was lodged and fed thereunder, the supply of such articles of food was too remotely the result of the false pretence to support a conviction (*g*).

The obtaining.

The obtaining in this section does not mean obtaining the loan of, but the property in, any chattel (*h*), as where the defendant obtained the use of a horse for a day from livery stable keepers, by falsely pretending that he was sent by a customer to hire it; but this does not apply to money, on the loan of which the property in it passes as much as on a sale (*i*). The valuable security so obtained must be the property of some one else than the prisoner; therefore, when a man by means of a false pretence induced another to sign by way of acceptance a bill of

Valuable security, what.

(*d*) *Reg.* v. *Martin*, 36 L. J., M. C. 20; L. R., 1 C. C. R. 56; *Reg.* v. *Kerrigan*, 33 L. J., M. C. 71; L. & C. 383; *Reg.* v. *Archer*, Dears. C. C. 449; *Reg.* v. *Kendrick*, 5 Q. B. 49; 12 L. J., M. C. 135.

(*e*) *Reg.* v. *Burgon*, D. & B. 11.

(*f*) *Reg.* v. *Martin*, 36 L. J., M. C. 20; L. R., 1 C. C. R. 56; *Reg.* v. *Kerrigan*, 33 L. J., M. C. 71; L. & C. 383.

(*g*) *Reg.* v. *Gardner*, D. & B. 10; 25 L. J., M. C. 100.

(*h*) *Reg.* v. *Kilham*, 39 L. J., M. C. 109; L. R., 1 C. C. R. 261.

(*i*) *Reg.* v. *Burgon*, D. & B. 11.

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exchange prepared by the prisoner and handed by him to the other for acceptance, it is not within the statute (*k*).

An order upon the treasurer of a burial society for the payment of the sum, to which the representatives of the deceased member of the society was entitled, is a valuable security (*l*).

Chattels, what.

Dogs are not the subject of an indictment for obtaining them by false pretences (*m*).

A railway ticket or pass enabling the holder to travel on the line, but to be given up at the end of the journey, is a chattel within the act (*n*).

A false pretence, what.

What shall be deemed a false pretence within this act depends upon the construction of the acts for which it is substituted; and it has been held, that the false pretence must be a false representation as to some existing fact, and made for the purpose of inducing the prosecutor to part with his property: and not a mere promise, which the promiser intends to break, as of payment for goods on delivery (*o*). A defendant saying that he had got to pay his rent, whereas he had no intention of doing so, is not such a false pretence (*p*). So, where an indictment stated the false pretences to be, that the prisoner would tell the prosecutor where his strayed horse was, if he would give him 1*l.*, without alleging that the prisoner pretended he knew where it was, it was held bad, though the prisoner received the money, and refused to tell (*q*). But it has been holden that obtaining money as a share of a bet, on a fraudulent representation that it had been laid, though to be decided by the future event of a pedestrian feat, is a false pretence (*r*). It is not necessary to constitute the offence that the prisoner should orally or in writing make any false assertion, for, if he presents a genuine order for the payment of money, and assumes by his conduct to be the person to whom it is payable, and by this means fraudulently obtains money which belongs to another, he will be within the statute (*s*). So, where a party not being a member of the university of Oxford, went into a shop there, wearing the academic cap and gown, and obtained goods, his dress was held a sufficient false pretence, though nothing passed in words (*t*). Another instance in which the acts and conduct of a party were held tantamount to a false pretence, without false verbal representations, was, that where a party obtained goods and money in exchange for a counterfeit

The false pretence.

Acting a false pretence.

(*k*) *Reg.* v. *Danger*, D. & B. 307; 26 L. J., M. C. 185.
(*l*) *Reg.* v. *Greenhalgh*, Dears. C. C. 267.
(*m*) *Reg.* v. *Robinson*, Bell, C. C. 34; 28 L. J., M. C. 58.
(*n*) *Reg.* v. *Boulton*, 1 Den. C. C. 508; 19 L. J., M. C. 67.
(*o*) *R.* v. *Goodhall*, R. & Ry. 461; but see *R.* v. *Parkes*, 2 Leach, 616.
(*p*) *Reg.* v. *Lewis Lee*, L. & C. 309, 528.
(*q*) *R.* v. *Douglas*, 1 Moo. C. C. 462.
(*r*) *R.* v. *Young*, 3 T. R. 98.
(*s*) *R.* v. *Story*, R. & Ry. 81. The post-office order was made payable to Stor*er*, and prisoner signed Sto*ry*, his own name.
(*t*) *R.* v. *Barnard*, 7 C. & P. 784.

promissory note, by asking for goods at a shop, and, at the same time, throwing down, as in payment, the note in question, which purported to be of larger value than the price of the goods, without stating it to be genuine (*u*). Uttering, as good and available, a bank note which had been long cancelled, and the makers bankrupt, has been thought not to be sufficient evidence of a fraud indictable at common law as a cheat (*x*); or of a false pretence knowingly and designedly made, inasmuch as without further evidence as to the facts and to the prisoner's knowledge of the facts, it might be that a further dividend might be paid, or it might be paid in full, or the prisoner might not be aware of the state of the facts (*y*). On the other hand, it is evident that putting a note of this kind into the general circulation of the country is likely, by defrauding a succession of persons, to affect the public, and is not the mere case of cheating in a private bargain. Uttering a flash note on the bank of elegance, and saying it is a 5*l*. Bank of England note and will go anywhere, is a false pretence (*z*).

A False Pretence, what.

One false essential fact, by means of which money is obtained, is sufficient, though at the same time there were two other false promises, neither of which would sustain the indictment, as where a man obtained money from a single woman by pretending that he was unmarried and would marry her, and with it furnish a house for them to live in and would return and marry her (*a*).

Double false pretences.

The statute is not intended to apply to fraudulent or false statements made in the course of real commercial transactions as in partnership transactions, by which one partner wrongfully obtains money from another partner (*b*). But it applies to false representations as to definite facts, such as to be cognizable by the senses made before, during or after a contract of purchase and sale of goods, with respect to which such contract is made, as distinguished from statements of opinion which may amount only to exaggerated though mistaken praise of the article. As where in a cheese fair the vendor of cheese falsely pretended certain "tasters" to have come out of certain cheeses, which he sold in consequence, whereas, in truth, he produced

Commercial transactions.

(*u*) *R.* v. *Freeth*, Russ. & Ry. 127; *R.* v. *Evans*, 5 C. & P. 553; whereas, obtaining money from a county treasurer by a forged order, purporting to be signed by a magistrate, for paying the expenses of conveying vagrants, had been held a false pretence in *R.* v. *Rushworth*, Russ. & Ry. C. C. 317; 1 Stark. Cr. P. 396.

(*x*) In *R.* v. *Flint*, R. & Ry. 460; *R.* v. *Spencer*, 3 C. & P. 420; *R.* v. *Clark*, Berks Summer Assizes, 1837; Dick. Q. S., ed. Talfourd, 330.

(*y*) *Reg.* v. *Evans*, Bell, C. C. 187.

(*z*) *Reg.* v. *Coulson*, 1 Den. C. C. 592; 19 L. J., M. C. 182.

(*a*) *Reg.* v. *Jennison*, L. & C. 157; 31 L. J., M. C. 146; *Reg.* v. *West*, D. & B. 575; 27 L. J., M. C. 227. See *Reg.* v. *Fry*, D. & B. 449; 27 L. J., M. C. 68.

(*b*) *Reg.* v. *Evans*, 32 L. J., M. C. 38; L. & C. 252; *Reg.* v. *Watson*, D. & B. 348: 27 L. J., M. C. 18.

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them from his pocket, and they were of a different and better quality than the bulk of the cheeses (*c*); or where by falsely pretending that coal delivered was of the weight of fifteen hundred weight, whereas it was of eight hundred weight only to the defendant's knowledge (*d*); or that a chain of base metal was a chain of silver (*e*); or where an article sold was falsely pretended to be Everett's blacking, a well-known article at the place of sale, and was a totally different thing (*f*); but it does not apply to such a case as where plated spoons were represented to be equal to Elkington's A., and that the foundation was of the best material, and that they had as much silver upon them as Elkington's, inasmuch as the representation that the quality of the plating of the spoons and the quantity of silvering laid on them by the electrotype process was equal to Elkington's A., and that the material was the best, was exaggerated praise on a matter of opinion (*g*).

Exaggerated praise of article.

Obtaining goods by giving in payment a cheque on a banker with whom the party keeps no cash, and which he knows will not be paid, was declared by all the judges to be indictable as a false pretence within the statute 30 Geo. 2, c. 24 (now replaced by 24 & 25 Vict. c. 96, s. 88) (*h*), though it was not an indictable fraud at common law (*i*). A false statement to a parish officer as an excuse for not working, that the party has not clothes, is not a false pretence within the act, though it induce the officer to give him clothes, as it was rather an excuse for not working, than a false pretence to obtain goods (*k*).

Obtaining money by a pretence, known by the offender to be false at the time, is equally criminal, though the party who parted with the money laid a plan to entrap him into commit-

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(*c*) *Reg.* v. *Goss*, Bell, C. C. 208; 29 L. J., M. C. 86; *Reg.* v. *Abbott*, 1 Den. C. C. 273.

(*d*) *Reg.* v. *Ragg*, *id.* 214; *Reg.* v. *Sherwood*, D. & B. 251; 26 L. J., M. C. 81.

(*e*) *Reg.* v. *Roebuck*, Dears. & B. 24; 25 L. J., M. C. 101.

(*f*) *Reg.* v. *Dundas*, 6 Cox, C. C. 380.

(*g*) *Reg.* v. *Bryan*, D. & B. 265; 26 L. J., M. C. 84.

(*h*) See per *Bayley*, J., in *R.* v. *Jackson*, 3 Camp. 370; cited in *Wavell's case*, 1 Moo. C. C. R. 228. See *Locket's case*, 1 Leach, 94; 3 T. R. 98; 2 East, P. C. c. 18, ss. 8, 9.

(*i*) *R.* v. *Lara*, 6 T. R. 565; *R.* v. *Flint*, R. & Ry. 460, *ante*, p. 330. Per *Patteson*, J., in *Wickham* v. *Reg.* (in error), 10 A. & E. 34; 2 P. & D. 33.

A false pretence of this kind was held to be well laid "that the cheque was a good and genuine order for the payment of, and of the value of, the sum specified;" *R.* v. *Parker*, 2 Moo. C. C. 1. A count alleged the prisoner to have obtained from G. P. by a false pretence (stated) a sovereign, "with intent to defraud G. P. of the sum of 5*s.*, parcel of the value of the last-mentioned piece of the current gold coin." Prisoner was shown to have made the pretence laid, viz., that he was Mr. H., and thereby induced G. P. to buy, at the cost of 5*s.*, a bottle of stuff he said would cure G. P.'s child. G. P. gave him a sovereign and received 15*s.* in change. Prisoner was shown not to be H.: held to be a false pretence, and intent well laid; *Reg.* v. *Bloomfield*, C. & Mar. 537.

(*k*) *R.* v. *Wakeling*, R. & Ry. 504.

ting the offence (*l*), provided the person parted with the money in the belief that the false pretence was true (*m*). *Nature of the False Pretence.*

Cheating at play is obtaining by false pretences; for by 8 & 9 Vict. c. 109, s. 17, every person who shall by any fraud or unlawful device, or ill-practice in playing at or with cards, dice, tables or other game, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat and defraud such person of the same, and being convicted thereof shall be punished accordingly.

The offence under this section consists in winning the money; and it appears that that means rather the right to have the money than the actual obtaining of the money, and that it is not necessary to state in the indictment to whom the money won belonged, but at any rate after verdict on motion in arrest of judgment the indictment omitting such an allegation is sufficient by virtue of 7 Geo. 4, c. 64, s. 21 (*n*).

So, obtaining a cheque on a banker, on unstamped paper, payable to a person named, but not to bearer also, is not obtaining a "valuable security" within the act, for, by 55 Geo. 3, c. 184, the banker would be liable to a penalty of 50*l.* for paying it (*o*). Obtaining credit on account from the prisoner's bankers by drawing a bill on a person on whom he has no right to draw, and which has no chance of being paid, and delivering it to them, is not obtaining *money*, though the bankers in consequence pay money on the prisoner's account to other people to a larger extent than they would otherwise have done (*p*); but by the 89th section of the 24 & 25 Vict. c. 96 (*q*), whoever shall by any false pretence cause or procure any money to be paid, or any chattel or valuable security to be delivered to any other person for the use or benefit, or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel or valuable security within the meaning of the last preceding section. This section seems to meet the case of *Reg.* v. *Butcher* (*r*). Procuring chattel, &c. to be delivered to another person.

A false pretence by a servant to his master or his master's agent that a larger amount was required by him to pay certain dock dues or such like matters for his master than was really

(*l*) *R.* v. *Ady*, 7 C. & P. 140.
(*m*) *Reg.* v. *Mills*, D. & B. 205.
(*n*) *Reg.* v. *Moss*, D. & B. 104; 26 L. J., M. C. 9.
(*o*) *R.* v. *Yates*, 1 Moo. C. C. 170.
(*p*) *R.* v. *Wavell*, 1 Moo. C. C. 224.
(*q*) *Reg.* v. *Eagleton*, Dears. C. C. 515; 24 L. J., M. C. 158.
(*r*) Bell, C. C. 6; 28 L. J., M. C. 14; *R.* v. *Wavell*, 1 Moo. C. C. 224.

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required, whereby he obtained the larger sum and paid the smaller amounts, is an obtaining the money by false pretences (*s*), or a larceny of the money as a servant according to the circumstances of each case (*t*). So, where upon a pretence by a servant to a chief clerk of his master that he had in the course of his duty paid a certain sum for kitchen stuff which he had bought for his master, the servant obtained from the clerk such sum of monies of the master which the master had furnished the clerk with to pay for kitchen stuff, he was held not to be indictable for larceny because the clerk had delivered the money to him with the intention of parting with it altogether, but was indictable for false pretences (*u*).

Indictment against several persons or for several charges, and evidence.

If several persons are present at the time of the false pretence, and concur in the fraud, though the words are uttered by one only, all may be included in the indictment, for the act of one is the act of all (*x*). Nor is it any objection that the same indictment includes several charges (*y*). Where two matters were so connected in one count as false pretences that they could not be separated; the falsehood of one not being proved, judgment for the crown was reversed on error (*z*).

If the false pretences alleged are proved by means of two conversations which have taken place at some interval of time, and have reference to the same subject, it is for the jury to determine whether they were connected so as to make both one continuing representation (*a*).

Of the allegations of indictment.

A mere allegation in the words of the statute (*b*), that the defendant obtained the goods by a *false* pretence or pretences, without specifying more, will not suffice, if objected to before verdict (*c*), for the particular matter relied on as having been falsely pretended must be set out, and the truth of it distinctly negatived by specific averment, or the indictment will be bad on error; but it is not necessary to set out a written document unless something turns upon its nature and character (*d*). The particular false pretence need not however be set out on an indictment for *conspiring* to obtain money by false pretences (*e*), for there the conspiring is the gist of the

(*s*) *Reg.* v. *Thompson*, 32 L. J., M. C. 57; L. & C. 233.
(*t*) *Reg.* v. *Cooke*, 40 L. J., M. C. 68; L. R., 1 C. C. R. 295.
(*u*) *Reg.* v. *Barnes*, 2 Den. C. C. 59; 20 L. J., M. C. 34.
(*x*) *R.* v. *Young*, 3 T. R. 98; *R.* v. *Coulson*, 1 Den. C. C. 592; 19 L. J., M. C. 182.
(*y*) *Ibid.*
(*z*) *Wickham* v. *The Queen* (in error), 2 P. & D. 333; 10 A. & E. 34.
(*a*) *Reg.* v. *Welman*, Dears. C. C. 188; 22 L. J., M. C. 118.
(*b*) As to using words of statutes, see *ante*, pp. 197, 220; *In re Fletcher*, 13 L. J., M. C. 16; see *Fletcher* v. *Calthrop*, 1 New Sess. Cas. 529; *Reg.* v. *Kenrick*, 5 Q. B. 49; 12 L. J., M. C. 135.
(*c*) 7 & 8 Geo. 4, c. 64, s. 21, *ante*, p. 197.
(*d*) *Reg.* v. *Coulson*, 1 Den. C. C. 592; 19 L. J., M. C. 182; *Reg.* v. *Woolley*, 1 Den. C. C. 559; 19 L. J., M. C. 165.
(*e*) *R.* v. *Perrott*, 2 M. & S. 379, 386; relied on in *R.* v. *Harris*, 5 B. & A. 926, 934; *R.* v. *Munoz*, Stra. 1127; *R.* v. *Mason*, 2 T. R. 581; *R.* v. *Gill*, 2 B. & A. 204; and see *ante*, p. 518, *in notis*.

offence. The evidence must sustain the allegations (*f*); it is not necessary, however, that the whole representation set out should be stated or proved to have been false; nor that the whole of the allegations, either of the pretence or falsehood, should be proved; it will suffice if any entire allegation of pretence and falsehood is sustained, and if such false pretence as charged, or a part of it, appears to have been the efficient cause of the success of the prisoner's fraud (*g*). *Of the Allegations in the Indictment.*

By a proviso to the 88th section of the 24 & 25 Vict. c. 96, "it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences to allege that the party accused did the act with intent to defraud without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security." This section gets rid of the difficulty raised by *Sill* v. *The Queen* (*h*). As to allegation of intent to defraud, &c.

The indictment must show with convenient certainty a false pretence respecting an existing fact, and it was held not to do so where it alleged the false pretence to be that the prosecutor's cashier was to give the defendant a sum of money, and that the prosecutor was going to allow the defendant ten shillings a week for the benefit of his health (*i*); but it was held sufficient to allege that a woman obtained money from a married woman, whose husband had run away from her, by falsely pretending that she had the power to bring him back (*k*). But an indictment against a workman for falsely pretending that he had done more work than he had done, and so obtaining payment for it, it must be made clearly to appear that it was not a mere overcharge or fraudulent claim in respect of a *quantum meruit* (*l*). As to the false pretence.

To allege that the prisoner unlawfully obtained from A. B. "a cheque for the sum of 8*l.* 14*s.* 6*d.*, of the monies of the said A. B.," is sufficient to show that the cheque is the property of A. B. (*m*). And it should appear to whom the pretence is made, but if alleged to be made to B. and others, on proof that it was made to B. alone, the indictment may be read treating "and others" as surplusage (*n*).

But as to the proof of the intent to defraud, if the prosecutor has been induced to part with his goods by means of the false pretences used by the prisoner, it does not negative the intent to defraud, that the prisoner at the time he made the false pretences intended to pay the price of the goods when it should be in his power to do so (*o*). Intent to defraud.

(*f*) *Reg.* v. *Bulmer*, 33 L. J., M. C. 171; L. & C. 476.
(*g*) *R.* v. *Hill*, R. & Ry. 190; 2 Russ. C. & M. 311.
(*h*) 1 E. & B. 553; 22 L. J., M. C. 41.
(*i*) *Reg.* v. *Henshaw*, 33 L. J., M. C. 132; L & C. 444.
(*k*) *Reg.* v. *Giles*, 34 L. J., M. C. 50.
(*l*) *Reg.* v. *Oates*, Dears. C. C. 459; 24 L. J., M. C. 123.
(*m*) *Reg.* v. *Godfrey*, D. & B. 426; 27 L. J., M. C. 151; and see now the above proviso.
(*n*) *Reg.* v. *Kealey*, 2 Den. C. C. 69; 20 L. J., M. C. 57.
(*o*) *Reg.* v. *Naylor*, 35 L. J., M. C. 61; L. R., 1 C. C. R. 4.

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As to the trial of the indictment.

By the last proviso to the 88th section of the 24 & 25 Vict. c. 96, "on the trial of any such indictment," *i. e.*, an indictment for obtaining or attempting to obtain any chattel, money or valuable security by false pretence, "it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud."

And by a former proviso to the same section, "if upon the trial of any person indicted for such misdemeanour it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for larceny upon the same facts."

As to several counts.

If a committal has been made on a charge of obtaining one chattel, it is not allowable to add another count charging the obtaining another chattel at another time without obtaining an order under, or complying with, the Vexatious Indictments Act (22 & 23 Vict. c. 17); and if such second count be added the court ought to quash it, and not put the prisoner to plead to it (*d*). And if the court do not quash it, and evidence is given on both counts, the evidence relating to such second count will have been improperly admitted, and a conviction on the first count, as well as one on the second, will be quashed (*e*).

Evidence.

Where the false pretence consists in passing off the notes of a bank, which has stopped payment and become bankrupt years before, as good notes of a solvent bank, it is not necessary to produce the bankruptcy proceedings where there is proof that the bank had stopped payment forty years before and had not re-opened (*f*); but there must be some evidence to show that the notes were not of the value represented by the prisoner, and that he knew them not to be so (*g*). So if the pretence is by word of mouth that a note produced to be changed is a 5*l.* note, and change is given in belief of that fact, whilst it was in fact a 1*l.* Irish note, it makes no difference that the person receiving the note and deceived was able to read, and might, by reading it, have detected the fraud, if he did not in fact do so (*h*). There is no duty, on the part of the person to whom the representation is made, to inquire into the truth of the statement made before acting upon it (*i*); but the money, &c. must be obtained in consequence of the false pretence, so that if the prosecutor knew at the time he parted with the money that the statement made was false, it would not be indictable (*k*).

Evidence of a separate false pretence, similar to the one

(*d*) *Reg.* v. *Fuidge*, 33 L. J., M. C. 74; L. & C. 390.
(*e*) *Ibid.*
(*f*) *Reg.* v. *Dowey*, 37 L. J., M. C. 52.
(*g*) *Reg.* v. *Evans*, Bell, C. C. 187; 29 L. J., M. C. 20. See *ante*, p. 529.
(*h*) *Reg.* v. *Jessop*, D. & B. 442; 27 L. J., M. C. 70.
(*i*) *Reg.* v. *Woolley*, 1 Den. C. C. 559; 19 L. J., M. C. 165.
(*k*) *Reg.* v. *Mills*, D. & B. 205; 26 L. J., M. C. 79.

Trial of the Indictment.

charged in the indictment, made on a subsequent day, by which another sum of money was obtained, is not admissible to support the charge in the indictment (*l*). But evidence that on a prior occasion the prisoner made a different false pretence to a third person was held admissible to show the scienter of the prisoner (*m*); and it was further held, that where the prior false pretence related to the precious stone of which a ring was made, it was not necessary to produce the ring (*n*). Secondary evidence may be given of a writing containing the false pretence if it be lost before the trial (*o*). If the pretence is used in one county, and the money obtained in another, the venue may be laid in either (*p*).

Venue.

A man who obtains goods by false pretences in one county, and carries the goods into another county, when he is taken into custody, must be tried in the place where he so obtained the goods (*q*). A conviction had in the wrong county will be quashed on a case reserved by the Court of Crown Cases Reserved (*r*). When the false pretence was made by a letter posted in a county, and received in a county of a borough, and the money was sent by post in a registered letter posted in the borough and received by the prisoner in the county, it was held that the offence consisted of the making of the false pretence and obtaining the money by means of such false pretence, and that the offence was committed partly in one county and partly in another county, and that the case came within 7 Geo. 4, c. 64, s. 12, by which any misdemeanour begun in one county and completed in another may be tried in either of the said counties as if it had been wholly committed therein (*s*); but apart from the statute, according to *Reg.* v. *Jones* (*t*), the offence consists in obtaining the money, and that is obtained when and where the party sending it puts it into the post, inasmuch as the postmaster there is the prisoner's agent to receive it. This indictment cannot be removed by certiorari into Queen's Bench (*u*).

An allegation that the defendant did unlawfully falsely pretend, omitting the word knowingly, is good after verdict (*x*).

(*l*) *Reg.* v. *Holt*, Bell, C. C. 280; 30 L. J., M. C. 11.
(*m*) *Reg.* v. *Francis*, 43 L. J., M. C. 97; L. R., 2 C. C. R. 128.
(*n*) *Ibid.*
(*o*) *R.* v. *Chadwick*, 6 C. & P. 181.
(*p*) 7 Geo. 4, c. 64, s. 12. Not so before that act; *R.* v. *Burdett*, 4 B. & A. 179.
(*q*) *Reg.* v. *Stanbury*, 31 L. J., M. C. 88; L. & C. 128.
(*r*) *Ibid.*
(*s*) *Reg.* v. *Leech*, Dears. C. C. 642; 25 L. J., M. C. 77.
(*t*) 1 Den. C. C. 551.
(*u*) *Reg.* v. *Butcher*, 9 Dowl. P. C. 135; *R.* v. *Saunders*, 5 D. & R. 601.
(*x*) *Reg.* v. *Bowen*, 19 L. J., M. C. 65; *Reg.* v. *Coulson*, 1 Den. C. C. 592; 19 L. J., M. C. 182.

Forms of Indictment for obtaining Money, &c., by False Pretences.

Indictments for False Pretences on Stat. 24 & 25 *Vict. c.* 96, *s.* 88 :—

Indictment for obtaining Goods from a Tradesman under Pretence of being a Servant to a Customer, and sent for them by him.

That A. B., contriving and intending unlawfully, fraudulently and deceitfully to cheat and defraud one C. D. of his goods, wares and merchandises, on the ——— day of ———, at ——— aforesaid, unlawfully, knowingly and designedly did falsely (*y*) pretend to the said C. D. that he the said A. B. then was the servant of one C. Q. of ———, tailor (the said C. Q. then and long before being well known to the said C. D. and a customer of the said C. D. in his said business and way of trade), and that he the said A. B. was then sent by the said C. Q. to the said C. D. for ten yards of certain superfine woollen cloth, by which said false pretence the said A. B. did then and there, to wit, on, &c., at, &c. aforesaid, unlawfully, knowingly and designedly obtain from the said C. D. ten yards of superfine woollen cloth, of the goods, wares and merchandises of the said C. D. (*z*), with intent then and there to cheat and defraud him the said C. D. of the same, whereas in truth and in fact the said A. B. was not then the servant of the said C. Q., and whereas he the said A. B. was not then, or ever hath been, sent by the said C. Q. to the said C. D. for the said cloth, or for any cloth whatsoever, against the form of the statute, &c. and against the peace, &c.

Indictment for defrauding a Person of Goods by giving him in Payment a Cheque on Bankers, knowing it to be of no Value.

That A. B., on the ——— day of ———, A.D. ——, unlawfully, knowingly, designedly, fraudulently and deceitfully did deliver to W. J., a servant of B. M., sent by the said B. M. to the said A. B. with certain goods, &c., of the said B. M., who delivered the same to him with a bill and receipt, a certain paper writing purporting to be an order for payment of money, *subscribed A. B.* (*a*), purporting to bear date the, &c. and to be directed to P. and Q. bankers and partners, by the names and descriptions of, &c. for the payment of, &c. to Messrs. R. & M. or bearer, and then unlawfully, knowingly and designedly did falsely pretend that the said order was a valid order for the payment of the said sum of money, by means of which said false pretences the said A. B. did then unlawfully obtain from the said W. J. as servant of the said B. M. the said goods of the said B. M. with intent to defraud: whereas in truth and in fact the said order was not a valid order for the payment of the said sum, or any other sum, as he the said A. B. then well knew, contrary, &c.

(*y*) It has been reported that to say "feloniously," would be fatal; *R.* v. *Walker*, 6 C. & P. 657. Central Criminal Court. *Qu.* see *R.* v. *Scofield*, *post*.

(*z*) Essential to be stated; *Reg.* v. *Parker*, 3 Q. B. 292; *Reg.* v. *Norton*, 8 C. & P. 196. The want of it will occasion indictment to be quashed, for it is not cured by verdict under 7 Geo. 4, c. 64, s. 21. See *Martin* v. *The Queen* (in error), 3 N. & P. 472; 8 A. & E. 481; *R.* v. *Douglas*, *post*, 337.

(*a*) See, as to the necessity of setting out the document, *ante*, p. 532. It must be shown to be A. B.'s handwriting, and that he knew it to be worthless; *Wickham* v. *The Queen* (in error), 10 A. & E. 34; 2 P. & D. 333; *R.* v. *Philpotts*, C. & K. 112. See *R.* v. *Jackson*, *ante*, p. 332, note.

Section 10.

Receivers where principal offence is a misdemeanour.

By 24 & 25 Vict. c. 96, s. 95, whosoever shall receive any chattel, money, valuable security or other property whatsoever, the stealing, taking, obtaining, converting or disposing whereof is made a misdemeanour by this act, knowing the same to have been unlawfully stolen, taken, obtained, converted or disposed of, shall be guilty of a misdemeanour, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanour shall or shall not have been previously convicted thereof, and shall or shall not be amenable to justice, and every such receiver, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than five years (*b*), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. 24 & 25 Vict. c. 96, s. 95.

When the goods received have been obtained by false pretences, the indictment should state that the goods had been so obtained (*c*), and it is the safer course to set forth the particular false pretences used (*d*).

Indictment for receiving Goods obtained by False Pretences.

For that A. B., on the ——— day of ———, A.D. ——, unlawfully, knowingly and fraudulently did receive ten gold watches of the value of ———, of the goods and chattels of E. F., by one C. D., then lately before unlawfully obtained from the said E. F., with intent to defraud, by false pretences, that is to say, by falsely pretending to ——— that he the said C. D. was the servant of one G. H., and had been sent by the said G. H. for the said watches to be inspected by him, whereas in truth and in fact the said C. D. was not the servant of the said G. H., nor had he been sent by the said G. H. for the said watches as aforesaid, or for any other purpose whatsoever; and he the said A. B., at the time of receiving the said watches as aforesaid, well knew the same to have been unlawfully obtained by the said C. D. from the said G. H. by the false pretences aforesaid, with intent to defraud, against the form of the statute, &c., and against the peace of our lady the Queen, her crown and dignity (*e*). Receiving goods unlawfully obtained, &c.

(*b*) 27 & 28 Vict. c. 47, s. 2.
(*c*) See *Reg.* v. *Wilson*, 2 Moo. C. C. 52.
(*d*) *Reg.* v. *Goldsmith*, L. R., 2 C. C. R. 74; 42 L. J., M. C. 94.
(*e*) *Ibid.*

Challenges, &c.

Section 11.

CHALLENGING AND BEARING CHALLENGES.

Challenges to break the peace by fighting are indictable as misdemeanours, as well in those who send, as in those who knowingly carry them. Upon the same principle, employing words or writings for the purpose of provoking another to send a challenge, where the tendency is direct and manifest, is equally indictable, even though the provocation should fail in its object (*f*). And no previous misconduct on the part of the individual challenged or provoked will form a defence against such an indictment, so as to entitle the defendant to an acquittal, although it will weigh with the court in determining the sentence (*g*). Where, indeed, a party challenged applies to the Court of Queen's Bench for a criminal information, that extraordinary remedy will not be granted, if he shall appear to have given provocation to his adversary, but he will be left to indict at the assizes or sessions. The punishment, on conviction, is fine or imprisonment, or both, in the discretion of the court.

Indictment for sending a Challenge inclosed in a Letter (*h*).

That T. M., being a person of a wicked and malicious disposition, and wickedly and maliciously intending and designing, as much as in him lay, not only to disquiet and terrify one D. E., but also the said D. E. maliciously to kill and murder, on the ——— day of ——— A.D. ——, did unlawfully and wickedly provoke and excite the said D. E. to fight a duel with and against him the said T. M., and that he the said T. M. a certain challenge, in the name of the said T. M., in the form of a letter to the said D. E. directed, did then and there maliciously and unlawfully write and cause to be written, and which said letter was to the tenor and effect following, that is to say [*here set forth the letter, with proper innuendos to explain it*], which said challenge, so as aforesaid written and directed, he the said T. M. afterwards to wit, on the said, &c. at, &c. aforesaid, maliciously and unlawfully, to the said D. E. did send and deliver, and cause to be sent and delivered, to the great damage and terror of him the said D. E., to the evil example, &c., and against the peace, &c.

Section 12.

CHEATS AT COMMON LAW.

A mere private imposition short of felony, and effected by a "naked lie" without the association of artful device, or false token, voucher, order, &c., is not indictable as a cheat at common law, unless it is public in its nature, and calculated to defraud numbers, or to injure the crown or the public in

(*f*) *R.* v. *Phillips*, 6 East, 464.
(*g*) *R.* v. *Rice*, 3 East, 581.
(*h*) The venue may be laid either in the county where the challenge was written, or in that where it was received, according to its direction; *R.* v. *Williams*, 2 Campb. 506.

Cheats at Common Law.

general (*i*), as by a person in the course of his trade openly and publicly carried on (*k*). For in other cases prudence and caution, it was thought, would supply sufficient security (*l*); but the selling by false weights and measures, though to one person only, or producing false tokens, or taking other like measures to cheat, as by putting a false mark or token upon an article so as to pass it off as a genuine one, when in fact it is a spurious one (*m*), which cannot be guarded against by ordinary care, were always held indictable offences (*n*).

What frauds amount to cheats at common law.

Such are the following among other frauds:—Those affecting the administration of public justice, as counterfeiting a creditor's authority to discharge his debtor from prison (though, if genuine, it would be good), whereby his liberation was effected (*o*), or endangering the public health by selling unwholesome provisions, unfit for the food of man, whether to the public generally (*p*), or under a contract with government for supplies to particular bodies, as foreign prisoners of war under the king's protection (*q*), or the military asylum at Chelsea (*r*). Frauds calculated to affect all persons, as selling by false weights and measures (*s*), counterfeiting tokens of public authenticity, as the alnager's seal on cloth, while those duties remained unrepealed by 11 & 12 Will. 3, c. 20, s. 2 (*t*), playing with false dice (*u*), obtaining money from a soldier on a false pretence of having a power to discharge him (*x*), or getting the king's bounty by enlisting as a soldier, being an apprentice, liable to be retaken by a master (*y*).

To put the mark of a particular manufacturer on a gun, so as to make it appear the genuine production of the manufacturer, which it was not, and by that means to obtain the price of a genuine article; or to paint an artist's name in the corner of a picture, in order to pass it off as an original picture by the artist, and by that means to obtain the price of a genuine picture, is a cheat at common law (*z*).

(*i*) *Reg.* v. *Eagleton*, Dears. C. C. 376, 515; 24 L. J., M. C. 158; 1 East, P. C. 817, 821, *ante*, p. 220; and see *Wickham* v. *The Queen*, 10 A. & E. 37; 2 P. & D. 334, per Lord *Denman*.

(*k*) *Reg.* v. *Closs*, D. & B. 460; 27 L. J., M. C. 54.

(*l*) 1 Hawk. c. 71, s. 2; 2 East, P. C. 818; *R.* v. *Gibbs*, 1 East, R. 185; but see *Reg.* v. *Woolley*, 1 Den. C. C. 559; 19 L. J., M. C. 165.

(*m*) *Reg.* v. *Closs*, *ubi sup.*

(*n*) See *R.* v. *Wheatley*, 1 Bla. R. 273; 2 Burr. 1125; cited 6 T. R. 565; 10 A. & E. 37; *R.* v. *Young*, 3 T. R. 104, per *Buller*, J.

(*o*) *R.* v. *Fawcett*, 2 East, P. C. 826, 862.

(*p*) *R.* v. *Treeve*, 2 East, P. C. 821.

(*q*) *Ibid.*

(*r*) *R.* v. *Dixon*, 2 Camp. 12; 3 M. & S. 11.

(*s*) *R.* v. *Wheatley*, 1 Bla. R. 273; 2 Burr. 1125, overruling *R.* v. *Wood*, 1 Sess. Ca. 217; *R.* v. *Young*, 3 T. R. 104.

(*t*) *R.* v. *Edwards*, Tremaine's P. C. 103; 2 East, 820.

(*u*) *R.* v. *Leeser*, Cro. Jac. 497.

(*x*) *Serlested's case*, Latch, 202. As to this case, see 6 East, 141.

(*y*) *R.* v. *Jones*, 2 East, P. C. 822; 1 Leach, 174. See p. 335. Also 7 Will. 4 & 1 Vict. c. 17, s. 40; c. 18, s. 37; and the Annual Mutiny Acts.

(*z*) *Reg.* v. *Closs*, D. & B. 460; 27 L. J., M. C. 54.

Cheats at Common Law.

What frauds not cheats at common law.

The following are some instances of frauds on individuals, which, not being effected in the course of general practice, or by means generally calculated to injure the public, are not indictable at common law: selling a smaller as and for a larger quantity of an article, if without using false weights or measures, this being a deception which could not have taken effect but for the buyer's carelessness in accepting without measuring (*a*). The like where a miller, who had received good barley to grind, delivered in return meal of musty and unwholesome barley, or of barley mixed with other grain, but not for the food of man, and the mill not being a soke mill, to which certain residents were obliged to resort to grind their corn (*b*). So as to obtaining money of A. by pretending to come by command of B. to receive money (*c*), or detaining part of corn sent to be ground (*d*). As to drawing cheque on a banker where party has no cash, see *ante*, p. 530.

Indictment for Cheat at Common Law in selling by false Weight or Measure.

Form of indictment.

That A. B., on the ——— day of ———, A.D. ——, and from thence until the taking this inquisition, at ———, did use and exercise the trade and business of a grocer, and during that time did deal in the buying and selling by weight of [tea, &c.] and of divers other goods, wares and merchandises; and that the said A. B. contriving and fraudulently intending to cheat and defraud the subjects of our said lady the Queen, whilst he used and exercised his said trade and business, to wit, on, &c. and on divers other days and times between that day and the day of taking of this inquisition, at, &c. aforesaid, did knowingly, wilfully, falsely, fraudulently and deceitfully keep in a certain shop there, wherein he the said A. B. did so as aforesaid carry on his said trade, a certain false pair of scales for the weighing of goods, wares and merchandises by him sold in the way of his said trade, which said scales were then and there by artful and deceitful contrivance so made and constructed, as to cause every quantity of goods, wares and merchandises weighed therein and sold thereby, to appear of greater weight than the real and true weight by one-tenth part of such apparent weight; and that the said A. B. on, &c. aforesaid, at, &c. aforesaid (he the said A. B. then and there well knowing the said scales to be false as aforesaid), did, by means of the said false pair of scales, and by weighing the said tea in and by the same, knowingly, wilfully and fraudulently sell and utter to one C. D., a subject of our said lady the Queen, certain goods in the way of his said trade, to wit, a large quantity of tea weighed in and by the said false scales, and as and for ten pounds weight of tea, whereas in truth and in fact the weight of the said tea so sold as aforesaid was short and deficient of the said weight of ten pounds by one-tenth part of the said weight of ten pounds, to wit, at, &c. aforesaid, against the peace, &c.

Punishment.

The punishment for frauds indictable at common law is fine and imprisonment, in the discretion of the court.

(*a*) *R.* v. *Wheatley*, 2 Burr. 1125; Cowp. 324; East, P. C. 817, 819.
(*b*) *R.* v. *Haynes*, 4 M. & S. 220. See 6 East, 133.
(*c*) *R.* v. *Jones*, 2 Ld. Raym. 1013; Salk. 379; 6 Mod. 105. See 1 Hawk. c. 71, s. 2; 2 East, P. C. 818.
(*d*) *Channel's case*, Stra. 793.

Section 13.

INJURIES TO PROPERTY.

Injuries to buildings by tenants.

By 24 & 25 Vict. c. 97, s. 13, whosoever being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully or maliciously pull down or sever from the freehold any fixture, being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanour.

No punishment being imposed by the act, the punishment at common law must follow, that is, imprisonment or a reasonable fine, or both. The imprisonment may be in the gaol or house of correction (*e*), and the costs may be allowed (*f*).

Destroying a turnpike gate, toll house, &c.

By 24 & 25 Vict. c. 97, s. 34, whosoever shall unlawfully and maliciously throw down, level or otherwise destroy, in whole or in part, any turnpike gate or toll bar, or any wall, chain, rail, post, bar or other fence belonging to any turnpike gate or toll bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act of parliament relating thereto, or any house, building or weighing engine erected for the better collection, ascertainment or security of any such toll, shall be guilty of a misdemeanour.

As no punishment is affixed by the statute, the common law punishment of imprisonment or fine, or both, follows. The imprisonment may be in the gaol or house of correction, under sect. 74 (*e*); and costs may be allowed under sect. 77 (*f*).

Damaging trees, wheresoever growing, to the amount of one shilling, after two summary convictions for the same offence.

Sect. 22. Whosoever shall unlawfully and maliciously cut, break, root up or otherwise destroy or damage the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same may be growing, the injury done being to the amount of one shilling at the least, shall, on conviction thereof before a justice of the peace (at the discretion of the justice), either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever having been convicted of any such offence (either against this or any former act of parliament), shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard

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(*e*) 24 & 25 Vict. c. 97, s. 74, *ante*, p. 459.
(*f*) *Ib.* sect. 77, *ante*, p. 459.

Injuries to Property, &c.

labour for such term, not exceeding twelve months, as the convicting justices shall think fit; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this act), shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Obstructing engines or carriages on railways.

Sect. 36. Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour (*g*).

It is an unlawful act of obstructing an engine, to alter the arms of a semaphore signal from "all clear" to "danger" and "caution," and to change the colour of two distant signals from white to red, whereby the driver of a goods train was caused to slacken speed almost to a stand-still (*h*).

So it is also for a person to hold up his arms as a signal, whereby a driver of a train is induced to reduce his speed from twenty miles to four (*i*).

This section applies to a railway though it has not been opened to the use of the public, if it be complete and fit for use (*k*).

Injuries to electric or magnetic telegraphs.

Sect. 37. Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance or delivery of any communication by any such telegraph, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: provided that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall, on conviction thereof, at the discretion of the justice, either be

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(*g*) See sect. 74, *ante*, p. 459; and as to costs, sect. 77, *ibid.*
(*h*) *Reg.* v. *Hadfield*, 39 L. J., M. C. 131; L. R., 1 C. C. R. 253.
(*i*) *Reg.* v. *Hardy*, 40 L. J., M. C. 62; L. R., 1 C. C. R. 278.
(*k*) *Reg.* v. *Bradford*, 29 L. J., M. C. 171; Bell, C. C. 268.

committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet (*l*).

Injuries to Works of Art, &c.

Sect. 39. Whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust or vase, or any other article or thing kept for the purposes of art, science or literature, or as an object of curiosity in any museum, gallery, cabinet, library or other repository, which museum, gallery, cabinet, library or other repository is either at all times or from time to time open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof or by the payment of money before entering the same, or any picture, statue, monument or other memorial of the dead, painted glass or other ornament or work of art in any church, chapel, meeting house or other place of divine worship, or in any building belonging to the Queen, or to any county, riding, division, borough, poor law union, parish or place, or to any university or college or hall of any university, or to any inn of court, or in any street, square, churchyard, burial ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing or fence surrounding such statue or monument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping: provided that nothing herein contained shall be deemed to affect the right of any person to recover by action at law damages for the injury so committed.

Injuries to works of art in museums, churches, &c

As to punishment and costs, see sects. 73, 74, 77, *ante*, pp. 458, 459.

By 24 & 25 Vict. c. 97, s. 51, whosoever shall unlawfully and maliciously commit any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided (*m*), the damage, injury or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable, at the discretion of the court, to be kept in penal servitude for five years (*n*), or to be imprisoned for any term not exceeding two years, with or without hard labour.

Persons committing malicious injuries to property exceeding the amount of 5*l.* not provided for by 24 & 25 Vict. c. 97, ss. 1—50.

(*l*) See sects. 74 and 77, *ante*, p. 459.
(*m*) For the provisions as to felonies, see *ante*.
(*n*) 27 & 28 Vict. c. 47, s. 2.

Injuries to Property.

As to fine and sureties to keep the peace, see sect. 73, *ante*, p. 458; and as to hard labour and costs, sects. 74, 77, *ante*, p. 459.

Making or having gunpowder, &c. with intent to commit any felony against this act.

Sect. 54. Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this act mentioned, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

Abettors in misdemeanors.

By 24 & 25 Vict. c. 97, s. 56, every person who shall aid, abet, counsel or procure the commission of any misdemeanour punishable under this act shall be liable to be proceeded against, indicted and punished as a principal offender. As to fines and sureties of the peace, see sect. 73, *ante*, p. 458; as to hard labour and solitary confinement, sects. 74, 75, *ante*, p. 459; and costs, sect. 77, *ante*, p. 459.

For the general provisions in respect of malicious injuries to property, as malice against the owner of property being unnecessary, see sect. 58, *ante*, p. 457; and with respect to cases where the offender is in possession of the property injured, sect. 59 (*o*); and as to its being unnecessary to prove that the intent to injure or defraud was directed to any particular person, sect. 60 (*p*).

As to offences committed within the jurisdiction of the Admiralty, sect. 72, *ante*, p. 458.

Indictment for demolishing a House or part thereof.

That A. B. was possessed of a certain dwelling-house, situate at ———, in the parish of D. in the county of M., and known as ———, and that the same was held by the said A. B. for the term of ten years, as tenant thereof to E. F.; and that the said A. B. being so possessed thereof on the ——— day of ———, at ———, did unlawfully and maliciously begin to demolish the same, contrary to the form of the statute, and against the peace, &c.

Section 14.

ESCAPE, PRISON BREACH, AND RESCUE.

Escapes.

All escapes from lawful custody, whether effected with or without force; all failures of duty in gaolers and officers by which their prisoners escape, whether wilful or negligent; and every rescuing or attempting to rescue parties lawfully charged with crime, are offences, differing in degree according to circum-

(*o*) 27 & 28 Vict. c. 47, s. 2.
(*p*) *Ante*, p. 459.

stances, but punishable either as misdemeanours or as felonies. *Escapes.*
The lowest degree of offence is that of the prisoner himself, when he takes advantage of the negligence of his keeper to regain his liberty; yet even this is a misdemeanour punishable by fine and imprisonment; because the law requires of all persons to submit themselves to its judgment, and to remain in custody till delivered by lawful process (*q*). The breach of prison by a party in custody, for whatever offence, was felony by the common law (*r*); but by the statute *de frangentibus prisonam* (*s*) it was enacted, "That none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was so taken and imprisoned did require such a judgment, if he had been convicted thereupon according to the law and custom of the realm." Thus, for a prisoner to break prison who is in custody on a capital charge is still felony, if the actual escape is proved (*t*); but, when in custody on a minor charge, it is now a misdemeanour, punishable with fine and imprisonment in the discretion of the court. Such a person is now also punishable summarily as an incorrigible rogue; see *post*, p. 638. Prison breach.

Whenever an officer, having a party lawfully in his custody, on a charge of felony, voluntarily permits him to escape, the officer is involved in the legal guilt of the crime charged on his prisoner (*u*). Where he negligently permits a prisoner to escape, which is defined to be where he omits to make fresh pursuit after him, he is guilty of a misdemeanour. And he is guilty, in this degree, if, from his negligence, a prisoner in his charge commits suicide, against which it is his duty to guard (*x*). But to constitute an indictable offence, either in the party or in the Escapes permitted by officers.

(*q*) 1 Hale, 611.
(*r*) *Ib.* 607.
(*s*) 1 Edw. 2, stat. 2. A "prison" may be any *lawful* place of imprisonment, as gaol, constable's house, &c.; 1 Hale, 609; 2 Inst. 589.
(*t*) 2 Hawk. c. 18, s. 12; *R.* v. *Tilley*, 2 Leach, 771: and is now punishable under the general provision of 7 & 8 Geo. 4, c. 28, s. 8, as being a "felony for which no punishment has been, or hereafter may be, specially provided," by transportation for seven years (now penal servitude, 20 & 21 Vict. c. 3, s. 2), or imprisonment for not exceeding two years, with whipping, once, twice, or thrice, if a male, and the court so think fit; and the imprisonment may be with or without hard labour in the common gaol or house of correction, and with solitary confinement for the whole or any portion or portions of the imprisonment according to the discretion of the court (7 & 8 Geo. 4, c. 28, s. 9); the solitary confinement not to be for longer than a month at one time or three months in a year (7 Will. 4 & 1 Vict. c. 9, s. 5). See *R.* v. *Stanley*, Russ. & Ry. 432. A breach of prison must be shown, though unintentional, as by throwing down loose bricks, *R.* v. *Haswell*, R. & Ry. 458; merely getting over the walls, passing out through a door, &c. is merely an escape, and not a breach of prison, 2 Hawk. c. 18, s. 9.
(*u*) Hawk. b. 2, c. 19, s. 40.
(*x*) Dalt. J. c. 159.

Escapes.

officer, there must be an actual and legal arrest previously made for a criminal matter; and, therefore, if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him for his prisoner, but never have him actually in his custody, and the party gets free, this is no escape in either (*c*). It is, however, an offence in any person wilfully to throw obstacles in the way of a lawful arrest on a criminal charge, and in a case of felony would constitute the party so offending an accessory (*d*).

Rescue by third persons.

Rescue is where a third person procures or assists the escape of a prisoner; and by 28 & 29 Vict. c. 126, s. 37, every person who aids any prisoner in escaping, or attempting to escape, from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress or other disguise, or any letter or any other article or thing, shall be guilty of felony, and, on conviction, be sentenced to imprisonment with hard labour for a term not exceeding two years (*e*). The act does not apply to the prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prison (*f*). "A prison" shall mean gaol, house of correction, bridewell or penitentiary; it shall include the airing grounds or other grounds or buildings occupied by prison officers for the use of the prison, and contiguous thereto (*g*).

Conveying into prisons disguise, &c. to facilitate escape.

Rescue of distress and pound breach.

Rescuing goods in custody of the law, as goods lawfully distrained for rent, and pound breach, are offences of the same kind as the rescue of prisoners, being injuries and insults of public justice, though of very inferior degree; and as such seem indictable at common law, and punishable with fine and imprisonment, in the discretion of the court (*h*). But offences of releasing or attempting to release animals lawfully seized for the purpose of being impounded, in consequence of having *been found straying, &c. or depasturing on inclosed land* without consent of the owner or occupier, either before or after impounded,—or of damaging any pound or lock or bolt thereof, are now subjected to a penalty of not exceeding 5*l.*, on conviction before two justices (*i*). Still, however, these offences seem indictable, see *ante*, Sect. 1, p. 468.

Indictment and evidence.

All indictments for escapes and rescues must show that the party was in custody charged with some crime, or committed for some crime, in a manner which makes the custody law-

(*c*) Hawk. b. 2, c. 19, s. 1.
(*d*) 1 Hale, 606.
(*e*) See indictments on this section; Archb. Cr. Pl. & Ev. 17th ed. 801.
(*f*) Sect. 3.
(*g*) 28 & 29 Vict. c. 126, s. 4. See *Reg.* v. *Holloway*, decided upon the repealed statute of 4 Geo. 4, c. 64.
(*h*) See 2 Hawk. c. 21, s. 20, and other authorities collected, 2 Chit. Cr. L. 204, note (*b*), Bac. Abr. *tit. Rescue.*
(*i*) 6 & 7 Vict. c. 30, s. 1.

ful (*k*). It is necessary, therefore, to allege and prove the charge, or conviction and warrant under which he was in custody, and an allegation that he was *duly* in custody will not suffice (*l*); for the legality of the custody is an inference in law to be drawn from the facts set forth, and of which the court must judge (*m*). But under "The Prisons Act, 1865," any writ, warrant or other legal instrument addressed to the gaoler of a particular prison, describing the prison by its situation or other definite description, shall be valid by whatever title such prison is usually known, or whatever be the description of the prison, whether gaol, house of correction, bridewell, penitentiary or otherwise (*n*); and by the same statute, sect. 58, every prisoner confined in a prison within the meaning of that act shall be deemed to be in the legal custody of the gaoler. So a count upon the 28 & 29 Vict. c. 126, s. 37 (see *supra*), will be sufficient, though it does not state the means employed to assist the prisoner (*o*).

Rescue of Goods.

If a certificate of the clerk of the court in which he is convicted be relied on, it must set forth the substance and effect of the conviction. Thus merely stating a party to have been "convicted of felony" will not suffice (*p*). It must also appear that the prisoner went at large, as well as that he escaped (*q*), for escape is getting out of view of the gaoler and being retaken on fresh suit (*r*): and in an indictment against an officer it must be stated whether the escape was suffered negligently or voluntarily; but, though negligence must be alleged, it need not be proved; for it will be inferred from the fact of the escape, unless rebutted by circumstances showing that it was produced by the unexpected and irresistible force of others (*s*).

Where any person is convicted of any escape or rescue from lawful custody on a criminal charge, the court may sentence the offender to be imprisoned for any term warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment (*t*).

Punishment.

See further as to these offences, Russell on Crimes, ed. Greaves, vol. 1, cc. 32, 33.

(*k*) *R.* v. *Fell*, 1 Lord Raym. 424.
(*l*) *R.* v. *Freeman*, Stra. 1226, and cases collected, 2 Ch. Cr. L. 1st ed. 172.
(*m*) *R.* v. *Richardson*, 1 Burr. 540; but see *contra*, Peake's Ch. P. 155.
(*n*) 28 & 29 Vict. c. 126, s. 61.
(*o*) *Reg.* v. *Holloway*, 2 Den. C. C. 287.
(*p*) *R.* v. *Watson*, R. & Ry. 468.
(*q*) Hawk. b. 2, c. 19, s. 14.
(*r*) Dalton, ch. 159.
(*s*) 1 Hale, 600.
(*t*) 14 & 15 Vict. c. 100, s. 29.

Indictment against a Parish Constable for negligently permitting a Person to escape who had been arrested by him on a Warrant for Misdemeanour, and directing him to bring the Party accused before a Magistrate.

Forms of indictment.

That on, &c. at, &c. one S. O. came before A. B. esquire, then and yet one of the justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county of N. and also to hear and determine divers felonies, trespasses, and other misdeeds, committed in the same county; and the said S. O. did then and there, on his oath, before the same justice, charge, accuse, and give information against one M. M. that he the said M. M. had then lately before unlawfully and designedly obtained certain monies of one G. H. from the said G. H. by certain false pretences, with intent to defraud, [*or*, that he the said M. M. had feloniously ravished A. B. spinster, and had carnal knowledge of her body against her will, &c. &c.,] whereupon he the said A. B. the justice aforesaid, did then and there make a certain warrant, under his hand and seal, in due form of law, directed to the constables of the parish of R. aforesaid, in the county aforesaid, thereby requiring them to take the body of the said M. M. and bring him before the said A. B. the justice aforesaid, to answer to such matters and things as should be alleged against him, touching the said offence; which said warrant afterwards, to wit, on the same day and year aforesaid, at D. aforesaid, in the county aforesaid, was delivered to one H. W., then being one of the constables of the said parish of R., in due form of law to be executed; by virtue of which said warrant the said H. W. afterwards, to wit, on the said, &c. at, &c. aforesaid, did take and arrest the body of the said M. M. and him the said M. M. in his custody, for the cause aforesaid, had; nevertheless, the said H. W. afterwards, to wit, on the said, &c. the duty of his office in that respect not regarding, at the parish of R. in the county aforesaid, unlawfully and *negligently* did permit and suffer the said M. M. to escape and go at large whithersoever he would, out of the custody of him the said H. W. to the great hinderance of justice, and against the peace, &c.

Indictment against two Persons for rescuing from a Constable a Person in his Custody for an Assault.

That on, &c. T. R. esquire, one of the justices of our said lady the Queen, assigned to keep the peace in and for the said county of ———, and also to hear and determine divers felonies, trespasses, and other misdemeanours, in the said county committed, did issue, make, direct, and deliver a warrant or precept in writing to W. C. of ———, in the county aforesaid, one of the constables of ———, in the county aforesaid, by which said warrant he the said W. C., the constable aforesaid, was commanded to take the body of D. D., late of ———, and bring him the said D. D. before the said T. R. to be examined by him the said T. R. concerning an assault said to have been committed by him the said D. D. upon B. G. J. of ———, which said W. C. the constable aforesaid, afterwards, that is to say, on, &c. aforesaid, at ——— aforesaid, in the county aforesaid, by virtue of the said warrant, did take and arrest him the said D. D. for the cause aforesaid, and him the said D. D. in his custody, by virtue of the said warrant, then and there had; and that R. R. and S. R. well knowing the said D. D. so to be arrested as aforesaid, afterwards, to wit, on the said, &c. at, &c. aforesaid, in and upon the said W. C. the constable aforesaid, then and there being in the peace of God and our said lady the Queen, and in the execution of his said office, did make an assault, and him the said D. D. then and there did beat, wound, and ill-treat; and that the said R. R. and S. R. him the said D. D. out of the custody of him the said W. C. and against the will of the said W. C. unlawfully did rescue and put at large, to go whersoever he would; and that the said D. D. himself out of the custody

of the said W. C. and against the will of the said W. C., then and there, unlawfully did rescue and escape at large, wheresoever he would go, against the peace, &c.

Forms of Indictment.

Section 15.

FISH—TAKING IN PRIVILEGED PLACES—FISH-PONDS, BREAKING DOWN.

Provisions of 24 & 25 Vict. c. 93, s. 24, as to taking fish in any water near a dwelling-house.

By 24 & 25 Vict. c. 96, s. 24, "whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any *land adjoining or belonging to the dwelling-house* (*t*) of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanour; and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money not exceeding five pounds as to the justice shall seem meet: provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall by *angling* between the beginning of the last hour before sunrise and the expiration of the first hour after sunset unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds; and if in any such water as last mentioned, he shall on the like conviction forfeit and pay any sum not exceeding two pounds as to the justice shall seem meet; and if the boundary of any parish, township or vill shall happen to be in or by the side of any such

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(*t*) The water protected by the old law, 5 Geo. 3, c. 14, must have been in "inclosed ground, being private property." The following comment upon that enactment may perhaps illustrate the provision now in force. "The object of the legislature was to prevent trespassers from intruding into parks, gardens and inclosed places, and also to preserve fish in those waters in which the owner would be most desirous to preserve them; although, therefore, a trout in a river running through an open common is of equal value with a trout in a river running through a park or garden, yet taking a trout from the stream on a common (see *Lisle* v. *Brown*, 5 Taunt. 440; *R.* v. *Daman*, 1 Chit. R. 147; 2 B. & A. 378), is only a trespass [now punishable by fine and conviction under 24 & 25 Vict. c. 96, s. 24, above], while the taking one from a stream in a park or garden is an offence," now punishable as a misdemeanour as above. Per *Best*, C. J., in delivering the judgment of the Court of Common Pleas, *Wickes* v. *Clutterbuck*, 2 Bing. 491; 10 B. Moore, 63; see 5 Tyr. 296.

Taking Fish in a Private Fishery.

water as is hereinbefore mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township or vill named in the indictment or information, or in any parish, township or vill adjoining thereto."

By "unlawfully and wilfully" in the above section is meant intentionally and without any legal right; and a person is liable to be convicted under that section who fishes in private water under a claim of a right as one of the public acquired by public user, inasmuch as such a right cannot exist in law; and it is no defence that he *bonâ fide* but mistakenly supposed that he had such right (*u*).

The common law punishment of fine or imprisonment or both seems to follow, as no punishment is fixed by the statute. And see 24 & 25 Vict. c. 96, s. 118, *ante*, p. 389, as to hard labour.

Indictment on the first Clause of sect. 24 *of* 24 *&* 25 *Vict. c.* 96, *for taking Fish in Water adjoining or belonging to a Dwelling-house.*

That A. B. on the ——— day of ———, A.D. ——, at the parish of ———, in the said county, in a certain stream of water there situate, then and there running through and being in certain land, to wit, a pleasure-ground of one C. D., wherein the said C. D. then had a right of fishery there, five fish called eels, then and there being found in the said stream in the said close of the said C. D. then and there *adjoining* (*x*) and belonging to the dwelling-house of the said C. D. unlawfully and wilfully did take; against the form of the statute in such case made and provided, and against the peace, &c.

Dredging oyster beds, &c.

By 24 & 25 Vict. c. 96, s. 26, whosoever shall unlawfully and wilfully use any dredge or any net, instrument or engine whatsoever, within the limits of any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, though none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument or engine drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement. And it shall be sufficient in any indictment to describe either by name or otherwise the bed, laying or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: provided that nothing in this section contained shall prevent any person from catching or

(*u*) *Hudson* v. *M'Rae*, 33 L. J., M. C. 65.

(*x*) Absolute contiguity seems here meant; and ground separated from a house by a narrow walk and paling, wall or gate, was held not within the meaning of similar words in sect. 38 of this act against robbing gardens; *R.* v. *Hodges*, M. & M. 341.

fishing for any floating fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking floating fish only.

Taking Oysters, &c.

By 24 & 25 Vict. c. 97, s. 32, whosoever shall unlawfully and maliciously cut through, break down or otherwise destroy the dam, flood-gate or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish; or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water with intent thereby to destroy any of the fish therein that then may be, or that may thereafter be put therein; or shall unlawfully and maliciously cut through, break down or otherwise destroy the dam or flood-gate of any mill pond, reservoir or pool, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping. See for general provisions, *ante*, p. 457, *et seq.*

Breaking dam of fish or mill pond, or putting lime or noxious material in water.

Indictment for breaking the Dam of a Fish-pond.

That A. B. on the ——— day of ———, at ———, the dam of a certain fish-pond [*see other waters described in the act, supra*] of one J. N. there situate, then and there unlawfully and maliciously did break down and destroy with intent thereby then and there to take and destroy the fish in the said pond then and there being [*or, and did thereby then and there cause the loss and destruction of divers of the fish in the said pond then and there being*], against the form of the statute, &c., and against the peace, &c.

Indictment for putting Lime, &c. into a Fish-pond.

That A. B., late of, &c. at, &c. unlawfully and maliciously did put a large quantity, to wit, two bushels of lime, into a certain fish-pond [*see other waters described in the act*] of one J. N. there situate, with intent thereby then and there to destroy the fish in the said pond then and there being, against the form, &c., and against the peace, &c.

Section 16.

FORCIBLE ENTRY AND DETAINER.

Of the offence at common law.

The assertion of right to lands or houses by force has always been discouraged by courts, from a just apprehension of the tumults to which such proceedings may lead. Although, therefore, no indictment will lie for a mere trespass, accompanied only by constructive force, yet it seems to be established that an entry on land or into a house, garden, &c. or a church, though no one be therein, with such actual violence as amounts to an unlawful act, or public breach of the peace (*y*), expressed in law to be "with force and arms and a strong hand" (*z*), *e. g.* bringing unusual weapons, threatening violence, breaking open a door, or violent ejection of the possessor of a house (*a*), is an offence indictable at common law, as a forcible *entry;* though the statutes give other remedies to the parties grieved, *viz.*, restitution and damages; and that the illegal and violent maintenance of possession, if the entry was unlawful, is, in like manner, indictable as a forcible *detainer* (*b*). To sustain such an indictment at common law, it seems that no circumstances of great public violence or terror are necessary; for it is laid down (*c*) "that an entry may be said to be forcible, not only in respect of violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any violence in the manner of entry, as by breaking open the doors of a house, whether any person be in it at the same time or not, especially if it be a dwelling-house." The offence of forcible entry at common law is punishable by fine or imprisonment in respect of the injury done to the public peace.

Punishment at common law.

Forcible entry within the statutes.

But further to discourage the attempts of parties to assert their claims by violence, statutes were passed in very early times, not merely to annex punishment to the offence of entering by strong hand on a peaceable possession, but to grant restitution to the party dispossessed on the conviction of the offender. After, therefore, the statute 5 Rich. 2, sess. 1, c. 8, had declared

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(*y*) See per *Le Blanc*, J., 8 T. R. 363, and per Lord *Kenyon*, *id.* 364; *R.* v. *Wilson and others.*

(*z*) *Reg.* v. *Newlands*, 4 Jurist, 322, *Littledale*, J.

(*a*) Co. Lit. 257; Com. Dig. *tit. Forcible Entry* (A 2).

(*b*) See judgment of the court in *R.* v. *Wilson*, 8 T. R. 361; *R.* v. *Wilson*, 3 A. & E. 817; 5 N. & M. 164. Com. Dig. *tit. Forcible Entry* (A 1, 2, B 1); an entry, though by one person only, will be forcible, if either by act or threat at the time of his entry he gives the party in possession just cause to fear bodily hurt if he does not give way; and the same circumstances of violence or terror which make an entry forcible, make a detainer forcible also. A detainer may be forcible whether the entry were so or not; Hawk. b. 1, c. 64; Com. Dig. *tit. Forcible Entry*, if such entry was *unlawful; R.* v. *Oakley*, 4 B. & Ad. 307; 1 N. & M. 58.

(*c*) Hawk. b. 1, c. 64, s. 26. The writer is discussing the remedy on the *statutes.* See also as to these statutes, Reeves' Hist. C. L. Vol. III. pp. 202, 229, 289–397.

the law, "that none should make entry into lands and tenements but in cases where entry is given by the law, nor in such cases, with strong hand nor with multitude (*d*) of people, but only in a peaceable and easy manner, on pain of imprisonment and ransom," the statute 15 Rich. 2, c. 2, gave a remedy by summary commitment of the offender till fine and ransom; and by 8 Hen. 6, c. 9, this provision was extended to cases of *forcible detainer*, and justices of the peace were empowered to restore the premises to the former possessor, where the force had been found by a jury summoned by them (*e*). On these statutes it was doubted whether any but a freeholder could have restitution; and, therefore, the 21 Jac. 1, c. 25, applied the power conferred by the former acts to the restitution of possession of which tenants for terms of years, tenants by copy of court roll, guardians by knight service, and tenants by elegit, statute merchant or statute staple, had been forcibly deprived; on this account the prosecutor's interest in the premises must be stated in the indictment (*f*). Under these acts, therefore, a prosecutor who is a freeholder or leaseholder, &c. may have restitution, on conviction of the party of whose dispossession he complains. This restitution may be awarded by the court of quarter sessions, as justices of peace are expressly empowered to grant it; and in this respect they act as judges of record (*g*), and have greater power than justices of oyer and terminer and gaol delivery, who cannot grant restitution, but can only punish the offender (*h*), or than justices of assize under 11 Geo. 2, c. 19, s. 17, who on examining the proceeding of justices who have acted on sect. 16, by putting an owner into possession of premises deserted, &c. by a tenant, can only *order* restitution to be made (*i*).

Definition of Offence.

Writ of restitution.

The justices may execute the writ of restitution in person, or may make their precept to the sheriff to do it (*j*). The sheriff may raise the county (*k*). And if the execution of a writ of restitution is avoided by fresh force, a second writ of restitution may issue without a fresh inquisition, if applied for within a reasonable time (*l*).

It seems to have been at one time supposed that greater force was necessary to sustain an indictment for forcible entry at

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(*d*) Ten make a "multitude;" Co. Lit. 257 a. See *R.* v. *Herne*, cited Stra. 195. *Mandamus* on this act refused, in *Ex parte Davy*, 6 Jur. 949.

(*e*) *Reg.* v. *Harland*, 1 P. & D. 93; 8 A. & E. 826; 2 M. & Rob. 141; *R.* v. *Hake*, 4 M. & Ryl. 483, n.; but the inquisition must set forth the estate possessed by the party in the property disputed; *Reg.* v. *Bowser*, 8 D. P. C. 128.

(*f*) *R.* v. *Wilson*, 8 T. R. 360, per Lord *Kenyon*.

(*g*) See 3 B. & Ad. 688, per *Littledale*, J.

(*h*) Hawk. b. 1, c. 64, s. 61; Bac. Abr. *Forcible Entry* (F).

(*i*) See *Ashcroft* v. *Bourne*, 3 B. & Ad. 684; *Reg.* v. *Traill*, 12 A. & E. 761.

(*j*) 1 Hawk. c. 64, s. 49.

(*k*) *Ibid.*

(*l*) *R.* v. *Harris*, 1 Ld. Raym. 482; 1 Russ. on Crimes, ed. Greaves, 434.

Of Forcible Entry.

common law than under the statutes (*m*), but the observations of Lord *Kenyon*, in *R.* v. *Wilson* (*n*), seem to negative this distinction, and to place both proceedings on their true ground. "I do not know," said he, "that it has ever been decided that it is necessary to allege a greater degree of force in an indictment at common law for a forcible entry than in an indictment on the statutes; therefore an indictment at common law charging the defendants with having entered unlawfully and *with strong hand*, is good;" and *Le Blanc* and *Lawrence*, JJ., added, that the words *with strong hand* means something more than *vi et armis*, or a common trespass (*o*). In truth there is no good sense in any distinction as to the degree of force indictable in either way; but in neither case will a mere entry by an open door or window, or with a key, however procured, as by trick and contrivance, suffice (*p*); nor an entry which the possessor is induced to permit by threats of destroying his cattle or goods (*q*); but any entry effected by an actual breaking of a dwelling-house, or attended by an actual array of force, will be indictable in either form. The true distinction is, that on an indictment at common law the prosecutor needs only to prove a peaceable possession at the time of the ouster; and that there, as he alleges no title, so he can have no restitution: while in an indictment on the statute of Richard, his interest, *viz.* a seisin in fee, must be alleged; on that of James, the existence of a term or other tenancy; and on these statutes, restitution will be granted. It must be observed, however, that even on these statutes, proof that the prosecutor holds colourably as a freeholder or leaseholder will suffice; and that the court will not, on the trial, enter into the validity of an adverse claim made by the defendant, which he ought to assert, not by force, but by action (*r*).

Evidence.

Regaining possession to which party is entitled.

Hawkins says, that at common law a man disseised of lands or tenements, if he could not prevail by fair means, might lawfully regain possession thereof by force, unless put to a necessity of bringing his action by having neglected to re-enter in due time (*s*). This, however, has been doubted by Lord

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(*m*) *R.* v. *Blake*, 3 Burr. R. 1731.

(*n*) 8 T. R. 357.

(*o*) *Viz.*, the degree of violence amounting to a breach of the public peace, and therefore indictable as forcible entry. See 8 T. R. 361—363; *Harvey* v. *Bridges*, 14 M. & W. 437, 442.

(*p*) Com. Dig. *Forcible Entry* (A); 3 Hawk. b. 1, c. 64, s. 26.

(*q*) Hawk. b. 1, c. 64, s. 28.

(*r*) Per *Vaughan*, B., in *R.* v. *Williams*, Monmouth Summer Assizes, 1828; confirmed on motion for a new trial; and see *Jayne* v. *Price*, 5 Taunt. 326; 1 Marsh. 68.

(*s*) Pleas of the Crown, Book I. Ch. 64, s. 1; and see reporter's note to *R.* v. *Smyth*, 1 Moo. & R. 159; Hawkins lays down the same law as to retaking goods from a wrongful possessor, and is upheld by Lord *Tenterden*, in *R.* v. *Milton*, M. & M. 107.

At common law the owner may peaceably retake the stolen article wherever he finds it [without the writ of restriction prescribed by 28 Hen. 8,

Evidence.

Kenyon (*t*). The actual occupation of the premises at the time of entry, or the perception of rents and profits, is *primâ facie* evidence of seisin in fee, subject to evidence of his having a less estate (*u*). Entering with strong hand to dispossess a tenant by force is a forcible entry, though he holds over after notice to quit expired (*v*); but the turning out the landlord's cattle on the demised land, or getting possession without force, or eviction of the premises held over, is, under such circumstances, not actionable (*x*). By 1 & 2 Vict. c. 74 (and 56 Geo. 3, c. 88, for Ireland), when the interest of a tenant at will, or for a term not exceeding seven years, either without liability to rent, or at a rent not exceeding 20*l.* a year, is ended, and the tenant holds over, two justices may give the landlord possession (*y*).

See further as to this offence, Russell on Crimes, vol. 1, c. 29.

Indictment for a forcible Entry and Detainer at Common Law.

That A. B., C. D. and E. F. together with divers other persons, to the number of six or more, whose names are to the jurors aforesaid as yet unknown, on, &c. with force and arms, and with pistols, staves, and other offensive weapons, &c. into a certain messuage and garden (*z*) there situate, and then (*a*) and there being in the peaceable possession of G. H. unlawfully, violently, and injuriously, *and with a strong hand* (*b*), did enter; and that the said A. B., C. D. and E. F., together with the said other persons, then and there, with force and arms, and with a strong hand, unlawfully, violently, forcibly, and injuriously did expel, amove, and put out the said G. H. from the possession of the said messuage and garden, and the said

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c. 11, superseded by 24 & 25 Vict. c. 96, s. 100, *post*, after conviction of the felon], unless the property is changed by some intermediate act, *e. g.*, by the seizure of them by peace officers on suspicion of the felony, or by the lord of the manor, as waifs by the felon on his flight, or by sale in market overt; East's P. C. 789.

So after conviction he may take them again wherever he finds them, or bring trover for them; but to take them back from the offender with intent to favour him, is a misdemeanour, *ibid.*, and see Gilbert's Evid. 222. As to action by buyer against seller for retaking goods sold, see *Gillard* v. *Brittan*, 8 M. & W. 575.

(*t*) *R.* v. *Wilson*, 8 T. R. 364; and see 8 A. & E. 828.

(*u*) *Jayne* v. *Price*, 5 Taunt. 326; 1 Marsh. 68.

(*v*) *Taunton* v. *Costar*, 7 T. R. 431; and see 2 Shower, 853; 3 T. R. 294; *Turner* v. *Meymott*, 1 Bing. 158; *Butcher* v. *Butcher*, 7 B. & C. 399; *Newton* v. *Harland*, 1 M. & Gr. 644, collecting the cases; *Harvey* v. *Bridges*, 14 M. & W. 437, 442; see *Blades* v. *Higgs*, 31 L. J., C. P. 347.

A wife is indictable for forcibly entering a house of which her husband is in possession, though obtained from her by contrivance; *R.* v. *Smyth*, 1 M. & Rob. 155; 5 C. & P. 201.

(*x*) *Taunton* v. *Costar*, *ubi sup.*; *Turner* v. *Meymott*, *ubi sup.* See Coke's Rep. Fraser's ed. Vol. I. 517, note (*u*), 518, note (*y*); 6 Taunt. 202; 1 Pri. 53; 16 East, 77; 1 M. & Ryl. 220, 221 (*o*); 4 B. & Ad. 311; 8 B. & C. 4; 6 C. & P. 284, 410.

(*y*) See *Darlington* v. *Pritchard*, 12 L. J., C. P. 34; 4 M. & Gr. 783.

(*z*) The premises must be described with certainty; and therefore an allegation that the defendant entered *a tenement* will not suffice; 3 Leon. 102; Co. Lit. 6 a.

(*a*) See 2 Chit. Cr. L. (2nd ed. 220—222); 3 Q. B. R. 406; *Reg.* v. *Newlands*, 4 Jurist, 322, *Littledale*, J.

(*b*) Necessary words, meaning something more than a common trespass, see *ante*, p. 554.

Forcible Entry.

G. H. so as aforesaid expelled, amoved, and put out from the possession of the same, then and there, with force and arms, and with a strong hand, unlawfully, violently, forcibly, and injuriously have kept out (*c*), from the day and year aforesaid until the taking of this inquisition (*d*), and still do keep out, to the great damage of the said G. H. and against the peace, &c. [See form of Indictment for a forcible Entry into a Freehold, under 5 Rich. 2, c. 8, Archb. Cr. Pl. 17th ed. 848; Indictment on 21 Jac. 1, c. 15, would be the same except in the introductory description of the prosecutor's estate, which should be according to the fact, as for a term of years unexpired, copyhold, tenancy, &c.]

Section 17.

Game—Offences relating to.

1. *Offences under* 9 *Geo.* 4, *c.* 69, *and* 7 *&* 8 *Vict. c.* 29.. 556 | 2. *Offences under* 24 *&* 25 *Vict. c.* 96, *s.* 17 562

1. Offences under 9 Geo. 4, c. 69.

Offences against the game laws are, for the most part, punishable by summary conviction; but the being "found armed at night, with intent to kill game," was made punishable as a misdemeanour with seven years' transportation by 57 Geo. 3, c. 9, reciting, "that idle and disorderly persons frequently go armed in the night-time, for the purpose of protecting themselves, and aiding and assisting each other in the illegal destruction of game and rabbits, and that such practices are found by experience to lead to the commission of felonies and murders."

This statute has been repealed, and more complicated, but in some respects less severe, provisions substituted in its room, as follows:—

Third offence of by night unlawfully destroying game or rabbits, or by night unlawfully being in any land

The 9 Geo. 4, c. 69, enacts, by sect. 1, that "if any person shall, after the passing of this act, *by night* (*e*) unlawfully take or destroy any game or rabbits in any land, whether open or inclosed,—*or* shall, *by night*, unlawfully enter *or* be in any land, whether open or inclosed (*f*), with any gun, net, engine, or other instrument, for the purpose of taking or destroying game (*g*); such offender shall upon conviction thereof before

(*c*) The same description and degree of force is necessary to constitute a forcible *detainer*, as a forcible *entry;* Dalt. 126; Hawk. b. 1, c. 64, s. 30.

(*d*) No indictment can warrant an award of restitution, unless it alleges that the wrongdoer both ousted the party grieved, and continued in possession at the time of finding the indictment; for it would be a repugnancy to award restitution to one who never was in possession, and vain to award it to one who does not appear to have lost it; Hawk. b. 1, c. 64, s. 41.

(*e*) See *post*, pp. 558, 559.

(*f*) Waste land on either side a highway bounded by hedges on the farther side from the highway form part of the highway, and are not open or inclosed land within the above section; *Veysey* v. *Hoskins*, 34 L. J., M. C. 145.

(*g*) If the parties were *out* by night on land for purpose of taking or destroying rabbits only, it is not within this clause.

two justices of the peace be committed, for the *first* offence (*h*), to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour; and, at the expiration of such period, shall find sureties by recognizance (*i*), or, in Scotland, by bond of caution, himself in 10*l.* and two sureties in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a *second* time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months; and at the expiration of such period shall find sureties by recognizance or bond as aforesaid, himself in 20*l.* and two sureties in 10*l.* each, or one surety in 20*l.* for his not so offending again for the space of two years next following; and in case of not finding such sureties shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend *a third time*, he shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be [kept in penal servitude (*k*)] for seven years, [and not less than five years (*l*)], or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and, in Scotland, if any person shall so offend a first, second or third time, he shall be liable to be punished in like manner as is hereby provided in each case."

with instrument for purpose of taking game.

Second offence.

Third offence.

By 9 Geo. 4, c. 69, s. 2, "where any person shall be found upon any land, committing any offence as before mentioned, it shall be lawful for the owner, *or* occupier of such land, *or* for any person having a right or reputed right of free warren or free chase therein, *or* for the lord of the manor or reputed manor wherein such land shall be situate, *and also* for any gamekeeper or servant of any of the persons herein mentioned, *or* any person assisting him, to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or other offensive weapons whatsoever, towards any

Apprehending offenders.

Assaults upon owners of land, gamekeepers, &c.

(*h*) As to requisites of this commitment, see in *Re Fletcher*, 13 L. J., M. C. 16; *Cureton* v. *Reg.*, 30 L. J., M. C. 149; 1 B. & S. 208.

(*i*) Not to offend again; *Reg.* v. *Reynolds*, 13 L. J., M. C. 65; 1 Sess. Ca. 51.

(*k*) 20 & 21 Vict. c. 3, s. 2.

(*l*) 27 & 28 Vict. c. 47, s. 2.

Offences relating to Game.

person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for seven years, or to be imprisoned and kept to hard labour for any term not exceeding two years."

Resisting lawful apprehension.

A watcher, employed by a head keeper of a person whose trustees had possession of the estate, and who had been employed by such person for twenty years, and paid by his agent down to the time of the trial, but who had never had any direct communication with the trustees, was held to have sufficient authority to apprehend (*m*).

Evidence of former convictions.

In order to facilitate the proof of an indictment for the third offence under sect. 1 of this act, all convictions for a first and second offence are directed to be returned to the sessions; and the record of such conviction, or any copy of such record, is evidence on the trial for the third offence (*n*); but prosecutions for offences punishable on summary conviction by virtue of the act shall be *commenced* (*o*) within *six* calendar months, and prosecutions by indictment under it within twelve calendar months after the commission of such offence (*p*).

Definition of night.

As to the extent of the terms "night" and "game," in this act, the statute itself supplies an interpretation; "night" is "considered and declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise" (*q*); and by "game" it intends "hares, pheasants, partridges, grouse, heath or moor game,

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(*m*) *Reg.* v. *Fielding*, 2 C. & K. 621.

(*n*) 9 Geo. 4, c. 69, s. 8.

(*o*) *Commencement of Prosecution.*] Stat. 8 & 9 Will. 3, c. 26, now repealed, prohibited by s. 9, prosecution under that act "unless such *prosecution be commenced*" within, &c. Held, that the information and proceeding before the magistrate, on the defendants being taken, was the "*commencement*" of the "*prosecution*" within the meaning of that act; *R.* v. *Willace*, 1 East, P. C. 186. If the apprehension within the prescribed time after the offence is relied on to sanction an indictment preferred *after* that time had elapsed, the warrant to apprehend or commit must be produced; *R.* v. *Philips*, Russ. & Ry. 369; see *Reg.* v. *Brooks*, 1 Den. C. C. 217; 2 C. & K. 402. The justices' warrant, under which the prisoners were apprehended, dated within a year from the commission of the offence, was held not to be sufficient to show the commencement of the prosecution in due time, although it recited that an information had been laid and that the information itself ought to have been given in evidence; *Reg.* v. *Parker*, 33 L. J., M. C. 135; L. & C. 459; *Reg.* v. *Hull*, 2 F. & F. 16. A prosecution is clearly *commenced* by preferring a bill, for that is the party's act; but whether a bill preferred against two, and ignored as to one within the prescribed time, is a sufficient "*commencement*" of a prosecution to entitle a prosecutor to proceed on a bill found against the latter, four years after for same offence, *quære*. See *R.* v. *Killminster*, 7 C. & P. 228; *Adam* v. *Bristol* (*Inh.*), 2 A. & E. 389; 4 N. & M. 144.

(*p*) 9 Geo. 4, c. 69, s. 4.

(*q*) *Id.* s. 12.

black game, and bustards" (*r*). Rabbits are expressly included in sect. 1.

Definition of Night and Game.

These provisions of the first and second sections apply to the case in which an offender goes *alone*, or in which *two only* go together, on an expedition for the destruction of game. Sect. 9 applies to cases where a party of *three or more* are together and armed for the same purpose; which offence is punishable more severely, *viz.* by penal servitude for not exceeding fourteen years nor less than seven years, or imprisonment and hard labour for not exceeding three years; but this last offence is only cognizable by the justices of gaol delivery of the county, &c.

Indictment on 9 *Geo.* 4, *c.* 69, *s.* 1, *for Misdemeanour in taking or destroying Game or Rabbits by Night, after two previous Convictions; —or in entering Land with Gun, Net, or Engine, for the purpose of destroying Game.*

Berkshire } The jurors, &c. present that A. B. on the ——— day of
to wit. } ———, A.D. ——, was duly convicted before ——— and ———, esquires, two justices of the peace for the said county, for that he the said A. B. [*set out the first conviction in the past tense to the end of the adjudication of punishment*] and the jurors, &c. that the said A. B. afterwards, to wit, on the ——— day of ———, A.D. ——, was duly convicted before [*set out second conviction in the past tense to the end of the adjudication of punishment*] (*s*), and the jurors, &c. that the said A. B. afterwards and after he had been so twice convicted as aforesaid, and within twelve calendar months now last past, to wit, on, &c. in the ——— year of the reign of, &c. about the hour (*t*) of eleven in the night of the same day, at the said parish of ———, in the said county, *by night* (*u*) did unlawfully take and destroy certain game and rabbits, to wit, one pheasant, and two rabbits, in certain land called ——— [*or* "of J. N." *or* in the occupation of J. N.] (*x*), there situate [*or*, by night did unlawfully

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(*r*) Sect. 13. Young pheasants reared under a common hen, so long as they are about her and under her guardianship and control, are not game within the statute; *Reg.* v. *Garnham*, 8 Cox, C. C. 451.

(*s*) The second conviction need not necessarily be set out *in hæc verba; Cureton* v. *Reg.*, 30 L. J., M. C. 149; 1 B. & S. 208.

(*t*) Unnecessary to state that it was between sunset and sunrise, &c. *Ante*, p. 209. Per *Parke*, B., in *R.* v. *Riley*, 1 Lew. Cr. C. 149; and per *Gurney*, B., in *R.* v. *Penson*, *id.* 154.

(*u*) As to the mode of framing the charging sentence, see *Davies* v. *The King*, 10 B. & C. 89; *Cureton* v. *Reg.*, 30 L. J., M. C. 149—153.

(*x*) The particular close must be described by its name, *or* abuttals, *or* ownership, *or* occupation; for the offence being of a local nature, the indictment must, it seems, particularize the offence in one or other of the above modes, by informing the defendant to what specific spot the evidence is to be directed. *R.* v. *Ridley*, R. & Ry. 515, decided on 57 Geo. 3, c. 90, and applicable to the terms of this act. See *R.* v. *Mellor*, 2 D. P. C. 173, per *Taunton*, J., *contra*, on similar words in 1 & 2 Will. 4, c. 32, s. 30. A "certain cover in the parish of P." is insufficient; *R.* v. *Crick*, 5 C. & P. 508. Variance in the proof of the name of the parish or the close, its local situation, or its occupation as laid, is fatal; *R.* v. *Owen*, Ry. & M. 118, on 57 Geo. 3, c. 90. If both the name and the occupation of the close are stated, both must be proved as laid; *ibid. R.* v. *Pye*, 2 East, P. C. 785; *R.* v. *Healey*, 1 Moo. C. C. 1. The ownership may be stated, if the land be a wood, &c. *not* let to a tenant. Where several persons, acting with a common intent of entering land to kill game, allot to some of their party

Offences relating to Game.

enter certain land called ———] of [*or*, in the occupation of] one J. N. there situate, and was then and there (*y*) by night, unlawfully in the said land, with a certain gun [*or* net, engine, or other instrument], for the purpose then and there, by night, as aforesaid, of taking and destroying game *there* (*z*), against the form of the statute, &c., and against the peace, &c.

The 9 Geo. 4, c. 69, extended to highways.

By 7 & 8 Vict. c. 29, the pains, penalties, &c. imposed by 9 Geo. 4, c. 69, on persons *by night unlawfully taking* or destroying game or rabbits, in any land, are imposed on a like taking, &c. on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, &c., owners and occupiers of land adjoining either side of that part of such road, &c. where the offender shall be. His gamekeeper, or servant, or assistant have like power of apprehending offenders, and that act with all its powers is declared applicable, but a right of shooting over the land of another gives no authority to authorize a gamekeeper to apprehend persons trespassing on such land in pursuit of game (*a*).

Indictment for assaulting Owner or Occupier, Gamekeeper or Servant, &c., the Defendant having been found by Night on Land, armed with a Gun, &c. for the purpose of destroying Game (*b*).

The jurors, &c. present, that J. S. before the committing of the assault hereinafter mentioned, to wit, on, &c. [about the hour of ten on the *night* of the same day], at, &c. [*viz.* the parish in which the land, &c. is] by night, was unlawfully on certain land ["any land" in the act] called ——— [*or*, of J. W. *viz.* the owner, *or*, in the occupation of H. H. *or* abutting on ———] there situate, armed with a certain gun [*or* with a certain net, &c.] then and there for the purpose of illegally taking and destroying game there by night, and that the said J. S. was then and there found by night as aforesaid, unlawfully upon and in the said land by night as aforesaid, armed with a certain gun, then and there for the purpose of then and there unlawfully destroying game by night, by one S. S. [*the act is* "owner or occupier, or person having a right or reputed right of free warren or free

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the task of watching outside a particular spot, in order to give an alarm on the approach of keepers, these watchers are equally indictable with those who enter the land; *R.* v. *Passey*, 7 C. & P. 282; *R.* v. *Locket*, *ibid.* 300; but see *R.* v. *Dowsell*, 6 C. & P. 390.

Where a plea alleged seisin in fee by the defendant of certain premises, and a right of way in the *occupiers* thereof, in respect of such occupation, it was held a justification of the defendant's alleged trespass, though the premises were not in his own occupation, but in that of his tenant; *Hollis* v. *Proud*, 2 D. & Ry. 31; *Stott* v. *Stott*, 16 East, 343, 349; 5 Taunt. 311.

(*y*) The defendant must be proved to have intended to kill game in the close which is laid to have been entered with that intent; *R.* v. *Barham*, 1 Moo. C. C. 151; *R.* v. *Capewell*, 5 C. & P. 549; *R.* v. *Davis*, 8 C. & P. 759.

(*z*) *In re Fletcher*, 13 L. J., M. C. 16. In a conviction on 9 Geo. 4, c. 69, s. 1, it was held necessary to use the word "*there*," and not sufficient to follow the words of the statute; but see *Hill*, J.'s, remarks on that case in *Cureton* v. *Reg.*, 30 L. J., M. C. 149, 153.

(*a*) *Reg.* v. *Wood*, 1 F. & F. 470.

(*b*) 9 Geo. 4, c. 69, s. 2.

chase thereon, or the lord of the manor or reputed manor wherein such land may be situate, or any gamekeeper or servant of the persons herein mentioned, or any person assisting such gamekeeper or servant"], the servant of the said J. W., the said S. S. then and there having lawful authority to seize and apprehend the said J. S. upon the said land hereinbefore mentioned, and that* the said J. S. with the gun aforesaid [*or*, state according to the fact any of the other weapons enumerated in the act], which he the said J. S. in both his hands then and there held, did then and there unlawfully assault and beat and offer violence towards the said S. S., the said S. S. then and there being lawfully authorized to seize and apprehend the said J. S. upon the said land, against the form of the statute, &c., and against the peace, &c. (*c*).

Form of Indictment.

Indictment where the Defendant escaped from the Land and was pursued (d).

Same as last to the * " the said J. S. then and there from the said land did escape into a certain close there situate [add its name if known], and the said J. N. did then and there pursue the said J. S. into the said last-mentioned close for the purpose of seizing and apprehending him the said J. S. as aforesaid, he the said J. N. having then and there lawful authority as aforesaid so to do, and that he the said J. N. being then and there about to seize and apprehend the said J. S. for the offence aforesaid" [*as in last precedent to the end*].

The above may form one indictment, and may be joined with a count for a common assault (*e*).

A gamekeeper or other person properly authorized under 9 Geo. 4, c. 69, may apprehend a poacher without giving notice of his purpose, or calling on him to surrender (*f*), or announcing in what capacity he apprehends him (*g*); and this whether he offends against section 1 only, or against section 9, by being out armed with two or more other persons (*h*).

Parties who find poachers in a wood need not intimate by *words* that they are gamekeepers, or come to apprehend: the circumstances are sufficient notice, and a person out poaching who sees a man run after him may fairly presume he so runs to take him; but if a servant of one who is neither owner of the land or of the manor comes to apprehend, and uses fatal violence in so doing, it would be murder (*i*.)

If a man is lord of a manor which includes land of his, and also of another, a poacher may be apprehended in the last land by the servant of the lord (*k*).

By 7 & 8 Vict. c. 29, s. 1, all the pains, punishments and forfeitures imposed by 9 Geo. 4, c. 69, upon persons by night unlawfully taking or destroying any game or rabbits in any land open or inclosed as therein set forth, shall be applicable

The 9 Geo. 4, c. 69, extended to public roads, &c.

(*c*) See *Reg.* v. *Curnock*, 9 C. & P. 730.
(*d*) 9 Geo. 4, c. 69, s. 2.
(*e*) *R.* v. *Finucane*, 5 C. & P. 551.
(*f*) *R.* v. *Payne*, 1 Moo. C. C. 378; *R.* v. *Taylor*, 7 C. & P. 266.
(*g*) *R.* v. *Taylor*, 7 C. & P. 266; *R.* v. *Whitome*, 3 C. & P. 394.
(*h*) *R.* v. *Ball*, 1 Moo. C. C. 333.
(*i*) *R.* v. *Davis*, 7 C. & P. 785; *R.* v. *Addison*, 6 C. & P. 388.
(*k*) *R.* v. *Davis*, 7 C. & P. 787.

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The 9 Geo. 4, c. 69, extended to public roads, &c.

to and imposed upon any person by night unlawfully taking or destroying any game or rabbits, on any public road, highway, or path, or the sides thereof, or at any opening, outlets, or gates from any such land into any such public road, highway, or path in the like manner as upon any such land open or inclosed, and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorized by the said act to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said act or this act; and the said act, and all the powers, provisions, authorities and jurisdiction therein or thereby contained or given, shall be as applicable for carrying this act into execution, as if the same had been herein specially set forth.

The power has been conferred on constables of searching persons on the highways and public places whom they may suspect of coming from land where they shall have been unlawfully in pursuit of game, and taking from them any game, guns, nets, &c.

Power of searching persons on highways given to constables.

By 25 & 26 Vict. c. 114, s. 2, it shall be lawful for any constable in any county, borough, or place in Great Britain and Ireland, and in any highway, street or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets, or engines used for the killing or taking game; and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game, or any such article or thing, is being carried by any such person, and should there be found any game, or any such article or thing as aforesaid, upon such person, cart, or other conveyance, to seize and detain such game, article, or thing.

Game is defined by sect. 1 of the act, and is substantially the same as that in 9 Geo. 4, c. 69, s. 13, excepting that it includes rabbits and the eggs of pheasants, partridges, grouse, black or moor game.

Of killing hares and conies in the night-time, in grounds lawfully used for the breeding them.

By 24 & 25 Vict. c. 96, s. 17, it is enacted, "whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, take (*l*) or kill any hare or coney, in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such

(*l*) Take means catch and not take away; *R* v. *Glover*, Russ. & Ry. 692.

offender shall be guilty of a misdemeanour, and being convicted thereof shall be punished accordingly: provided always, that nothing herein contained shall affect any person taking or killing, in the day-time, any conies on any sea bank or river bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank."

Of killing Hares, &c. in Night-time.

Indictment under 24 & 25 Vict. c. 96, s. 17, for taking or killing Hares or Conies in Warrens, or Breeding-grounds, in the Night-time.

Form of indictment for taking conies in a warren.

That A. B. on the ——— day of ———, A.D. ——, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, that is to say, about the hour of eleven o'clock in the night of the said day, at, &c. in a certain warren and ground of C. D. there situate, then lawfully used for the breeding and keeping of conies [*or* hares], ten conies [*or* hares] then and there being found, then and there in the said warren and ground unlawfully and wilfully did take [*or kill, or "take and kill," according to the fact*]; against the form of the statute, &c., and against the peace, &c.

Section 18.

NUISANCES TO HIGHWAYS.

(1) *Non-repair of Highway or Bridges* .. .. .. 563 | (2) *Obstructions to Highways* 588

Indictable nuisances on.

It is a public duty of the inhabitants of a parish to repair the highways within it, and their omission or neglect so to do is indictable as a nuisance. So to cause any material obstructions on a highway is an indictable offence in the person committing such a misfeasance.

No action lies for non-repair of county bridge.

The consideration touching prosecutions for the non-repair of highways and bridges differs essentially from that of other parts of the criminal law; for though in form they are criminal proceedings, in practice they are usually resorted to as modes of trying disputed questions of liability to repair, for no action lies by an individual against the inhabitants of a county for an injury sustained in consequence of a public bridge being out of repair (*m*); nor can such action be maintained against the county surveyor (*n*); and the same law prevails with respect to the liability of the parish surveyor to such an action (*o*). With regard to the place of trial the venue of course is local, but as in indictments for not repairing *county* bridges (or the 300 feet of highways thereto adjoining at either end), all the inhabitants of the county are defendants, such indictments when found at

Place of trial of indictment.

(*m*) *Russell and others* v. *The Men Dwelling in the County of Devon*, 2 T. R. 667, and cases collected, *Rose* v. *Groves*, 12 L. J., C. P. 252.

(*n*) *M'Kinnon* v. *Penson*, 9 Exch. 609.

(*o*) *Young* v. *Davies*, 31 L. J., Ex. 250; 2 H. & C. 197; *Taylor* v. *Greenhalgh*, 43 L. J., Q. B. 168; *Parsons* v. *The Vestry of Bethnal Green*, 37 L. J., C. P. 62.

Non-repair of Highways.

sessions of the peace are, after plea of not guilty (*p*), often removed into the Court of Queen's Bench by *certiorari*. See as to *certiorari*, *ante*, p. 357 *et seq.*

In case of such removal, the record is sent down for trial on the civil side at the assizes, either in the adjoining county, or some other place where an impartial trial can be had (*q*). But though it has been considered that no inhabitant of the county indicted for not repairing a county bridge, &c., ought to sit as a juror on the trial, he being in fact one of the defendants, yet the minuteness of his interest occasions frequent disregard of this rule. Indeed, by 1 Ann. stat. 1, c. 18, s. 5, *such* indictments are not to be tried out of the county where they lie, or to be removed by *certiorari* out of it into any other court, except, as we have seen, at the instance of the crown. See *ante*, "*Certiorari*," p. 357. Both at common law *ex necessitate rei* (*r*), and by several statutes (*s*), inhabitants of the county indicted may be examined at the trial as witnesses for the prosecution; and since 6 & 7 Vict. c. 85, for the *defence*, not being "individually named" on the record.

What are public ways and bridges.

A cart way (*via* or *aditus*) contains a footway (*iter*), and a pack and prime or horse and footway (*actus*), and is called *regia alta via*, because common to all the Queen's subjects (*t*). First, it may be proper to observe that no prosecution in any form can be sustained for the omission to repair any way or bridge (*u*) but such as is *public*; for the omission to repair a private way, or even its positive obstruction, not being a *common nuisance*, is only the ground of a civil action. It often, therefore, becomes a question whether the way or bridge in respect of which a prosecution is instituted is *public* or *private*. On this question it is indisputable that all ways, whether for carriages, horses, or foot passengers, leading to a market town, or beyond it, or from town to town, are properly called "highways" (*x*). It is now held that a road dedicated

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(*p*) *R.* v. *Taunton St. Mary*, 3 M. & S. 465.

(*q*) The attorney-general may choose which adjacent county he will, as Berks, where the bill is found in Wilts, *Reg.* v. *Wilts* (*Inh.*), 6 Mod. 191, 307. See *R.* v. *Cumberland* (*Inh.*), 6 T. R. 194; also *R.* v. *Oxfordshire* (*Inh.*), 4 B. & C. 194, an indictment tried in Gloucestershire; *Reg.* v. *Adderbury East* (*Inh.*), 5 Q. B. 187.

(*r*) 2 Show. 47; 1 Ventr. 351; 15 East, 474; 1 B. & Ald. 66.

(*s*) 1 Ann. st. 1, c. 18, s. 13; 5 & 6 Will. 4, c. 50, s. 100; 3 Geo. 4, c. 126, s. 137; 6 & 7 Vict. c. 85, before which declarations of inhabitants were made evidence by 3 & 4 Vict. c. 26; *Reg.* v. *Adderbury* (*East*) *Township*, 5 Q. B. 187; 14 & 15 Vict. c. 99, ss. 2, 3.

(*t*) Co. Lit. 56 *a*; Bac. Abr. *tit.* "Highways" (A); but a "pack and prime" way does not contain a carriage-way, *ibid.* An occupation way and public highway may co-exist over the same road; *Brownlow* v. *Tomlinson*, 6 M. & G. 484; *Selby* v. *Crystal Palace District Gas Co.*, 31 L. J., Chanc. 595; 30 Beav. 606.

(*u*) A bridge may be a common *highway*; *Regina* v. *Sainthill*, Ld. Raym. 1174; but *county* bridges are not within the new Highway Act, 5 & 6 Will. 4, c. 50, unless so specially mentioned (*ibid.* s. 5).

(*x*) Co. Lit. 56 *a*.

to (*y*) and used by the public for twenty-five years, becomes a highway, which the parish must repair, though they have neither adopted nor acquiesced in the dedication or the user (*z*): and four or five years' user as a public road is sufficient to warrant a jury in presuming that it was so used with the full assent and by the dedication of the owners of the soil (*a*); and it is not necessary to show by whom the dedication was made (*b*). But a way to a private house, or perhaps even to a village, which terminates there, or leads to the common fields of a town, and it is said, even to a parish church, is only a way for a particular class of persons, and therefore not public (*c*). A public highway may in point of law exist over a place, but it may be a *cul de sac* (*d*), which is not a thoroughfare. *What is a Public Highway.*

Upon evidence satisfactory and uncontradicted, showing a public right of way as far back as the memory of living witnesses can be expected to extend, the jury may presume a previous enjoyment corresponding with that evidence (*e*); and if, during the whole of that time, the land over which the way had passed had been under lease, a jury may presume against the reversioner a dedication of the way by his ancestors to the public at a period anterior to the land having been first leased (*f*); but no dedication can be presumed against him to have been made during the existence of a term of years (*g*). Dedication of way.

There may be a limited dedication to the public of a way, *i. e.* subject to the inconvenience of its being occasionally ploughed up, as in the case where it went through a field (*h*). So, where an obstruction or erection exists upon land, and afterwards the land, or that which is immediately adjoining to it, is dedicated to the public as a way, the dedication is subject to the inconvenience or risk arising from the obstruction or erection (*i*). Limited dedication.

(*y*) There must be an *intention* by the owner of the soil to dedicate. Of that intention the user by the public is *evidence*, but no more. A single act of interruption by the owner is of much more weight on a question of intention than many acts of enjoyment; *Poole* v. *Huskinson*, 11 M. & W. 830, per *Parke*, B.; *Stone* v. *Jackson*, 16 C. B. 199; *Roberts* v. *Karr*, 1 Camp. 262; *Reg.* v. *Hawkhurst*, 11 W. R. 9; 7 L. T., N. S. 268.

(*z*) *R.* v. *Leake* (*Inh.*), 5 B. & Ad. 469; 2 Nev. & M. 583. See *R.* v. *Paddington* (*Vestry*), 9 B. & C. 456; *R.* v. *Lyon*, 5 D. & R. 497.

(*a*) *Jarvis* v. *Dean*, 3 Bing. 448; *Woodyer* v. *Haddon*, 5 Taunt. 138. Eight years sufficient, and no particular time necessary to constitute evidence of dedication.

(*b*) *Reg.* v. *Petrie*, 4 E. & B. 737; 24 L. J., Q. B. 167; *Reg.* v. *Eastmark*, 11 Q. B. 877; 17 L. J., Q. B. 177.

(*c*) Hawk. b. 1, c. 76, s. 1; *Bateman* v. *Black*, 21 L. J., Q. B. 406; 18 Q. B. 870; but see *Mildred* v. *Weaver*, 3 F. & F. 30.

(*d*) *Young* v. *Cuthbertson*, 1 Macq. H. L. C. 455; *Bateman* v. *Black*, *ubi sup.*

(*e*) *Ibid.*

(*f*) *Winterbottom* v. *The Earl of Derby*, 36 L. J., Ex. 194; L. R., 2 Ex. 316.

(*g*) *Bermondsey Vestry* v. *Brown*, 35 Beav. 226; 11 Jur., N. S. 1031.

(*h*) *Mercer* v. *Woodgate*, 39 L. J., M. C. 21; 10 B. & S. 833.

(*i*) *Fisher* v. *Prowse*, 31 L. J., Q. B. 212; 2 B. & S. 770; *Morant* v. *Chamberlain*, 30 L. J., Ex. 299; 6 H. & N. 541; *Robbins* v. *Jones*, 15 C. B., N. S. 221; 33 L. J., C. P. 1.

Non-repair of Highways.

There may be a dedication to the public for a limited purpose, as for a footway, horseway, driftway, &c., but there cannot be a dedication to a limited part of the public, as to the inhabitants of a particular parish (*k*). Neither can there be a dedication to the public for a limited time (*l*); nor can the public by non-user release their rights, for the maxim is once a highway always a highway (*m*).

Where highway destroyed.

The highway which the parish is called upon to repair must be in existence as a highway at the time; thus, a parish may not be convicted for not rebuilding a sea-wall washed away by the sea, over the top of which the alleged highway used to pass (*n*). So, where part of a highway had, at the time when the indictment was preferred, been destroyed by encroachments of the sea, and the surface of the existing road was in good repair up to the point when it had been destroyed, which was a cliff with perpendicular sides, caused by successive encroachments; it was held, that there was no obligation on the parish to provide an available carriage-way from that point in the line of the former road down to the beach (*o*); or on a private individual liable to repair *ratione tenuræ*, to repair a road destroyed under the like circumstances (*p*).

Bridges.

All bridges built in highways, by whomsoever erected and dedicated to the public, are public bridges; but to constitute a bridge a public bridge, at least where it has not been repaired, or a county bridge, it must be over such water as answers the description of a *flumen vel cursus aquæ*, that is, water flowing in a channel between banks more or less defined, although such channel may be occasionally dry (*q*). It is familiar law that a bridge made by a private individual for his own benefit at an ancient ford, if useful to the public, is to be repaired by them, and not by the builder (*r*). And a raised causeway forming an approach to a bridge, but at more than three hundred feet from it, and pierced with arches and culverts to suffer water to pass under, when the meadows over which it was carried were flooded, is not such a bridge as the county is bound to repair (*s*).

But the Queen's Bench has since denied that *R.* v. *Oxfordshire* proves any rule of law to exist for prohibiting, under all or any circumstances, every part of a structure from being

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(*k*) *Poole* v. *Huskinson*, 11 M. & W. 827; *Vestry of Bermondsey* v. *Brown*, L. R., 1 Eq. 204.

(*l*) *Dawes* v. *Hawkins*, 8 C. B., N. S. 848; 29 L. J., C. P. 343.

(*m*) *Ibid.*

(*n*) *R.* v. *Paul*, 2 M. & Rob. 307.

(*o*) *Reg.* v. *Hornsea*, Dears. C. C. 291; 23 L. J., M. C. 59.

(*p*) *R.* v. *Bamber* 5 Q. B. 279; 13 L. J., M. C. 13.

(*q*) 2 Inst. 701; *R.* v. *Oxfordshire* (*Inh.*), 1 B. & Ad. 289; (as stated by *Patteson*, J., in *R.* v. *Witney* (*Inh.*), 3 A. & E. 72.) Also re-stated per Cur., 1 B. & Ad. 289.

(*r*) *Robbins* v. *Jones*, 33 L. J., C. P. 5, per *Erle*, C. J.

(*s*) *R.* v. *Oxfordshire* (*Inh.*), 1 B. & Ad. 289.

treated as a *bridge*, because water does not *at all times* flow under that part; for to confine the words *flumen vel cursus aquæ* to a constant stream or course of water flowing at all times to the exclusion of *flood waters*, whether rarely or often occurring, does not consist with *R.* v. *Trafford* (*t*). They intimated that a structure of arches made to carry a highway in such a manner as to permit flood waters to flow in their accustomed course, should be treated as a *bridge*, though at ordinary times there may be no water passing under the arches. At any rate, where such arches were twenty-nine in number, contiguous to, and as it were in immediate continuation of an acknowledged county bridge, which extended from one end of them over the river Trent by five arches, and from the other over a brook by eight arches, and had been always immemorially (*u*) repaired by the county as part of that bridge; it was held, that no rule of law prevented the whole structure from being taken to be one county bridge. The river Trent constantly flowed under all five arches, and the brook under one of the eight, while under most of the other twenty-nine were pools of stagnant water at all times, and under all of them the waters of Trent flowed in flood time (*u*). *What is a Public Bridge.*

Where a bridge consists of more than one arch, the whole must be indicted as one bridge; nor can each arch be there treated as a separate bridge (*x*).

A want of parapets will not prevent a structure from being a bridge or make it a culvert only; nor will the mere fact of an arch spanning a stream necessarily make it a bridge (*y*); but a foot-bridge formed by three planks nine or ten feet long, and a hand-rail, which carried a public footpath over a small stream, was held not to be such a bridge as the county was bound to repair (*z*). If a bridge be used by the public only in time of flood, and be shut at other times, it will only be public for such purpose, and at such a period (*a*); but though the purpose for which a dedication takes place may be limited, there can be no *dedication* to a limited part of the public (*b*).

At common law, the obligation to repair all highways lies on the parishes through which they pass; each being liable to repair such portions of road as are situate in its respective limits (*c*); and a parish is not excused from putting a highway into good and substantial repair by the circumstance that it is Obligation to repair highways and bridges.

(*t*) 1 B. & Ad. 874, 887, affirmed *quoad hoc*, in error, 2 Tyr. 201; 8 Bing. 204; 2 C. & J. 265. Held unlawful to obstruct the accustomed course of flood-waters flowing only occasionally.

(*u*) *Reg.* v. *Derbyshire* (*Inh.*), 2 Q. B. 745.

(*x*) *R.* v. *Oxfordshire* (*Inh.*), 1 B. & Ad. 289, as stated per Cur., 2 Q. B. 755.

(*y*) See per Lord *Denman*, in *R.* v. *Witney* (*Inh.*), 3 A. & E. 71; and *Bridge's case*, Godbolt's R. 346, pl. 441; stated 1 B. & A. 301, note.

(*z*) *Reg.* v. *Southampton*, 18 Q. B. 841; 21 L. J., M. C. 201.

(*a*) *R.* v. *Northamptonshire* (*Inh.*), 2 M. & S. 262; *R.* v. *Buckingham* (*Marquis*), 4 Campb. 189.

(*b*) *Poole* v. *Huskinson*, Dict. *Parke*, B.; 11 M. & W. 830.

(*c*) 1 Hawk. b. 1, c. 76, s. 5.

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little used and has never been repaired with hard materials, that it passes into another parish which denies it to be a highway, and that it is of no use to repair the part in one parish until the liability of the adjoining parish has been determined (*d*); and *at common law* a like obligation is imposed on counties to repair all public bridges within their boundaries (*e*), which obligation, since the Statute of Bridges, extends not merely to the bridge itself, but to the roads at each end (*f*), the extent of which last liability is fixed by 22 Hen. 8, c. 5, s. 9, at three hundred feet "from any of the ends of it." This provision, probably, originated in the difficulty of ascertaining the precise termination of the arches (*g*). Whenever a road is opened and used by the public, or a bridge is built or rebuilt, or being widened and made more beneficial, though at greater expense than actually necessary, having been originally built before 24th June, 1803 (Lord *Gower's* Act) (*h*), is accepted and used by the public, the liability to repair attaches on the parish in the first case, and on the county in the last, and this even though in the former case the road be set out in an extra-parochial place under an inclosure act which required the confirmation of a certificate of a surveyor before the inhabitants of the parish in which it was were to be liable, and this was never done, but the place was made into a township, with its own poor rate, contables, &c. (*i*), and in the latter the bridge be erected by trustees under an act of parliament authorizing them to employ their tolls in the repair of bridges (*k*). So the setting out a bridle way as a carriage road under an act of parliament, without complying with the conditions precedent to make the public liable to repair as a carriage road, does not exonerate the parish from repairing it as a bridle way (*l*). A county is not bound to repair a bridge built since 24th June, 1803, unless it is

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(*d*) *Reg.* v. *Claxby* (*Inh.*), 24 L. J., Q. B. 223.

(*e*) *R.* v. *Yorkshire* (*W. R.*), 2 East, 342, 348.

(*f*) *R.* v. *Yorkshire* (*West Riding, Inh.*), 7 East, 588, affirmed on error in Dom. Proc.; 5 Taunt. 284. Nor does the rule differ in the case of a body corporate (or private person) liable *by prescription* to repair a bridge; and this, though the repairs done by the parties liable have been confined to the fabric of the bridge, and those to the approaches have been done by turnpike commissioners; *R.* v. *Lincoln* (*Mayor and City of*), 8 A. & E. 65; 3 N. & P. 275; for as early as the reign of Edward the Third, the approaches to a bridge, the fabric of which, but not the *fines ejusdem pontis*, an ecclesiastical corporation sole was bound by prescription to repair, were yet held by the judges to be excrescences of the bridge itself, and, as such, *primâ facie* repairable by the same party as the bridge itself; *Abbot of Combe's case*, 43 Ass. 275, B. pl. 37.

(*g*) *R.* v. *West Riding, Yorkshire* (*Inh.*), 7 East, 588, affirmed on error in Dom. Proc.; 5 Taunt. 284; and see 4 B. & A. 623.

(*h*) *Viz.*, date of passing of 43 Geo. 3, c. 59, called Lord *Gower's* Act; *R.* v. *Devonshire* (*Inh.*), 5 B. & Ad. 283; 2 N. & M. 213; *R.* v. *Lancashire* (*Justices*), 2 B. & Ad. 813.

(*i*) *Reg.* v. *Midville* (*Inh.*), 4 Q. B. 240.

(*k*) *R.* v. *Oxfordshire* (*Inh.*), 4 B. & C. 194; 6 Dowl. & Ry. 231.

(*l*) *Reg.* v. *Cricklade* (*Inh.*), 14 Q. B. 735; but see *Reg.* v. *Dukinfield*, 32 L. J., M. C. 230; 4 B. & S. 158.

erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor (*m*), and the repairs of the roads over and adjoining to bridges built since 20th March, 1836, are to be done by the parishes or turnpike trustees (*n*). It is however competent for the prosecutor to put a township, *primâ facie*, in the place of a parish by alleging in the indictment a customary liability in the township to repair all highways within it, and need not limit the custom to such roads as but for the custom would be repairable by the parish. And if there are no roads in the township repairable by individuals other than the inhabitants at large, such custom may be proved (*o*); but if, where such a custom is laid, the defendants can show that any highway in the township is repairable by an individual, the custom would be negatived, so that it is desirable to be cautious about laying so large a custom (*p*). So the same customary liability to repair a public bridge may exist in a township (*q*).

Repair of Bridges.

Township—when liable.

But though, *primâ facie*, these obligations thus belong to parishes and counties, and may by immemorial custom belong to townships (*r*), they may be removed by specially pleading and showing in evidence that other bodies or individuals are bound to repair either by prescription, which is a duty commencing with the reign of Richard the First (*viz.*, A.D. 1189), or by custom, or "by reason of the tenure" of adjacent lands (*s*) or *ratione clausuræ* (*t*); but it would seem that a parish cannot be liable by prescription to repair a highway situate in another parish (*u*). And, at any rate, if the burden could be so shifted, it can only be so under an obligation equally durable with that which would have bound the parish; which obligation must have arisen in respect of some consideration of a nature as durable as the burden (*x*). And a plea which stated the consideration for such a prescription to be the levying and receiving by the foreign parish rates and charges in respect of lands in the parish, or the highways adjoining the highway, was held insufficient, as no such right could exist in

Liability of individuals by custom—*rationetenuræ* or *ratione clausuræ*.

(*m*) 43 Geo. 3, c. 59, s. 5.
(*n*) 5 & 6 Will. 4, c. 50, s. 21.
(*o*) *Reg.* v. *Heage* (*Inh.*), 2 Q. B. 128.
(*p*) *Ibid.*
(*q*) *Reg.* v. *Adderbury East* (*Inh.*), 5 Q. B. 187.
(*r*) *R.* v. *Great Broughton*, 5 Burr. 2700.
(*s*) But not of a tenement shown to have originated within legal memory, 1 Hawk. c. 76, s. 8; *e. g.*, a mill shown not to have existed before Henry 8th's time; *R.* v. *Hayman*, M. & M. 401, *Tindal*, C. J. As to liability of an infant to repair a bridge in respect of ownership of lands of which there is no occupier, see *R.* v. *Sutton*, 3 A. & E. 597; 8 A. & E. 516. Prescription admits of being proved by *vivâ voce* evidence; 2 B. & Cr. 54; Litt. s. 165, 170; 5 Tyr. 326, 871.
(*t*) *Robbins* v. *Jones*, 33 L. J., C. P. 5, per *Erle*, C. J.
(*u*) *Reg.* v. *Parish of Ashby Folville*, 35 L. J., M. C. 154; L. R. 1 Q. B. 213.
(*x*) *Ibid.*; *R.* v. *St. Giles, Cambridge*, 5 M. & S. 260.

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law, or if it did could not be immemorial (*y*); but where there are several townships in one parish a particular township may, by immemorial usage, be liable to repair its own roads as distinct from the parish at large (*z*). If by act of parliament enabling a navigation company to cut through lands, the company cut through a highway and make a bridge to connect the highway over the opening, the navigation company are liable to repair it (*a*); and on the same principle a railway company authorized to make a level crossing over a highway is under the obligation to keep the highway, *i. e.*, the crossing, in repair (*b*). At common law the onus of repairing a bridge, *ratione tenuræ*, falls primarily on the occupier, but the owner must reimburse (*c*). The liability, *ratione clausuræ*, is only on the occupier of the inclosure and not on the owner, not being occupier (*d*); nor does the Highway Act (5 & 6 Will. 4, c. 50) affect the liability of counties to the repair of bridges repairable by the county, though, by custom, repairable by the hundred (*e*). They cannot, however, by any agreement with individuals, exonerate themselves from the discharge of their public duty (*f*); nor do even the statutes for regulation of turnpike roads destroy this common law liability of parishes (*g*); and a local act which directed the proprietors of a navigation to repair a highway, and subjected them to indictment in case of default, was held not to relieve the inhabitants from their common liability (*h*). So stringent is that obligation on them, that it was no excuse for parishioners indicted at common law for not repairing highways, that they had done their full statute duty as required by 13 Geo. 3, c. 78; for that act (now repealed by 5 & 6 Will. 4, c. 50) only gave a cumulative remedy (*i*).

Liability of navigation company.

Of railway company for level crossing.

Extent of liability.

Inhabitants are not bound to put a way in a better condition than it has been time out of mind, but into such a condition as it has usually been at the best (*k*), and therefore are not indictable for not widening bridges or roads which have become too narrow for the increased traffic of modern times (*l*);

(*y*) *Reg.* v. *Ashby Folville* (*Inh.*), 35 L. J., M. C. 154; L. R., 1 Q. B. 213.

(*z*) *R.* v. *Ecclesfield*, 1 B. & A. 348.

(*a*) *R.* v. *Kerrison*, 3 M. & S. 526; *Reg.* v. *Ely*, 15 Q. B. 827; 19 L. J., M. C. 223.

(*b*) *Oliver* v. *North Eastern Railway Company*, 43 L. J., Q. B. 198.

(*c*) *Baker* v. *Greenhill*, 3 Q. B. R. 148.

(*d*) *Reg.* v. *Ramsden*, E. B. & E. 949; 27 L. J., M. C. 296.

(*e*) *Reg.* v. *Upper Half Hundred of Chart and Longbridge* (*Inh.*), 39 L. J., M. C. 107.

(*f*) *R.* v. *Liverpool Corporation*, 3 East, 86. See *R.* v. *Scarisbrick* (*Inh.*), 6 A. & E. 509.

(*g*) *Reg.* v. *Lordsmere* (*Inh.*), 15 Q. B. 689; 19 L. J., M. C. 215; *R.* v. *Netherthong*, 2 B. & A. 179; and see 3 A. & E. 65.

(*h*) *Reg.* v. *Brightside Bierlow*, 13 Q. B. 933; 19 L. J., M. C. 50. See *Little Bolton* v. *Reg.*, 12 L. J., M. C. 104.

(*i*) Bac. Abr. *tit.* "Highways" (G).

(*k*) *Reg.* v. *Cluworth* (*Inh.*), Salk. 358.

(*l*) *R.* v. *Devonshire* (*Inh.*), 4 B. & C. 670.

but if an ancient bridge be widened the liability to repair may be extended to the part so widened (*m*). *Conditions of Liability.*

But if by act of parliament a set of persons is authorized to make a line of road, either single (*n*), or with a branch (*o*), or a system of roads with several lines and branches (*p*), the completion of the whole is requisite, as a condition precedent to any part becoming a highway repairable by the parish or district in which it is situate; for such acts are in the nature of contracts between those who procure them and the public, that, in consideration of the former completing the line or lines of communication, the entirety of which forms the benefit stipulated for by the latter, the districts through which they pass should be subject to the burden of their future repairs.

Modes of prosecution.

These decisions are analogous to the spirit of 41 Geo. 3, c. 109, s. 9; since which act it is decided that roads adopted and made longer by commissioners of enclosure, as well as those newly made by them under their award, must be certified by the special sessions to be fully completed and repaired, before they can become such roads as the parishes are bound to repair (*q*).

Indictment against a corporation.

A corporation may be indicted at the sessions for disobeying an order made by justices under a local act for not repairing a highway, but as a corporation aggregate can only appear by attorney, which they cannot do at sessions; the indictment should then be removed into the Queen's Bench by certiorari, and distress infinite lies to compel appearance (*r*).

Presentment.

We have already seen that a public way out of repair might formerly (*s*) be *presented* by a justice; and that such presentment, when formally made, had all the force of an indictment; but this never affected the common law remedy of indictment, which might then be adopted on the part of the public as fully as it may now. As to the mode of proceeding under 5 & 6 Will. 4, c. 50, s. 95, where the obligation to repair the highway is denied by the surveyor on behalf of the inhabitants of the parish, see *post*, p. 574, and Part III., Chap. III.; and so also as to proceeding under 24 & 25 Vict. c. 61, s. 19, where the waywarden denies the liability on behalf of his parish, see *post*, p. 576, and Part III., Chap. III. The usual process on

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(*m*) *Reg.* v. *Adderbury East*, 5 Q. B. 187.
(*n*) *R.* v. *Cumberworth* (*Inh.*), 3 B. & Ad. 108.
(*o*) *R.* v. *Cumberworth* (*Inh.*), 4 A. & E. 731.
(*p*) *R.* v. *Edge Lane* (*Inh.*), 4 A. & E. 723.
(*q*) *R.* v. *Hatfield* (*Inh.*), 4 A. & E. 156.
(*r*) *Reg.* v. *Birmingham and Gloucester Railway Company*, 3 Q. B. 223.
(*s*) *Viz.*, under 13 Geo. 3, c. 78, s. 24, before 5 & 6 Will. 4, c. 50, see s. 99, but this stat. does not repeal the provisions as to the presentments of county bridges to which the 13 Geo. 3, c. 78, s. 24, was applied by 43 Geo. 3, c. 58, s. 1; *Reg.* v. *Breconshire* (*Inh.*), 15 Q. B. 813; 18 L. J., M. C. 123; and as to these prosecutions directed by special sessions, *id.* s. 95.

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such indictment against a parish is by *venire facias ad respondendum* (*r*) served on any two of its inhabitants who live in the county in which the bill is preferred, to compel their appearance. Upon these two may the whole fine be levied. As to their reimbursement, see p. 576, *post.*

Information in Queen's Bench, when it may be exhibited.

Where the grand jury of a county repeatedly refuse to find a bill against a county for the repair of a dilapidated bridge, and where the bill has been thrown out by a grand jury composed in part of landowners in the parish who took part in the discussion as to whether the bill should be found or not (*s*), the Court of Queen's Bench will grant an information against the county; but that extraordinary remedy will not be allowed, unless absolutely essential for the purposes of justice (*t*). The proceedings on a presentment when made, an indictment found, or an information exhibited, are exactly similar.

Requisites of indictment or presentment against parishes or counties for not repairing highways or bridges.

Indictments against a parish for the common nuisance of not repairing highways, and indictments and presentments against a county for not repairing bridges, must allege affirmatively that the way or bridge is public; that it lies *within* the parish or county which is alleged to be bound to repair (*u*), and that it is out of repair; and should conclude by alleging that the inhabitants of the county or parish, or that a corporation aggregate, or railway or canal, &c. company (*x*) are bound to repair it. It seems that if a parish be within two counties, and a highway lying in one part be out of repair, the indictment should not be against that part only, but against the whole

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(*r*) Or distringas, *ante*, p. 337.

(*s*) *Reg.* v. *Inh. of Upton St. Leonards*, 16 L. J., M. C. 84.

(*t*) *R.* v. *Steyning*, Sayer's R. 92.

(*u*) *Halsey's case*, Latch. 183, cited 1 H. Bl. 356. "To" *Kensington*, held to exclude Kensington, *Ibid.* "From and to," do not necessarily exclude the place named, *R.* v. *Knight*, 7 B. & C. 413, though so held in *R.* v. *Gamlingay*, 3 T. R. 513; 1 Leach, C. C. 528, *S. C.;* and again, since *R.* v. *Knight*, in *Reg.* v. *Botfield*, 1 C. & M. 151; (*R.* v. *Knight*, not cited). See *R.* v. *Camfield*, 6 Esp. 136; *R.* v. *Steventon*, C. & K. 55.

"From and through" places named, is said to exclude the *termini*, *R.* v. *Upton*, 6 C. & P. 133, per *Tindal*, C. J. As to "towards," see 3 A. & E. 181, *Lempriere* v. *Humphrey;* and 1 East, 377, *Wright* v. *Rattray* (cited in 7 B. & C. 266, *De Beauvoir* v. *Welch*); *Rouse* v. *Bardin*, 1 H. Bla. 351. "Abutting on," see 3 A. & E. 183. "Towards and unto B." are satisfied by a line of way to B. which turns backwards, in the middle, and then returns to B. by a way recently dedicated; *R.* v. *Downshire* (*Marchioness*), 4 A. & E. 232. "From and through the town of U. towards the parish of G." excludes (*Hammond* v. *Brewer*, 1 Burr. 376) the *terminus* U., so as not to permit a prosecutor to show a road in U. to be out of repair; *R.* v. *Upton-on-Severn*, 6 C. & P. 134, per *Tindal*, C. J.; for, though a township is not necessarily coterminous with a parish, it may be bound by custom to repair a highway within it. "From the town of C. to a place called H. hill, and that defendant illegally erected gates *between* the said town of C. and H. hill." *Patteson*, J., held the town excluded; *Reg.* v. *Fisher*, 8 C. & P. 612; 2 Saund. 158, *a*, n. 6.

(*x*) *Reg.* v. *Birmingham and Gloucester Railway Company*, 9 C. & P. 409, *Parke*, B.; 2 Q. B. 47, 233; but in an indictment against a parish it is not material to state whether the way is immemorial or not; *Reg.* v. *Turweston*, 16 Q. B. 109; 20 L. J., M. C. 46.

Form of Pleading.

parish (*y*); but the venue must be laid in the county where that part of the road out of repair is situate; and where the boundary of two parishes lies along the centre of a highway an order of justices, made under 34 Geo. 3, c. 64, apportioning the highway to each parish for the purposes of repair, was held final on an indictment against one for non-repair of the part allotted to it (*z*). If the bridge or way was a highway for all purposes (*i.e.*, public) at the time of the nuisance committed in not repairing, &c. or obstructing it, the term *highway* (*a*) is sufficient, the words "common and public" being mere repetition; but if in an indictment against a parish, such allegation may be rejected as surplusage (*b*); the highway is stated to have been such from time immemorial, which is unnecessary (*c*); but such allegation in an indictment against a township or district is necessary, and the prosecution would fail, should it appear that sixty years ago it was put an end to by an inclosure act, though it has been since used and repaired by the district indicted (*d*). If there be a limitation in the right of way, as if it is only used by the public when it is dangerous to pass through an adjacent stream, such limitation should be stated (*e*). It is not necessary to state the *termini* of the way, but when stated they must be proved, and a variance in this respect will be fatal (*f*), unless amended under 14 & 15 Vict. c. 100, s. 1; but where an indictment charged the obstruction of a footway from A. to C., and it appeared that the way was a carriage-way from A. to B., and a footway from B. to C., the obstruction being between B. & C.; this was held of a misdescription amendable under that section (*g*). It is usual to state the extent of the way which is out of repair; but it may be doubted whether this is necessary; however, though the court does not at present estimate the fine from the description of the length and breadth of the nuisance, its insertion cannot prejudice (*h*). Objection to the too general description of a road in an indictment can only be taken by plea in abate-

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(*y*) *R.* v. *Clifton*, 5 T. R. 498; *R.* v. *Weston*, 4 Burr. 507.

(*z*) *Reg.* v. *Hickling*, 7 Q. B. 880; 14 L. J., M. C. 177; *Reg.* v. *Perkins*, 14 Q. B. 229; 19 L. J., M. C. 105.

(*a*) 2 Saund. 158, n. (4), citing *Aspindall* v. *Brown*, 3 T. R. 265.

(*b*) *Reg.* v. *Turweston* (*Inh.*), 20 L. J., M. C. 46; 16 Q. B. 109.

(*c*) 2 Saund. 158, d; Dyer, fol. 33; *R.* v. *Jones*, 2 B. & Ad. 611; *R.* v. *Hollingberry*, 4 B. & C. 329.

(*d*) *Reg.* v. *Westmark* (*Tithing*), 2 M. & Rob. 305, *Maule*, J.

(*e*) *Allen* v. *Ormond*, 8 East, 4, n. (*a*); *R.* v. *Northamptonshire* (*Inh.*), 2 M. & S. 262. An allegation of a "pack and prime" way is not supported by proof of a "carriage" way, and the defendants will be acquitted; *R.* v. *St. Weonard's*, 6 C. & P. 582, *Alderson*, J.

(*f*) *Rouse* v. *Bardin*, 1 H. Bla. 351; 6 C. & P. 582; *R.* v. *St. Weonard's*, 5 C. & P. 579; 6 C. & P. 582; *Reg.* v. *Turweston* (*Inh.*), 20 L. J., M. C. 46; 16 Q. B. 109.

(*g*) *Reg.* v. *Sturge*, 3 E. & B. 734; 23 L. J., M. C. 172.

(*h*) 2 Saund. 158, n. 7

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ment (*i*), or on motion to quash the indictment. When the indictment is against an individual, or select body, on a peculiar obligation against common right, it is not sufficient to state a liability to repair, but it is necessary to show how that liability arises, as "by reason of the tenure or inclosure of certain lands;" or in the case of an extra-parochial hamlet or hundred not otherwise liable, a usage "from time immemorial" (*k*). The inhabitants of the several townships in a parish may be conjointly indicted for not repairing a road in it (*l*).

Plea, and inspecting parish books.

Whenever the defence to an indictment or presentment is, that the road or bridge is *not* within the parish so indicted, or is not a highway (that is, not public), or is not out of repair, the ordinary plea of not guilty is proper (*m*). And where any private individual, or body of persons other than the county in the case of a bridge, and the parish in case of a road, are made defendants, they may dispute not only these matters on the general issue, but also their liability to repair. A plea of guilty to a former indictment against the same parish, &c. for not repairing the same highway, seems conclusive evidence that it is a public way; however, where a county is indicted at the instance of a parish for not repairing a bridge, and the question is by which of those bodies it is to be repaired, the Court of Queen's Bench will not order inspection by the county of the parish books and documents relating to the former repairs (*n*).

But where the county or parish are prosecuted, and they seek to discharge themselves from liability, on the ground that some other persons than themselves are bound to repair, *e. g.*, by reason of tenure or inclosure of certain lands, taking of toll, &c., they must plead such liability in a *special plea;* and this, even though the alleged liability be thrown on a part of the same parish or county indicted (*o*). And such special plea must not only state who is bound to repair, but how the obligation arises (*p*).

Proceedings at sessions: Plea

In indictments for not repairing highways when the defend-

(*i*) *R.* v. *Hammersmith* (*Inh.*), 1 Stark. 357, *e. g.*, by stating that the road described in the plea was equally well known by the description given in the indictment, per Lord *Ellenborough.*

(*k*) 2 Saund. 158, n. 9; *R.* v. *Kingsmoor* (*Inh.*), 2 B. & C. 190, *post;* *R.* v. *Hayman*, Moo. & M. 401; *Reg.* v. *Turweston* (*Inh.*), 20 L. J., M. C. 46.

(*l*) *R.* v. *Auckland* (*Inh. of three Townships named*), 1 A. & E. 744; 1 M. & Rob. 286. See 2 B. & C. 166, *R.* v. *Machynleth.*

(*m*) *R.* v. *Northamptonshire* (*Inh.*), 2 M. & S. 362. It will be some evidence that the bridge is not *public*, that private persons have in fact repaired it. *Ibid.* For whatever a prosecutor is bound to prove on the general issue, a defendant may controvert the truth of by opposite evidence; *R.* v. *Norwich* (*Inh.*), Stra. 181.

(*n*) *R.* v. *Bucks* (*Justices*), 8 B. & C. 375; for the books are not public but parochial only: and see *R.* v. *Witney*, 7 C. & P. 208.

(*o*) 2 Saund. 159, b. n. 9 and 10.

(*p*) *Id. ibid.* See forms, *post.*

ants (who under the Highway Act, 5 & 6 Will. 4, c. 50, s. 94, may be either the surveyors of the parish, or other parties liable to repairs) intend to try, the bill is found at one sessions, and the defendants plead and try at the next sessions, and the trial then proceeds as in ordinary cases of misdemeanour.

Form of Pleading.

—Respiting sentence till justices certify that road is in repair.

On an indictment against a township for non-repair of a road an indictment against an adjoining township for non-repair of a portion of highway in continuation of the road in question, either submitted to or prosecuted to conviction, is admissible in evidence to prove the road in question to be a highway (*q*); and the conviction of a former owner and occupier of a certain field for the non-repair of a highway, on a presentment preferred against him alleging his liability to repair it *ratione tenuræ*, to which he pleaded guilty, together with evidence of the subsequent repair of the same highway by the occupiers of the same lands, and of the sale of them with public notice that they were subject to such liability, is evidence against the present occupier of his liability to repair the same highway (*r*). So a former conviction of a township for non-repair of a highway in the township, on a presentment by a justice alleging that the highway was in the township, and that the township was liable to repair it, was held to be conclusive evidence that the highway was in the township, and that the township was liable to repair it (*s*). Hearsay evidence of reputation that a person and his predecessors were liable to repair a county bridge is admissible (*t*).

Evidence.

But when, as often happens, no defence is intended, the defendant pleads guilty, and sentence of fine is respited from time to time until the repairs are completed, when, on a certificate to the court by two magistrates that the road is in good repair, the court will assess a nominal fine (*u*). So, if it be certified in

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(*q*) *Reg.* v. *Brightside Bierlow* (*Inh.*), 19 L. J., M. C. 50.
(*r*) *Reg.* v. *Blakemore*, 2 Den. 410; 21 L. J., M. C. 60.
(*s*) *Reg.* v. *Haughton* (*Inh.*), 1 E. & B. 501; 22 L. J., M. C. 89.
(*t*) *Reg.* v. *Bedford* (*Inh.*), 24 L. J., Q. B. 81; 4 E. & B. 535.
(*u*) Sir T. Raym. 215, and cases collected, 6 T. R. 631. The common law judgment was a fine for the offence and a distringas to remove the nuisance, and then the party caused a *constat* to issue to the sheriff, who returned that the way was repaired; *ibid.* 1 Hawk. c. 76, s. 94; *R.* v. *Incledon*, 13 East, 164. See 6 Mod. 163. Where an indictment for not repairing a road *ratione tenuræ* is removed into the Queen's Bench, the defendant will not be discharged on producing the usual affidavits, *viz.*, that the road has been actually repaired since the conviction, and is likely to remain so, till after he has pleaded guilty and paid the fine; *R.* v. *Lincomb*, 2 Chit. R. 214; *R.* v. *Loughton*, 3 Smith's R. 575; and it is reported to have been held by *Bayley*, J., that the indictment will not be quashed because the evidence afforded against the parish by the conviction would be thereby destroyed, *R.* v. *Lincomb*, 2 Chit. R. 214. The prosecutor's costs must, in the Queen's Bench, be paid down to the time when the defendant makes a submission accepted by the court, or to the judgment, if the conviction is by verdict, *R.* v. *Wingfield*, 1 Bla. R. 603. At the assizes, defendants who are under recognizance to try a traverse of a highway indictment must take it to the under-sheriff in order to his returning the

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like manner that the way has been, since the commencement of the prosecution, diverted by order of justices, the sentence will be merely nominal (*z*).

At some sessions the practice is not to discharge the inhabitants from the indictment, upon the justice's certificate that it is in repair, and likely to remain so, till the road has undergone a winter's wear ; and *Coleridge*, J., has acted on this principle in the Queen's Bench in the case of an indictment of this kind removed there by *certiorari* (*a*). Inhabitants confessed an indictment for not repairing a way. The court did not set a fine till after some neighbouring justices had certified it to be sufficiently repaired. After the fine was paid, the court said that writs of distringas might still be awarded to the sheriff against the defendants, *ad infinitum*, till the sheriff should certify the way to be in repair (*b*). To give such a certificate, either knowing its contents to be false, or not having ascertained that they are true, is an offence, and may be the object of an indictable conspiracy between the magistrates and the parties who induce them to certify (*c*).

Fine and costs of prosecution.

When the defendants do not appear to the indictment, or persist in refusing to repair, the court will, except in the winter months previous to Easter term (*d*), set a fine upon them, which may be levied on any (*e*) of the defendants, who, in the case of a parish, may compel reimbursement at a special sessions for the highways, who will make an order for it on the parish surveyor, or out of the money receivable by him for the highway rate, and must pay it within two months after service of the order (*f*). This fine is generally of an amount equal to what is shown on affidavit of a surveyor to be required to put the road in repair : it can only be applied towards the repair and amendment of the highway, "and if after conviction and order to pay a fine the defendants effectually repair the road they are entitled to the stay of further proceedings on the order, nor can the fine be claimed by the prosecutors on behalf of third parties for repairs done by them before the conviction (*g*).

Mode of enforcing judgment.

This fine will not, like other fines in criminal cases, be returned

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venire, and then enter it with the marshal, before it can be discharged on the magistrate's certificate. (So stated by Mr. *Bellamy*, clerk of assize, on the Oxford Circuit, cor. *Vaughan*, B., at *Salop*, Lent Assize, 1829.—MSS. Tyr.) Dick. Q. S. 404.

(*z*) *R.* v. *Incledon*, 13 East, 166.

(*a*) *R.* v. *Witney* (*Inh.*), 5 Dowl. P. C. 728, a rule for a fine for non-repair of a road will not be made absolute in the winter, and will be enlarged to Easter term; *R.* v. *Walton* (*Inh.*), 4 Jur. 195.

(*b*) *Reg.* v. *Cluworth* (*Inh.*), 6 Mod. 163, cited by *Lawrence*, J., 6 T. R. 637; and see *id.* 631; also Sir T. Raym. 315, cited by *Grose*, J., *id.* 636.

(*c*) *R.* v. *Mawbey*, 6 T. R. 619.

(*d*) *Reg.* v. *Walton*, 4 Jur. 195.

(*e*) *Ramsey* v. *Nornabell*, 11 A. & E. 383, 402. See *Reg.* v. *Claxby* (*Inh.*), 24 L. J., Q. B. 223.

(*f*) 5 & 6 Will. 4, c. 50, s. 96, replacing 13 Geo. 3, c. 78, s. 47, now repealed. See *post*, Part III., Chap. III.

(*g*) *Reg.* v. *Barnard Castle* (*Inh.*), 5 Jurist, 799; 1 Q. B. 246.

into the exchequer, but paid to such person as the court may order, to be by him received, applied and accounted for as directed by the court, to the repair of the road indicted (*h*). A continuing state of non-repair is a ground for a fresh indictment; and a court of quarter sessions, after fining a particular township for not repairing a bridge, cannot make another order to increase that fine (*i*), though the Queen's Bench, after inflicting a fine, would award writs of distringas *ad infinitum*, till certified that the way is repaired (*k*). By 3 Geo. 4, c. 126, s. 110, the court which imposes a fine for not repairing a turnpike road, shall *apportion the fine*, with the costs attending the same, between the inhabitants of such parish, township or place, and the trustees or commissioners of such turnpike road, in such manner as shall seem just (*l*). *Costs of Trial.*

The right to costs in prosecutions for not repairing highways and county bridges is involved in some perplexity. Right to costs.

First, as to costs *payable to prosecutors*. The enactments on this subject in 5 & 6 Will. 4, c. 50, *viz.*, sect. 95, for paying them out of the highway rate; and in sect. 98, for paying them by defendants who have set up a frivolous or vexatious defence, should be kept, as they were designed, wholly distinct from each other (*m*). By sect. 95, if on the hearing of any summons respecting the repair of any highway (*n*) the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required (*o*), to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division or place wherein such highway shall be, against the inhabitants of the parish or the party to be named in such order, for suffering and permitting the said highway to be out of repair, and the costs of such prosecution shall be directed by the judge of the assize before whom the said indictment is tried, or by the justices at such quarter sessions to be paid out of the rate made and levied in pursuance of this act in the parish in which such highway shall be situate: provided, nevertheless, that it shall be lawful for the party Order for costs to be paid out of highway rate.

(*h*) *Reg.* v. *Barnard Castle* (*Inh.*), 5 Jurist, 799; 1 Q. B. 246.
(*i*) *R.* v. *Machynleth*, 4 B. & A. 467.
(*k*) *Reg.* v. *Cluworth* (*Inh.*), Salk. 359; 6 Mod. 163.
(*l*) See *R.* v. *Papworth* (*Inh.*), 2 East, 413, on 13 Geo. 3, c. 84, s. 33, now repealed.
(*m*) See *Reg.* v. *Chedworth* (*Inh.*), 9 C. & P. 285, *Patteson*, J.
(*n*) See sect. 94, *post*, Part III., Chap. III. The justices must be satisfied that the way is a highway, and, if necessary, hear evidence on that point. *Reg.* v. *Johnson*, 34 L. J., M. C. 85.
(*o*) This is a ministerial duty and not a judicial act. *Reg.* v. *Surrey Justices*, 1 B. C. C. 70; 21 L. J., M. C. 195; *Reg.* v. *Arnould*, 8 E. & B. 550; 27 L. J., M. C. 92.

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against whom such indictment shall be so preferred at the quarter sessions as aforesaid, to remove such indictment by certiorari or otherwise into his Majesty's Court of King's Bench. An order for the costs under this section may be made by a judge at the assizes sitting in the Crown Court, though the defendants plead guilty (*p*). A judge, who tries at nisi prius an indictment removed by certiorari, has no power, under this section, to order the costs to be paid out of the rate (*q*).

Under this section the order for payment of the costs of the prosecution out of the rate extends not only to rates made or levied at the time of the order, but to the highway rate in general, and if there be not sufficient funds in the hands of the surveyors at the time, they must make a rate for that purpose, and the order binds not only the surveyors in the office at the time, but their successors until the costs be paid (*r*). Such costs cannot be levied by distress under sect. 103, but a mandamus will issue to compel the taking of the proper steps to execute the order (*s*).

Where a bill for not repairing a highway was preferred at an assize by order of special sessions, and tried on the Crown side, and defendants were convicted, *Williams*, J., held this section imperative on him to grant the prosecutor an order for his costs (*t*). And it has been also held to be imperative on quarter sessions (*u*). The order in either case must ascertain the amount of costs and order payment of that sum (*x*), and out of what fund it is payable (*y*).

But this is only so in cases where the obligation to repair an actual highway is disputed; so that where, on an indictment for not repairing a "public carriage highway," the defendants were acquitted on the ground of its not being a public highway for carriages; a certificate granted at the trial for costs to be paid to the prosecutor was set aside by the Queen's Bench (*z*).

(*p*) *Reg.* v. *Haslemere* (*Inh.*), 32 L. J., M. C. 30. It has been said, that if the jury are unable to agree upon their verdict and are discharged without giving one, the judge cannot direct the costs to be paid out of the rate under this section; *Reg.* v. *Hettesbury*, 8 L. T., N. S. 315.

(*q*) *Reg.* v. *Ipstones*, L. R., 3 Q. B. 216; 37 L. J., M. C. 37, overruling *Reg.* v. *Eardisland*, 3 E. & B. 960; 23 L. J., M. C. 145; and *R.* v. *Great Broughton*, 2 M. & R. 244.

(*r*) *Reg.* v. *Eyton*, 3 E. & B. 390.

(*s*) *Ibid.*; *Re Surveyors of Tryddyn*, 23 L. J., M. C. 43.

(*t*) *R.* v. *Yarkhill* (*Inh.*), 9 C. & P. 218.

(*u*) *Reg.* v. *Martin*, 13 L. J., M. C. 45.

(*x*) *Reg.* v. *Clark*, 5 Q. B. 887.

(*y*) *Reg.* v. *Watford*, 14 D. & L. 593.

(*z*) *Reg.* v. *Heanor* (*Inh.*), 6 Q. B. 745; 14 L. J., M. C. 38; 1 New Sess. C. 466; overruling the decision of *Tindal*, C. J., in the same case, reported, 13 L. J., M. C. 144; 2 M. & R. 445, n. It is not a part of the duty of the justices to direct a prosecution under sect. 95 where a previous indictment for the non-repair of the same way had been tried, upon which one of the issues raised was, whether it was a highway which the parish was liable to repair, and a verdict of not guilty found. *Ex parte Bartlett*, 30 L. J., M. C. 65.

Costs of Trial.

And a certificate granted at the trial has also been set aside when the jury found that the highway indicted was not within the division of the special sessions which made the order directing the indictment to be preferred (*a*). And again, with respect to highways within the jurisdiction of a highway board, it is enacted by 25 & 26 Vict. c. 61, s. 19, that when on the hearing of any such summons respecting the repair of any highway (*b*), the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division or place wherein such highway is situate, against the inhabitants of the parish or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and if directed to be paid by the parish, shall be deemed to be expenses incurred by such parish, in keeping its highways in repair and shall be paid accordingly.

Costs of prosecution.

If, on the trial of an indictment ordered under the above sect. 19, it be found by the jury at the trial that the road in question was not a highway, the court has no power under it to make any order as to the costs of the prosecution (*c*).

Costs payable by defendant, when.

By 5 & 6 Will. 4, c. 50, s. 98, it is "lawful for the court before which an indictment for not repairing a highway is *preferred*, to grant costs to be paid by the defendant to the prosecutor," if it shall appear to the said court that the defence was frivolous or vexatious. If the defendant plead guilty there cannot be said to have been a frivolous or vexatious defence, and in such a case the court has no power to make the defendant pay costs (*d*). In one case, an indictment for not repairing a turnpike road preferred at quarter sessions by direction of justices, pursuant to sect. 95, was removed by *certiorari* to the Queen's Bench. At the assizes the defendants were convicted. *Alderson*, B., held the defence frivolous, but said he had no power to grant any order for costs to be paid to the prosecutor by defendant under sect. 98, *that* section giving discretion as to costs to the court where the indictment is "preferred" (*e*). However, on a rehearing, *Williams*, J., granted the costs incurred by the prosecutor *before* the removal of the indictment from the quarter sessions under sect. 98 (*f*), and his

(*a*) *Reg.* v. *Hickling* (*Inh.*), 7 Q. B. 880; 15 L. J., M. C. 23.
(*b*) See sect. 18, *post*, Part III., Chap. III.
(*c*) *Reg.* v. *Parish of Buckland* (*Inh.*), 34 L. J., M. C. 178; 6 B. & S. 397.
(*d*) *Reg.* v. *Denton* (*Township*), 34 L. J., M. C. 13.
(*e*) *Reg.* v. *Preston* (*Inh.*), 2 M. & Rob. 137.
(*f*) 7 D. P. C. 593. It was held on the word "*tried*" in 13 Geo. 3, c. 78, s. 64 (now repealed and replaced as above), that where the defendants

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Order for costs of trial.

decision was approved by the full court in the following case: an indictment directed by special sessions, and found at the assizes for not repairing a highway, was removed by *certiorari* by the prosecutor into the Queen's Bench, and tried on the civil side at the assizes; the judge certified that the defence was frivolous, and ordered, under sect. 98, the defendant to pay costs to the prosecutor (*e*). He certified also separately that the case was fit to be tried by a special jury (*f*). If the costs are not paid to the prosecutor under the side-bar rule to that effect by the defendants who appeared and pleaded, the Queen's Bench will attach them (*f*). A like power still remains in the "court," in case of a frivolous defence to an indictment for not repairing a county bridge (*g*).

It is now held that the Queen's Bench has no power to award costs of proceedings in another court, *e. g.*, the quarter sessions (*h*). This was acted on in a case of great hardship. An indictment for obstructing a highway was removed by *certiorari* from quarter sessions; on affidavit that points of law would arise on the trial, &c. defendant kept the *certiorari* in his pocket without informing the prosecutor, and gave notice of trial at a subsequent session. Prosecutor attended there with his witnesses, and on the last day of sessions, before the case was called on, defendant lodged his *certiorari*. The Queen's Bench quashed the *certiorari*, and ordered a procedendo, yet refused to give prosecutor his costs of attending the sessions, because incurred after the *certiorari* had issued (*i*), but before removal. But it was admitted that the Queen's Bench might grant costs incurred after the removal by *certiorari*.

It seems that the certificate under sect. 98, of the defence being frivolous, &c. may be stated on the back of the record without any express award of costs to the prosecutor (*k*), and that under neither section need magistrates make an order for costs in terms exactly following those in the former pro-

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had been acquitted for want of prosecution, and the judge did not grant the costs to the defendant at the trial, as he might then do if the prosecution was vexatious, the King's Bench would not afterwards interfere; *R.* v. *Chadderton* (*Inh.*), 5 T. R. 272; see *R.* v. *St. John Baptist, Margate* (*Inh.*), 6 M. & S. 130.

(*e*) *Reg.* v. *Pembridge* (*Inh.*), 3 Q. B. 901. A rule to set aside both certificates on the authority of *R.* v. *Papworth*, 2 East, 41, as to the word "*preferred.*"

(*f*) *Reg.* v. *Pembridge, ubi sup.*

(*g*) *Viz.* under 13 Geo. 3, c. 78, s. 64, which is held to be kept alive for this purpose by 43 Geo. 3, c. 59, s. 1. *R.* v. *Merionethshire* (*Inh.*), 6 Q. B. 343.

(*h*) *R.* v. *Passman*, 1 A. & E. 603, overruling *Jones* v. *Davis*, 1 B. & C. 143; and *Stacey* v. *Evans*, 13 Price, 449.

(*i*) *R.* v. *Higgins*, 5 A. & E. 554; see *ante*, p. 362.

(*k*) *R.* v. *Clifton*, 6 T. R. 344; *R.* v. *St. John, Margate*, 6 M. & S. 130; see *R.* v. *Chadderton*, 5 T. R. 272.

ceedings (*l*). As to the form of the order, see *Commerell* v. *Ellis* (*m*). *Costs of Trial.*

Secondly, as to *costs of defending a prosecution* for not repairing a highway; though by 13 Geo. 3, c. 78, s. 64, a court might award costs *to a defendant* to be paid by the prosecutor, if the prosecution was *vexatious;* that act is repealed by 5 & 6 Will. 4, c. 50, s. 1, and no such remedy is given by the latter act in case of either a frivolous or vexatious prosecution (*n*). However, by 5 & 6 Will. 4, c. 50, s. 111, if inhabitants in vestry agree to defend an indictment found against the parish, the surveyor may charge in his account the reasonable expenses incurred in defending such prosecution, after the same are agreed to at a vestry, and allowed by two justices of the division, which expenses are to be paid out of the fines and rates authorized to be raised under the act, or, if necessary, by additional rate (*o*); but as respects an indictment for the non-repair of a county bridge, the court has power to certify that the defence was frivolous, and give costs to the prosecutor under 43 Geo. 3, c. 59, s. 1, notwithstanding the repeal of 13 Geo. 3, c. 78, s. 64, by 5 & 6 Will. 4, c. 50 (*p*); and the same power exists as to hundred bridges (*q*). But where the indictment is removed by *certiorari*, see the form of recognizance under 16 & 17 Vict. c. 30, s. 5, as to payment of defendant's costs, *ante*, p. 360.

Indictment against the Inhabitants of a Parish for not repairing a common Highway.

That on, &c. there was, and yet is, and of right ought to be, a certain common and ancient Queen's highway (*r*) leading from, &c. towards and

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(*l*) *Reg.* v. *Chedworth*, 9 C. & P. 285.

(*m*) 4 M. & S. 203.

(*n*) *Coleridge*, J., 7 D. P. C. 594, in *Reg.* v. *Preston*, in case of defence by a *parish*.

(*o*) This enactment replaces 13 Geo. 3, c. 78, s. 56, under which it was held, that vestrymen ordering such a defence were not personally liable to the attorney employed by the surveyor, or to the surveyor, if he had paid the bill. The bill should be sent in in parts to the surveyor every year, if the suit lasts more than one. The surveyor should then present it to the vestry, who must make an assessment to pay it, so that the burden may fall on those who inhabit the parish at the time. These may then resolve whether the suit shall proceed, and every one will be duly assessed. See *Sprott* v. *Powell and another*, 3 Bing. 478; 2 Stark. Ev. 2nd ed. 850. See *R.* v. *Fowler and others*, 1 A. & E. 836.

(*p*) *Reg.* v. *Merioneth* (*Inh.*), 6 Q. B. 343; 13 L. J., M. C. 158.

(*q*) *Reg.* v. *Chart and Longbridge* (*Inh.*), L. R., 1 C. C. R. 237; 39 L. J., M. C. 107.

(*r*) A way may be described as a common highway for carts, carriages, &c., though it has been always arched over, if, though not high enough to let very high road waggons pass under it, it will admit common carriages to pass; *R.* v. *Lyon*, 1 C. & P. 527; R. & M. N. P. C. 150, per *Littledale*, J. A common highway means a highway for *all manner* of things; *R.* v. *Hatfield*, Ca. t. Hard. 315. A road is not less a *highway* because part of it is *turnpike*-road; *Reg.* v. *Steventon*, C. & Kir. 55.

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unto, &c. used for all the Queen's subjects, with their horses, coaches, carts, and carriages, to go, return, pass, and repass, at their will and pleasure; and that a certain part of the same Queen's common highway, situate, lying, and being in the parish, &c. of A. B. in the same [*county*], containing in length, &c. in breadth, &c. on, &c. (*t*) and continually afterwards until the present day was, and yet is, very ruinous, deep, broken, and in great decay, for want of due reparation and amendment; so that the subjects of the Queen through the same way, with their horses, coaches, carts, and carriages, could not, during the time aforesaid, nor yet can, go, return, pass, or repass, as they ought and were wont to do; to the great damage and *common nuisance* (*u*) *of all the Queen's subjects* through the same highway going, returning, or passing; and against the peace, &c. And that the inhabitants of the parish of A. B. aforesaid, in, &c. aforesaid, the said common highway [*so in decay*] ought to have repaired and amended, and still of right ought to repair and amend, when and as often as it should, shall, or may be necessary.

Indictment against Inhabitants of a Township for not repairing a Highway situate within the Township.

That on, &c. there was, and still is, a certain common and public Queen's highway, leading from, &c. to, &c. used for all the Queen's subjects, with their horses, coaches, carts, and carriages, to go, return, pass, ride, and labour, at their free will and pleasure, and that a certain part of the said Queen's highway, situate, lying, and being in the township of, &c. containing in length, &c. and in breadth, &c. on, &c. and from thence continually afterwards until the day of the taking of this inquisition, at the township aforesaid, in the county aforesaid, was, and yet is, very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the Queen's subjects, through the same way, with their horses, coaches, carts and waggons, could not during the time aforesaid, nor yet can, go, return, pass, ride, and labour, without great danger of their lives, and the loss of their goods; to the great damage and common nuisance of all the Queen's liege subjects, through the same way going, returning, passing, riding, and labouring; and against the peace, &c. And that the inhabitants of the said township of, &c. in the county aforesaid, from time whereof the memory of man is not to the contrary, have repaired and amended, and have used and accustomed to repair and to amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, the said highway, so being in decay, as aforesaid, when and so often as it hath been and shall be necessary (*x*).

(*t*) Some day about the commencement of the nuisance. Only state the *termini*, when they can be readily ascertained, and no doubt can be raised respecting them. The way must be distinctly averred to be within the district sought to be charged with the repair; *R.* v. *Penderryn* (*Inh.*), 2 T. R. 513; *R.* v. *Bishop's Auckland* (*Inh.*), 1 A. & E. 744.

(*u*) Necessary, 1 Hawk. ch. 32, p. 692; *R.* v. *Hughes*, 4 C. & P. 373; Stra. 686—688; 16 East, 194; 1 Burr. 333; 1 Mod. 107; *R.* v. *Davey*, 5 Esp. 217, laid "inhabitants," but *semble* wrong.

(*x*) See *Reg.* v. *Heage* (*Inh.*), 2 Q. B. 128. Custom laid to repair *all common and public highways situate within the said township* is not necessarily bad, but it seems better to add in such a case "that would otherwise be repairable by the parish comprising such township;" *R.* v. *Hatfield*, 4 B. & A. 75; *R.* v. *Bridekirk*, 11 East, 303; see 1 B. & A. 352, 356; for that averment does not make it necessary to prove that there are or have been ancient highways in the township. *Reg.* v. *Barnoldswick* (*Inh.*), 12 L. J., Q. B. 44; 4 Q. B. 499; see *ante*, p. 577.

Forms of Indictment.

Indictment for not repairing a Part of a Highway situate in a Parish which lies partly in a City, being a County of itself, and partly in the County at large, against the whole Parish (y).

That long before, and at the time of the commencement of the nuisance hereinafter mentioned, there was, and of right ought to have been, and still is, and of right ought to be, a certain common and public Queen's highway, leading from that part of the parish of St. Olave, in the city of L. and *county of the same city*, which lies near to a certain place there, called the Dean's-yard, unto a certain place called and known by the name of the Old Lane, in that part of the parish of St. Olave which lies in the county of L. for all the liege subjects of our said lady the Queen, with their horses, coaches, carts, and other carriages, to go, return, pass, repass, ride, and labour, at their will and pleasure; and that a great part of the said parish of St. O. is situate in the *city of L. and county of the same city*, and the residue of the same parish is situate *in the said county of L.*, and that a *certain part* (*z*) of the said Queen's common highway, situate, lying, and being in that part of the said parish of St. O. which lies in the said county of L. [commencing (*a*) opposite to a certain cross called and known by the name of Cow-cross, situate in that part of the said parish of St. O. which lies in the said county of L. and extending to a certain place called

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(*y*) The indictment must be against the *whole* parish, and not against that part of it only which lies in the county where the way is out of repair, but the venue must be laid in the latter county. *R.* v. *Clifton*, 5 T. R. 498, overruling entirely *R.* v. *Weston*, 4 Burr. 2507; see per *Patteson*, J., *R.* v. *Bridgwater* (*Inh.*), 10 A. & E. 717; 5 Burr. 2700. The prosecutor may compel the appearance of any two inhabitants of the parish who live within that county, by serving them with process (of *venire facias ad respondendum*), and see per Lord *Kenyon*, 5 T. R. 503, 505, on them may the fine be levied (see *Reg.* v. *Pembridge*, 3 Q. B. 901), and the rest of the parishioners must reimburse them under order of special session; see 5 & 6 Will. 4, c. 50, s. 96. If the inhabitants of that part of the parish which lies in the adjoining county come in and plead, the court below might equally try in that case also, for they would be precluded from disputing its jurisdiction (5 T. R. 505). If a nuisance be committed in one county, and it affect the public in another, the defendant may be indicted in either. Hawk. b. 2, c. 25, s. 37; Staundford, b. 2, c. 91; 19 Edw. 3, Ass. pl. 6; 2 P. R. 241; 2 B. & P. 381. And where a person by reason of tenure of certain lands in one county is bound to repair a road in another, he may be indicted in the latter for the dilapidated state of the road, though his estate lies out of the jurisdiction of the quarter sessions; 5 T. R. 502.

Where one side of a highway is in one parish and the other in another, and 5 & 6 Will. 4, c. 50, s. 58 (*post*, Part III., Chap. III.), has not been acted on at special sessions, it should be stated that one half the way lies in one parish and the other half in the other; that each parish is liable to repair to the middle line of the way, and that a certain part of the way (mentioning the feet in length and width) lying in the parish indicted, was out of repair. *R.* v. *St. Pancras*, Peake's N. P. C. 215; and see *R.* v. *Bridekirk*, 11 East, 304; *R.* v. *Taunton* (*Inh.*), 3 M. & S. 465; *R.* v. *Machynleth and Penygoes*, 2 B. & C. 166; see *ante*, p. 570. Where two parishes are divided by a river, the boundary is presumed to be *ad medium filum aquæ*, *R.* v. *Landulph* (*Inh.*), 1 M. & Rob. 393. See a form of indictment against a county for not repairing its own division of a bridge lying in two counties, 3 Ch. C. L. 1st ed. 595; 5 T. R. 501; 4 Burr. 2511.

(*z*) This is sufficient even *if* the bridge has been *widened by defendants*, for they are either liable to repair the whole (as seems most probable), or at all events the ancient part, and could show to what extent they were liable. *Reg.* v. *Adderbury* (*East*) *Township*, 5 Q. B. 187, *ante*, pp. 567—573.

(*a*) As to stating *termini* and abuttals, see *ante*, p. 570.

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Knight's-house, at the commencement of the Old Lane aforesaid], and containing in length two thousand and two hundred yards, and in breadth forty feet, on, &c. and continually afterwards, until the day of the taking of this inquisition, at that part of the said parish of St. O. which lies in the said county of L. was, and yet is, very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the liege subjects of our said lady the Queen, in and through the same part of the said way, so as aforesaid being in decay, with their horses, coaches, carts, and other carriages, could not, during the time last aforesaid, nor yet can, go, return, pass, repass, ride, and labour, as they ought and were wont to do, without great danger of their lives, and the loss of their goods; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, in and through the same way going, returning, passing, repassing, riding, and labouring; and against the peace, &c. And that the inhabitants of the said parish of St. O. in the city of L. and county of the same city, and the inhabitants of the same parish of St. O. in the said county of L., from time whereof, &c. &c. [*Conclusion as in the last precedent.*]

Indictment against the Corporation of G. for not repairing a Highway which they are bound to repair by Custom (*b*).

That from time whereof the memory of man is not to the contrary there has been, and still is, a certain ancient and common Queen's highway, leading from a certain place called Dunstan's Cell, in the parish of All Saints, in the city of G. in the said county of G., into a certain lane called Shire Lane, in the parish of H. in the said county of G., for all the liege subjects of our said lady the Queen, with their horses, coaches, carts and carriages, to go, return, pass, repass, ride and labour, at their will and pleasure; and that a certain part of the said Queen's highway, containing in length, &c., and in breadth, &c., and lying in a certain street called Bennet's Wall, in the parish of All Saints aforesaid, in the said city of G. aforesaid, on, &c. and continually from thence afterwards, until the day of the taking of this inquisition, at the said parish, in the said city of G. and county of G. was, and yet is, miry, ruinous, broken, dirty, and in great decay, for want of the due reparation and amendment of the same, so that the liege subjects of our said lady the Queen through the same way, by themselves, and with their horses, coaches, carts and carriages, could not during the time aforesaid, nor yet can, go, pass, repass, ride and labour, without great danger of their lives and loss of their goods; to the great damage and common nuisance of all the liege subjects of our said lady the Queen through the same way going, returning, passing, repassing, riding and labouring; and against the peace, &c. And that the mayor, aldermen and burgesses of the city of G. aforesaid, *by reason of ancient custom, from time whereof the memory of man is not to the contrary* (*c*), during all

(*b*) See *Reg.* v. *Birmingham and Gloucester Railway Company*, 9 C. & P. 469; 3 Q. B. 223; *ante*, p. 570.

(*c*) This allegation of immemorial usage is also sufficient to charge a particular body, less or other than a county or corporate body, with the repair of a *bridge;—e.g.* a parish, *R.* v. *Hendon* (*Inh.*), 4 B. & Ad. 628; a corporation by prescription, *R.* v. *Stratford-on-Avon*, 14 East, 348; see the indictment in the case of Kingston Bridge, 6 M. & S. 365, note; a hundred, *R.* v. *Oswestry*, 6 M. & S. 361; a township, *R.* v. *Ecclesfield*, 1 B. & Ald. 348; *R.* v. *Machynleth and Penygoes*, 2 B. & C. 166; *R.* v. *West Riding, Yorkshire*, 4 B. & A. 623; *Reg.* v. *Heage* (*Inh.*), 2 Q. B. 128; and see p. 410, an extra-parochial place, *R.* v. *Kingsmoor*, 2 B. & C. 190; 2 Saund. 158, n. (*q*). In *Reg.* v. *Tryddyn*, 21 L. J., M. C. 108, the point was raised whether an indictment was bad which omitted to allege that the road indicted had ever been repaired, and the defendants had leave to demur and plead over—but it would seem that there was a conviction in that case. *Re Surveyors of Tryddyn*, 23 L. J., M. C. 43.

Forms of Indictment.

the time aforesaid, the common highway aforesaid, above particularly mentioned and described (so as aforesaid being in decay), have been accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, when and as often as occasion hath required and shall require.

Indictment against a County for suffering a Public Bridge to decay.

That on, &c. there was, and from thence hitherto hath been, and still is, a certain common and public bridge, commonly called High Bridge, otherwise Haigh Bridge, situate and being in the parish of B. in the county of N., in the common Queen's highway leading from the town of B. in the county aforesaid, towards and unto the town of C. in the same county, being a common highway for all the liege subjects of our said lady the Queen on foot, and with their horses, coaches, carts and other carriages, to go, return, pass, repass, ride and labour; and that the said common and public bridge, on the said, &c. aforesaid, and continually from thence until the day of the taking of this inquisition, at the parish of B. aforesaid, in the county aforesaid, was, and yet is, ruinous, broken, dangerous and in great decay for want of needful and necessary upholding, maintaining, amending and repairing the same, so that the liege subjects of our said lady the Queen, in, upon and over the said bridge, on foot, and with horses, coaches, carts and carriages, could not and cannot pass and repass, ride and labour, without great danger of their lives and loss of their goods, as they ought and were accustomed to do, and still of right ought to do; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, upon and over the said bridge, on foot and with their horses, coaches, carts and other carriages, about their necessary affairs and business, going, returning, passing, riding and labouring; and against the peace, &c. And that the inhabitants of the county of N. aforesaid, of right have been, and still of right are, bound to repair and amend the said common bridge, when and so often as it shall be necessary.

Indictment against a Private Individual bound ratione tenuræ *to repair, for suffering a Bridge to decay.*

That there is, and from time whereof the memory of man is not to the contrary there hath been, a certain public and common bridge in the parish of D. in the said county of B. over the river W., commonly called D. bridge, situate in the Queen's common highway leading from the town of D. in the said county of B. to the town of R. in the same county, for all the liege subjects of our said lady the Queen and her predecessors, to go, return, ride and travel on horseback, and with their cattle, carts and carriages, upon, along and over, at their will and pleasure; and that the said public and common bridge, on, &c. and from thence continually afterwards, until the day of taking this inquisition, was, and yet is, ruinous, in decay and out of repair, and insufficient, and without any parapet, building, erection or defence whatever on the sides thereof, to prevent horses and other cattle, carts and carriages, going, returning, passing and travelling upon, along and over the said bridge, from falling from thence into the said river, so that the Queen's liege subjects could not, during all the time last above mentioned, nor yet can, go, return, ride and travel upon, along and over the said bridge without great danger of their lives, and loss of their horses and other cattle, carts and carriages; to the great damage and common nuisance of all the said liege subjects going and returning, riding and travelling upon, along and over the said bridge; and against the peace, &c. And that C. M., late of &c. [*by reason of his tenure of certain lands*] (*d*),

(*d*) This is sufficient allegation of the obligation of a private person to repair a bridge or road, *ratione tenuræ; Reg.* v. *Bamber* (*Inh.*), 5 Q. B. 279; 13 L. J., M. C. 13; 2 Stark. Cr. Pl. 669, and the authorities there cited. *Ratione tenuræ* implies immemoriality; *R.* v. *Hayman*, M. &

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situate, lying and being at D. aforesaid (*e*), in the said county, during all the time aforesaid, was and still is bound to repair and amend the said bridge (*f*), when and as often as it hath been and shall be necessary, and to make the same sufficient, safe and secure, so that the liege subjects of our said lady the Queen may pass, repass, ride and travel upon, along and over the said bridge, without danger of their lives, or loss of their horses and other cattle, carts and carriages, &c.

Plea of the General Issue by the Inhabitants of a Parish to an Indictment for not repairing a Highway.

Forms of plea —general issue.

And A. B. and C. D., two of the inhabitants of the said parish of G. H., by E. F. their attorney, for themselves and the rest of the inhabitants of the said parish, come into court here, and having heard the said indictment read, say that they are not guilty of the said premises in the said indictment above specified and charged upon them, and of this they put themselves upon the country, &c.

Plea by the Inhabitants of a Parish to an Indictment for the Non-repair of a Highway, that an Inhabitant is bound to repair ratione tenuræ (*g*).

That an inhabitant is bound to repair *ratione tenuræ.*

And C. D. and E. F., two of the inhabitants of the said parish of G. H., by A. B. their attorney, for themselves and the rest of the inhabitants of the said parish (excepting one L. M.), come into court here, and having heard the same indictment read, say that our lady the Queen ought not further to prosecute the said indictment against the inhabitants of the parish aforesaid (excepting the said L. M. as aforesaid), because they say that as to the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken and in great decay, the said L. M. by reason of the tenure of certain lands and tenements called ———, lying and being in the said parish, ought to repair and amend the said part of the said highway, so alleged to be ruinous, miry, deep, broken, and in

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Malk. 401; *Reg.* v. *Ramsden*, E. B. & E. 949; 27 L. J., M. C. 296. The obligation to repair *ratione clausuræ* is on the occupier of the lands inclosed, and not the owner; *Reg.* v. *Ramsden, ibid.; ante*, p. 567. The ownership of a navigation is not equivalent to *tenuræ*, unless made so by act of parliament set out in the indictment.

(*e*) If the way lies in parish A. and the liability is laid in respect of lands there, the indictment is not supported by proof of liability to repair a way extending through A. *and other parishes*, by reason of tenure of a farm made up of lands in A. and the *other parishes*. See *Reg.* v. *Mizen*, 2 M. & Rob. 382.

(*f*) If he is only liable to repair part of the main arch of a bridge, which part is in a public township, it may be thus laid, "the said part of the said bridge which lies and is situate in the said township of ———," though it may have been widened since legal memory, and he *may* not be bound to repair the *added part; Reg.* v. *Adderbury* (*East*), *ante*, pp. 567, 573, 580.

Semble, if a highway is swept away by incroachment of the sea, with parts of the land, in respect of tenure of which the owner is bound to repair such way, the party bound to repair *ratione tenuræ* is not liable to be indicted for not repairing; *Reg.* v. *Bamber* (*Inh.*), 5 Q. B. 279. See *ante*, p. 564.

(*g*) As to pleading liability to repair a highway *ratione clausuræ* of the land wherein it lies on both sides of it, or *ratione coarctationis* by inclosing with a new hedge on one side, there having always been a hedge on the other; *R.* v. *Stoughton*, 2 Saund. 157; 5 Esp. 219; *Reg.* v. *Mawgan in Meneage* (*Inh.*), as reported 3 N. & P. 502; 8 A. & E. 496; and see Burn's Justice, *tit. Highway*, Sect. VI. 4; also *ante*, p. 571.

decay as aforesaid, when and so often as there should be occasion (as the said L. M. and all those who held the said lands and tenements for the time being, from time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do, and the said L. M. still of right ought to do). And this they the said C. D. and E. F. are ready to verify; wherefore they pray judgment, and that they and the rest of the inhabitants of the said parish of G. H. (excepting the said L. M. as aforesaid) by the court here may be dismissed and discharged from the said premises in the said indictment above specified. *Forms of Plea.*

Replication thereto, denying the Liability of the Party charged by the Plea to repair.

And hereupon R. S. [*the clerk of the peace or other person*], who prosecutes for our said lady the Queen in this behalf, says, that by reason of anything in the said plea above pleaded in bar alleged, our said lady the Queen ought not to be precluded from prosecuting the said indictment against the said inhabitants of the said parish of G. H., because he says that the said L. M. ought not to repair or amend the said part of the said highway so alleged to be ruinous, miry, deep, broken and in decay, as aforesaid, by reason of his said tenure, in manner and form as in and by the said plea is above supposed and alleged, and this he the said R. S. prays may be inquired of by the country. And the said J. S. and J. N. for themselves and the rest of the inhabitants of the parish of G. H. aforesaid do the like. Replication.

Plea to an Indictment against an entire Parish, for not repairing a Highway, that a particular Division of the Parish within which Division it is situate is bound to repair it.

And C. D. and E. F., two of the inhabitants of a certain district or township called A. in the said parish of G. H. by A. B. their attorney, for themselves and the rest of the inhabitants of the said district or township, come into court here, and having heard the said indictment read, say, that our lady the Queen ought not further to prosecute the said indictment, so far as respects the inhabitants of the district or township aforesaid because they say that the said parish of G. H. is and, from time whereof the memory of man is not to the contrary, hitherto has been divided into three districts or townships, called A., B. and C., and that the inhabitants respectively of the several districts or townships of A., B. and C., have, from time whereof the memory of man is not to the contrary, hitherto (*h*) been used and accustomed to repair and amend the several and respective highways situate and lying in the said respective districts or townships (*i*), independently (*k*) of each other; and that so much of the said highway in the said indictment mentioned as leads from ——— to ———, being in length ——— yards, and in breadth ——— yards, lies within the said district or township of A., and so much of the said highway as leads from ——— to ———, being in length, &c. [*as before*], lies within the said

(*h*) Immemoriality of burden is a sufficient consideration without more; *R.* v. *Ecclesfield* (*Inh.*), 1 B. & A. 348; *Pigott* v. *Bayley*, 6 B. & C. 16; *R.* v. *Yorkshire, West Riding* (*Inh.*), 4 B. &. A. 623; *R.* v. *Hendon* (*Inh.*), 4. B. & A. 628. See 5 M. & S. 260, *contra*, where the road is not within the district to be charged, see also *ante*, p. 567.

(*i*) This averment does not require affirmative proof to be given of the existence of ancient highways within the division; *Reg.* v. *Barnoldswick*, 4 Q. B. 499; but it seems better to add that the highways thus to be repaired would otherwise be repairable by the parish comprising such township. See *ante*, p. 567.

(*k*) It is no objection that all the townships are charged conjointly, *R.* v. *Bishop's Auckland* (*Inh.*), 1 A. & E. 744. As to this see *R.* v. *Eardisland*, 2 Camp. 494; also 2 B. & C. 166; 2 Burr. 984.

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district or township of B., and so much of the said highway, being in length, &c. [*as before*], as leads from ——— to ——— lies within the said district or township of C.; and that the said part of the said highway, in the said indictment described to be ruinous, miry, deep, broken, and in great decay, lies (*l*) in that part of the said parish of G. H. called the district or township of C.; and by reason of the premises aforesaid, the inhabitants of the said district or township of C. ought to repair and amend the part of the said highway last aforesaid, independently of the inhabitants of the said district or township of A. in the said parish, and this the said C. D. and E. F. are ready to verify; wherefore for themselves and the rest of the inhabitants of the said district or township of A. they pray judgment, and that they and the rest of the said inhabitants of the said district or township, by the court here, may be dismissed and discharged from the said premises in the said indictment above specified (*m*).

(2) *Indictable Obstructions to Highways.*

Nuisances in obstructing, encroaching on, or annoying the public in using public highways, bridges, harbours, watercourses or navigable rivers.

All permanent obstructions to the passage of her Majesty's subjects over public highways or bridges are nuisances, for which an indictment will lie. Thus, to place logs of timber upon them; to erect a gate across a road without immemorial usage to do so, even if it is kept open; and to suffer a way to be incommoded by trees hanging over it, are indictable offences (*n*); but this is not to prevent the reasonable exercise of the rights of ownership of the adjoining owner of land over the highway in the enjoyment of his own land, such rights not being inconsistent with the passage of the public (*o*). And where a highway runs between fences, the right of passage for the public *primâ facie* extends over the whole space between the fences (*p*). And though it has been holden that no indictment will lie for distributing lawful handbills on the footway in the street to the inconvenience of the passengers (*q*), yet it seems now to be well established that every unauthorized obstruction of a highway is a misdemeanour (*r*). Thus, a waggoner habitually keeping his waggons standing for hours to unload (*s*); a coachmaster plying for passengers, and allowing his coach to remain in the street more than a reasonable

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(*l*) This is absolutely necessary to be alleged, whether the inhabitants of the three townships be charged jointly or not, *R.* v. *Bishop's Auckland (Inh.)*, 1 A. & E. 774; and *R.* v. *St. Giles, Cambridge*, 5 M. & S. 260.

(*m*) See 1 Saund. 15, 9, c. A parish which, being indicted for not repairing a highway, relies on the liability of others to repair it, must, in their plea, admit that but for such liability, *e. g.* an immemorial custom for inhabitants of a township to repair, they would be liable. They must then show their own non-liability, and also who is liable to repair, *R.* v. *Eastington (Inh.)*, 5 A. & E. 765.

(*n*) Hawk. b. 1, c. 75, s. 9. See Viner's Abridgment, *tit. Nuisance* (C). See *Foreman* v. *Mayor, &c., of Canterbury*, 40 L. J., Q. B. 138.

(*o*) *Vestry of St. Mary, Kensington* v. *Jacobs*, 41 L. J., M. C. 72.

(*p*) *Reg.* v. *United Kingdom Electric Telegraph Co.*, 2 B. & S. 647, note (*a*); 31 L. J., M. C. 106; *Veysey* v. *Hoskins*, 34 L. J., M. C. 145.

(*q*) *R.* v. *Sermon*, 1 Burr. 516; *ante*, p. 466.

(*r*) *R.* v. *Cross*, 3 Campb. 227; *Reg.* v. *Train*, 2 B. & S. 660.

(*s*) *R.* v. *Russell*, 8 East, 427. See *Benjamin* v. *Storr*, 43 L. J., C. P. 162; L. R., 9 C. P. 650.

What Obstructions amount to a Nuisance.

length of time to take up and set down passengers (*t*); or the owner of a house allowing it to remain under repair, and obstruct the public passage for a longer time than is necessary (*u*); or the occupier of a house opening trenches for the purpose of laying down service pipes for gas from the main to the house without parliamentary powers (*v*); will be respectively indictable for nuisances. The holding of a fair or market is not indictable as an obstruction of the highway if there is a prescriptive custom shown to do so (*w*), but a statute sessions for labourers has no legal origin, and therefore is an indictable nuisance to obstruct the highway with refreshment stalls for the use of persons frequenting such (*x*). So, it is always a question for the jury whether the obstruction is so insignificant as not to amount to a nuisance (*y*); but the doctrine that a nuisance may be disproved by proving that though public injury was produced, greater public benefit was also produced, is now overruled (*z*). Nuisances resulting from the several acts of distinct parties, *e. g.*, occupiers of land raising fenders along a line of navigation, may be made the subject of a joint indictment against all of them (*a*); but the ill consequences of erecting piles in a harbour, if slight, uncertain, and rare, are not indictable (*b*). An indictment was held to be proved against the owner of a colliery for throwing quantities of refuse of his colliery into a navigable river so as to cause an obstruction, though he never came near the colliery, but the work was done by his workmen, and the deposit was caused contrary to his express orders (*c*). No action lies for a nuisance unless the plaintiff shows special injury to himself. If a road has been dedicated to the public and used, but the necessary steps by notice, &c., have not been taken under 5 & 6 Will. 4, c. 50, s. 23, to make it repairable by the parish, it is a highway in other respects, and an action lies for obstructing it to the plaintiff's damage (*d*). After conviction, the court may award a fine, or (if the subject-matter of the nuisance indicted is of a permanent nature, admitting of abatement) prostration of so

(*t*) *R.* v. *Cross*, 2 Campb. 224. A tradesman may peaceably remove a coach standing before his door by leading the horses away, and is not obliged to sue for damages; per *Raymond*, C. J., in *Slater* v. *Swann*, Strange, 872.

(*u*) *R.* v. *Jones*, 3 Campb. 230.

(*v*) *Reg.* v. *Longton Gas Company*, 2 E. & E. 651; 29 L. J., M. C. 118.

(*w*) *R.* v. *Smith*, 4 Esp. 109.

(*x*) See *Simpson* v. *Wells*, 41 L. J., M. C. 105.

(*y*) *Reg.* v. *Russell*, 3 E. & B. 942; 23 L. J., M. C. 173; *Reg.* v. *Betts*, 16 Q. B. 1022.

(*z*) *Reg.* v. *Russell*, 3 E. & B. 949, per Lord *Campbell;* and see *Reg.* v. *Train*, 31 L. J., M. C. 169; 2 B. & S. 640.

(*a*) *R.* v. *Trafford*, 1 B. & A. 874; see *ante*, *Bridgwater's* (*Duke of*) *Canal Case.*

(*b*) *R.* v. *Tindall*, 6 A. & E. 143; 1 N. & P. 716, *Scarborough Harbour Case*—a useful form of indictment.

(*c*) *Reg.* v. *Stephens*, L. R., 1 Q. B. 702; 35 L. J., Q. B. 251.

(*d*) *Roberts* v. *Hunt*, 15 Q. B. 17; *Reg.* v. *Cricklade*, 14 Q. B. 735.

Obstructions of Highways.

much of the thing as makes it a nuisance, or both fine and prostration; but both are not absolutely necessary, for the judgment should be adapted to the nature of the case (*d*); and if the obstruction which was indicted is removed, so that the public has free passage again, the judgment will be for a nominal fine (*e*).

Indictment for erecting a Gate across a Public Highway.

That at the time of committing the nuisance hereinafter mentioned, there was, and yet is, a certain ancient common highway, in the parish of M. in the county of N. leading from, &c. into, through, and over a certain public Queen's (*f*) highway, called the Great North Road, and from thence, to, &c. in the parish of B. in the said county, for all the liege subjects of our said lady the Queen and her predecessors, to go, return, and pass on foot and on horseback, at their free will and pleasure, and that on, &c. A. B. at a certain place there in the parish of ——— aforesaid, contiguous to, and on the east side of the Great North Road aforesaid, unlawfully and injuriously did erect and cause to be erected a certain wooden gate of the length of fifteen feet, and of the height of four feet, upon and across the said Queen's highway, leading from the place called, &c. to the Great North Road aforesaid; and that the said A. B. the said wooden gate so as aforesaid erected and made from the said, &c. until the day of the taking this inquisition, at, &c. aforesaid, unlawfully and injuriously did continue locked, and fastened with an iron chain, and yet doth continue, by which the Queen's common highway last aforesaid, during all the time aforesaid was so obstructed and stopped up that the Queen's liege subjects in, by, and through the same highway could not, nor yet can, go, return, and pass on foot and on horseback so freely as they ought and were wont to do: to the great damage and common nuisance (*g*) of all the liege subjects of our said lady the Queen going, returning, passing, and repassing, in, along, and through the said last-mentioned common Queen's highway to the evil example of all others in the like case offending, and against the peace, &c.

Indictment for erecting and continuing a House, part of which was on the Highway (*h*).

[*Describe the highway as before.*] That A. B., with force and arms, at, &c. unlawfully did erect and build, and cause and procure to be

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(*d*) *R.* v. *Pappineau*, Stra. 686; *R.* v. *Yorkshire* (*W. R. Justices*), 7 T. R. 467; *R.* v. *Stead*, 8 *id.* 142; 3 Bla. C. 221.

(*e*) *R.* v. *Incledon*, 13 East, 164; *R.* v. *White*, 1 Burr. 338.

(*f*) So in *Reg.* v. *Stratford* (*Inh.*), 3 Ld. Raym. 40, in error.

(*g*) Every indictment and presentment, whether for nuisances arising from neglect of duty or for encroachments on the public rights, must, in its conclusion, contain the words "to the common nuisance of all the liege subjects of our lady the now Queen," residing, passing or using, &c. (according to the facts), 2 Stra. 688.

(*h*) *R.* v. *Wright*, 3 B. & Ad. 681. See form of indictment for erecting and continuing a market stall in a public highway; *R.* v. *Starkey*, 7 Ad. & E. 95. Indictment lies against even the tenant at will of a house, which, standing on the highway, is ruinous and like to fall down, for, as the danger is what concerns the public, they have a remedy against the occupier in respect of his occupation; *Regina* v. *Watts*, 1 Salk. 357; Ld. Raym. 856; Raym. Ent. 25; see other cases, Burn's Justice, *tit. Highways*, Sect. VI. 4 (cited 9 B. & C. 730). See *R.* v. *Hollis*, 2 Stark. N. P. C. 536, *post*. An increased general facility in communicating with a seaport, and particularly in the conveying coals there, will not justify narrowing the highway by laying down a railway alongside it; *R.* v. *Morris*, 1 B. & Ad. 441. As to the neighbourhood of railways annoying old roads by

Forms of Indictment.

erected and built, a certain brick messuage and tenement, containing in length twelve feet and six inches, and in depth at the east end thereof five feet and six inches, and in depth at the west end thereof two feet and nine inches, and that the same was erected and built, and caused and procured to be erected and built, by him the said A. B. in and upon the said ancient and common highway at the parish aforesaid, in the county aforesaid, to wit, opposite to a certain dwelling-house of one G. H. there situate, and the said part of the said messuage and tenements so erected and built, and caused and procured to be erected and built, by him the said A. B. as aforesaid, in and upon the said ancient and common Queen's highway, at the parish aforesaid, in the county aforesaid, he the said A. B. from the said ——— day of ——— in the year aforesaid, until the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did continue, and yet doth continue; by reason and means whereof the said ancient and common Queen's highway was, during the time aforesaid, at the parish aforesaid, in the county aforesaid, encroached upon, narrowed, and straitened, so that the Queen's liege subjects in, by, and through the said highway could not, nor yet can, go, return, &c. [*as in last precedent*].

Indictment against a Corporation of a Town, for suffering a Watercourse which supplied the Inhabitants with Water, and which they were bound to cleanse, &c. to be filthy and unwholesome.

That from time whereof the memory of man is not to the contrary there was, and still is, a certain common and ancient watercourse (*i*), commonly called Trout Beck, leading from a certain place called the Corporation Dam, in the parish of, &c., in the county of B. to a certain place called the Falls, in the parish of, &c., in the suburbs of the town of B. aforesaid, in the county of B. aforesaid, used by all the liege subjects of our said lady the Queen and her predecessors for the time being, inhabiting and residing in and about the said parishes of ——— and ———, to supply them with water for the use and benefit of themselves and their families, and that a certain part of the said common and ancient watercourse in the parish of St. A. aforesaid, in the suburbs of the said town of B. in the county of B. aforesaid, containing in length five hundred yards, and in breadth ten feet, on, &c. and continually afterwards, until the day of the taking of this inquisition, at, &c. aforesaid, was and still is foul, filled and choked up with mud, weeds, rubbish, dirt, and other filth, whereby the course and passage of the water, which should and ought and before that time was used and accustomed to run and flow through the same watercourse, was during all the time last aforesaid, and still is, so greatly stopped and obstructed, that the liege subjects of our said lady the Queen inhabiting and residing in and about the said parish of St. A. during all the time last aforesaid were, and still are, not only deprived of the benefit and advantage of the water, which, during all the time last aforesaid, should and ought to have run and flowed, and still of right ought to run and flow, through the said watercourse, in its usual and accustomed manner, but also the said mud and other filth during all the time last aforesaid became and were and still are very offensive and nauseous, and the said water thereby greatly corrupted,

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noise and smoke, see *R.* v. *Pease*, 4 B. & Ad. 30; *R.* v. *Gregory*, 5 *id.* 555; 2 N. & M. 478; 2 Tyr. R. 201, in error; but see *R.* v. *Pease*, distinguished from the case of a canal company authorized by act of parliament to use the pure water of a brook, who used it after it was polluted so as to be a nuisance. *Reg.* v. *Bradford Navigation Co.*, 6 B. & S. 631; 36 L. J., Q. B. 191, *post*, p. 592.

(*i*) If a watercourse be stopped to the nuisance of the county, and *none appear bound by prescription* to clear it, those who have the right of fishing, and the neighbouring towns, who have the immediate use, may be compelled to remove the obstruction, Hawk. b. 1, c. 75.

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and unwholesome to be drunk by man, and by means thereof divers noisome and unwholesome smells did from thence arise there, so that the air thereby was and still is greatly corrupted and infected; to the great damage and common nuisance of all the liege subjects of our said lady the Queen, not only there residing and inhabiting, but also going, returning, passing, and repassing by the same; and against the peace, &c. And that the mayor, bailiffs, and commonalty of the said town of B. in the said county of B. for the time being (*k*), the said common and ancient watercourse so as aforesaid being foul, choked, and filled up as aforesaid, ought to empty, cleanse, and scour, and until the said grievance have, from time whereof the memory of man is not to the contrary, emptied, cleansed, and scoured, and have used and been accustomed to empty, cleanse, and scour, and still of right ought to empty, cleanse, and scour, when and as often as the same should or shall be necessary; yet the said mayor, bailiffs, and commonalty have not emptied, cleansed, or scoured, nor caused to be emptied, cleansed, or scoured, the said common and ancient watercourse, so being foul, filled and choked up as aforesaid, as they ought to have done, and still of right ought to do, but during all the time last aforesaid, permitted and suffered, and still do permit and suffer the said watercourse to be foul, filled and choked up as aforesaid, for want of emptying, cleansing, and scouring the same, to the great damage, &c. and common nuisance, and against the peace, &c.

Indictment for leaving open an Area on Foot Pavement in a Street.

[*Describe a public way as before.*] And that A. B., on the ——— day of ———, A.D. ——, at ———, in a certain part of the said common Queen's highway and public street, there, to wit, in the foot pavement of the said street, before the dwelling-house of him the said A. B. unlawfully and injuriously did leave open a certain area of the length of ———, and of the breadth of ———, belonging to him the said A. B., without putting or placing, or causing to be put and placed, any rails or other fence to enclose the same: and he the said A. B., from, &c. until, &c. at, &c. the said area so as aforesaid, being in the said foot pavement, of the said common Queen's highway and public street, unlawfully and injuriously did cause, permit, and suffer to be, remain, and continue open, by reason and means whereof the liege subjects of our said lady the Queen, during the time aforesaid, could not, nor yet can, go, return, and pass on foot in, by, and through the said common Queen's highway and public street, and as they were used and accustomed, and were wont and ought to do, without great peril and danger of their lives; to the great damage and common nuisance of all, &c. in, by, and through, &c. going, returning, and passing on foot, and against the peace, &c.

Indictment for stopping an Ancient Watercourse, whereby the Water overflowed the adjoining Highway, and damaged the same.

That P. Q., on the ——— day of ———, A.D. ——, with force and arms, at a certain ancient watercourse adjoining to the Queen's highway, within the same parish, leading from the town of B. in the county aforesaid, towards and unto the city of G. in the county of G. aforesaid, with gravel and other materials, unlawfully and injuriously did obstruct and stop up, and the said watercourse so as aforesaid obstructed and stopped up from, &c. aforesaid, until the day of the taking of this inquisition, at, &c. aforesaid, unlawfully and injuriously did continue, by reason whereof the rain and waters that were wont and ought to flow and pass through the said watercourse, on the same day and year aforesaid, and on divers other days and times afterwards, between that day and the day of the taking of this in-

(*k*) See the indictment in *R.* v. *Kingston Corporation*, 6 M. & S. 365, note. See also *Reg.* v. *Bradford Navigation Co.*, 6 B. & S. 631; 34 L. J., Q. B. 191, *post*, p. 596.

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quisition, did overflow and remain in the said Queen's common highway there, and thereby the same was, and yet is, greatly hurt, damaged, impaired, and spoiled, so that the liege subjects of our said lady the Queen, through the same way, with their horses, coaches, carts, and carriages, then and on the said other days and times, could not, nor yet can, go, return, pass, repass, ride, and labour as they ought and were wont to do; to the great damage and common nuisance of all the liege subjects of our said lady the Queen through the same highway going, returning, passing, repassing, riding, and labouring, and against the peace, &c.

Indictment for a Nuisance in diverting a Watercourse running into a Public Pond or Reservoir.

That from time whereof, &c. there has been and still is a common watercourse, near a certain place called Foss Dike, within the parish of B. in the said county of Lincoln, which continually during all the said time, at all times of the year, hath run, and been used, and accustomed, and of right ought, without any obstruction or impediment, to run out of a certain place, called the Great Wash, situate and being in the parish of S. in the county aforesaid, into and along the common highway, there leading from ——— to ———, and into a certain pond and reservoir in the said common highway there, and from the said pond and reservoir into the lands of H. D., at which said watercourse, pond, and reservoir, the inhabitants of the said parish of B. and all other her said Majesty's subjects in and through the said common highway passing and repassing, all the said time have used, and of right been accustomed to water their horses and other cattle at their free will and pleasure. And the jurors, &c. present that P. Q. on, &c. at, &c. aforesaid, in and across the said watercourse, in the said highway there, a certain mound, bank, or dam, did then and there make, erect, and build, and the same did raise so high, that the said water in its said ancient course was obstructed, and into the said pond and reservoir did not run as it was used, and accustomed, and ought to do, so that the inhabitants of the said parish and all other her Majesty's subjects in and through the said common highway passing and repassing, were, and still are, deprived of the use of the said pond and reservoir of water for their cattle, and hindered from enjoying the same as they ought and were wont to do: to the great damage, and common nuisance, not only of all the inhabitants of the said parish of B. but of all other the liege subjects of our said lady the Queen in and through the said common highway passing and going, and against the peace, &c.

Indictment for letting a Waggon stand in a Public Street so as to incommode Passengers (*l*).

That A. B., on the ——— day of ———, A.D. ——, before, and at the times hereinafter mentioned was, and still is, a proprietor of divers waggons for conveyance for hire of goods and merchandize to and from E., and being such proprietor he the said A. B. on the day and year aforesaid, and on divers days between the said day and taking of this indictment in the parish of ——— in the said county, without just cause or excuse did cause and permit divers, to wit, twenty waggons to stand and remain for a long time, to wit, ten hours on each day before his warehouse, situate in a public street and highway called ——— street, in the said parish, and divers cumbrous and other parcels which had been conveyed or were intended to be conveyed in such waggons to lie during such time scattered about such street, by which divers of her Majesty's subjects were impeded and incommoded in passing and repassing along the said street or highway, to the common nuisance, great hindrance, impediment and annoyance of all her Majesty's subjects passing and repassing such streets, &c., and against the peace, &c.

(*l*) See *ante*, p. 588.

Obstructions to Highways, &c.

2nd Count.—That the defendant permitted divers waggons to stand in the public street and highway, and there to remain before his warehouse for a long and unreasonable time, by which the Queen's subjects were during that time much impeded and obstructed, &c.

Section 19.

Offences against Religion (*m*) and Public Worship.

Indictment at Common Law (m) for Nuisance in an open Profanation of the Lord's day, by keeping Shop.

That A. B., on the ——— day of ——— A.D. ———, and continually afterwards until the day of taking this inquisition, at, &c. was, and yet is, a common Sabbath-breaker and profaner of the Lord's day, commonly called

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(*m*) The court of sessions of the peace has probably lost jurisdiction over this offence since 5 & 6 Vict. c. 38, *ante*, p. 8. The precedent and notes may be useful, however, to magistrates in considering the offence of Sunday trading, when brought before them as amounting to a common law nuisance, in order to distinguish that offence from "keeping shop" on Sunday against 3 Car. 1, c. 1.

Particular instances of profanation of the Lord's day or Sunday, are by several statutes made punishable before magistrates; but it is also said to be indictable at common law, 2 East's Pleas of the Crown, ch. 1, s. 3; and, as it seems, as a breach of public decency. Mr. East goes on to mention the above precedent, citing an early edition of the Crown Circuit Companion, 155, and 1 Hawkins, ch. 6, ss. 1, 2, 3. "At sessions," says Hawkins (edit. 1787), bk. 1, ch. 6, "it is usual to indict for the nuisance in keeping open shop," and cites Crown Circuit Companion, 372. The eighth and later editions of that work, however, omit the above precedent. A butcher might kill or sell victuals on Sunday before 3 Car. 1, c. 1; accordingly an indictment against a butcher for exercising his trade on a Sunday was held bad on demurrer, for not concluding "against the form of the statute," *R.* v. *Brotherton*, Stra. 702. *Quære*, for the act makes it only the subject of a penalty recoverable before a justice. See also 4 Bla. Com. 63; 1 Taunt. 134.

In Middlesex, precepts have for many ages issued each term from the Crown Office, directed to the constables in the different districts, to make returns to the grand jury, by way of presentment, of all nuisances, and profaners of the Lord's day, &c., in order that they may be proceeded against according to law. These returns when made are considered as presentments, and may be prosecuted as such, or as indictments, 1 Chitty's Criminal Law, 1st edit. 310. In practice, however, after appearance entered for defendant, the proceeding is in general abandoned, 7 & 8 Geo. 4, c. 38 (*ante*, p. 173), does not extend to prevent presentments (at least in Middlesex) by constables against persons, for that they "being common Sabbath-breakers and profaners of the Lord's day, commonly called Sunday, did on certain Sabbath days and hours during the celebration of divine service keep open shop and therein openly sell divers goods." This subject having been brought before the court of King's Bench in Trinity Term, 1837, by the grand jury of Middlesex, Mr. Justice *Littledale*, in his charge to them on 11th November, 1837, stated that presentments of nuisances, &c., by the constables to the grand juries were of the most remote antiquity, and must be considered deliberately by the latter, who must proceed to present such offences of profanation of the Sabbath as should be returned to them, and thus afford the opportunity of proceeding on such presentments to any person who might take them up. He also declared that Sunday trading, if carried on to any extent which creates a nuisance (see 1 Taunt. 134) or obstruction, was indictable at common law;

Sunday, and that the said A. B. on, &c. being the Lord's day, and on divers other days and times, being the Lord's days, during the time aforesaid, at, &c. in a certain place there called, &c. did keep a common, public, and open shop, and in the same shop did then and on the said other days and times, being the Lord's days, there openly and publicly sell and expose to sale flesh meat to divers persons, to the jurors aforesaid as yet unknown (*n*); to the common nuisance (*o*) of all the liege subjects of our said lady the Queen, and against the peace, &c.

Forms of Indictment.

Section 20.

MISPRISION OF FELONY.

Misprision of felony is concealing a felony which a man knoweth, but never consented to, for if he consented he is either principal or accessory (*p*).

In *Williams* v. *Bayley* (*q*), Lord *Westbury* defines it to be where a man, instead of performing his public duty and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, *and further converted it into a source of emolument for himself.* But it would seem that the last-mentioned element is not required in misprision of felony, though it is an important part of the offence of compounding a felony.

The punishment, in the case of a public officer, is imprisonment for a year and a day, or, in the case of a common person, for a less time at the discretion of the court, and in both fine and ransom at the King's pleasure, which is construed to mean the discretion at his courts of justice (*r*).

Section 21.

OF NUISANCES.

(1) *By carrying on Unwholesome or Dangerous Trades* .. 595
(2) *By keeping Disorderly Houses, Brothels, &c.* 597
(3) *Indecency* 598
(4) *Betting-houses* 600

Any trade, however innocent in itself, and useful in its objects, will be a nuisance if carried on in an improper place to the injury of the health or quiet of a neighbourhood. And if,

Nuisances in carrying on unwholesome occupations

but that a mere act of *selling* on the Lord's day was not now more indictable than it had been for the last 700 years.

By a Saxon law of King Athelstan, cited 2 Inst. 226, "Die autem dominico nemo *mercaturam* facito; id quod si quis egerit, et ipsâ merce, et triginta præterea solidis mulctatur."

(*n*) If they are known, their names must be stated.

(*o*) This allegation was omitted in *R.* v. *Brotherton*, Stra. 702, as well as "against the form of the statute." Such an act done in a corner might perhaps not be indictable at common law, *Drury* v. *Desfontaines*, 1 Taunt. 134.

(*p*) 1 Hale, 374; Fost. C. L. 126; *R.* v. *Burdett*, 4 B. & A. 177.

(*q*) 35 L. J., Chanc. 717, 726.

(*r*) Chitt. Cr. Pl. vol. 1, 706; 2 Hale, 374, 375.

Of Nuisances.

near to habitations or public ways.

as in the case of stench produced in a manufacture, the effect be not to render the adjacent places of residence absolutely unwholesome, but to make the comfortable enjoyment of life and property impossible to a number of persons, the same liability will be incurred (*p*). But where health is not affected, the public good resulting from an establishment in some respects offensive may be taken into consideration by the jury in determining whether, on the whole, it ought to be suppressed as a nuisance to the public (*q*). Length of time will not justify a public nuisance under any circumstances, even if twenty years' acquiescence concludes private rights existing at the beginning of that period, so as to oust all remedy by action (*r*). It seems however, that the maxim, *sic utere tuo ut alienum non lædas*, applies, as soon as the growth of human habitations near an offensive manufacture makes it injurious to them (*s*).

Owners of reversions are indictable for nuisances created by the occupier's use of premises calculated to create nuisance, if

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(*p*) *R.* v. *White*, 1 Burr. R. 333; *R.* v. *Neil*, 2 C. & P. 485; *R.* v. *Davey*, 5 Esp. 217.

(*q*) See 1 Russell on Crimes, 297.

(*r*) *Weld* v. *Hornby*, 7 East, 199; *Leeds* v. *Shakerley*, Cro. El. 751; *R.* v. *Cross*, 3 Campb. 227; though in *R.* v. *Neville*, Peake, N. P. C. 91, Lord *Kenyon* said, that in neighbourhoods where offensive trades have been borne with for many years, they are not indictable nuisances unless materially increased by a new manufacture; and see *R.* v. *Watts*, M. & M. 281. But length of time, accompanied by particular circumstances, of public convenience of one kind, opposed to the public inconvenience of another, will sometimes go a great way in making both judges and jurors very unwilling to convict. One case is instanced in *R.* v. *Smith*, 4 Esp. 111, and another is continually occurring respecting the subject of this precedent; *viz.* the deposit of dung, fish, sea-weed, and other descriptions of manure for short periods near the places where they are collected, in order to be taken to neighbouring fields for the improvement and promotion of agriculture. Large quantities of manure are frequently collected in large cities, and laid in heaps on the banks of canals and navigable rivers, for conveyance by barges and boats. In these and such like instances, the general benefit appears to counterbalance the local inconvenience, especially if the offensive matter remain no longer on each occasion than the necessity of the case requires. But a canal company, who were empowered by an act of parliament to take the water of certain brooks and use it for the purpose of their canal, which water was pure at the time when the act passed, but afterwards became polluted by drains before it reached the canal, was held indictable for using the polluted water and penning it back in the canal, so that it became a nuisance, inasmuch as there was nothing in the act compelling them to take the water, or authorizing them to use it so as to be a nuisance. *Reg.* v. *Bradford Navigation*, 6 B. & S. 631; 34 L. J., Q. B. 191; *R.* v. *Pease*, 4 B. & Ad. 30; and see *R.* v. *Gore* (the *Puddledock* case), 8 D. P. C. 102; also *R.* v. *Ward*, 4 A. & E. 384; 6 Nev. & M. 38; *Reg.* v. *Train*, 2 B. & S. 640; 31 L. J., M. C. 169. But an indictment lies for depositing wood naphtha in a warehouse situated in a crowded part of a city, in such a quantity as to create real danger to life and property; *Reg.* v. *Lister*, D. & B. 209.

(*s*) See *Reg.* v. *Bradford Navigation Co.*, 34 L. J., Q. B. 191, 199, *per Cockburn*, C. J.; *Cooper* v. *Barber*, 3 Taunt. 110 (cited 1 B. & Ad. 880); *Bliss* v. *Hall*, 4 Bing. N. C. 183; *Elliotson* v. *Feetham*, 2 *Id.* 134; see *Flight* v. *Thomas*, 10 A. & E. 590.

there be privity of contract between them; or where the reversion has been sold, if the former reversioner was liable (*t*). So masters are liable for nuisances in carrying on their trade committed by their servants although the masters have nothing to do personally with the nuisance, and it be done contrary to his orders (*u*).

Master liable for Acts of his Workmen.

If a prosecution for a public nuisance, *e. g.* keeping a common gaming or some other disorderly house, is discontinued after its removal by *certiorari*, any other person may take it up, by issuing a *venire* to bring it to trial, and by distringas and levy on the defendant's goods for not appearing (*x*).

(2.) The open carrying on of scandalous or immoral trades, or keeping indecent brothels, gaming-houses, lotteries (*y*), and disorderly places of resort of any kind, is an indictable nuisance (*z*); and in the case of brothels and gaming-houses, now subjects the parties offending to the punishment of hard labour (*a*). And these are offences for which a married woman may be indicted, either separately or jointly with her husband (*b*). If a person, being only a lodger, and having only a single room, make use of it for the purpose of open and flagrant immorality, so as to annoy the neighbours, the occupier may be indicted for keeping a bawdy-house, as if the whole house were so tenanted (*c*). But when the owner of a house does not live in the house, but lets it in different apartments to young women of immoral habits as weekly tenants occupying separately under distinct holdings, each tenant having her own key, and who were at their own disposal as well as their earnings; he was held not to be indictable for keeping a disorderly house (*d*), notwithstanding he had notice of the immoral purposes for which the house was used and did not give notice to quit (*e*). But an indictment cannot be sustained against a woman for being a common bawd, and inducing parties to meet and commit fornication; for the bare solicitation of chastity is not an offence at common law, but punishable in the ecclesiastical courts (*f*). But it seems not to be necessary to constitute the offence of keeping a disorderly house that any indecency or disorderly con-

In keeping disorderly houses, brothels, &c.

(*t*) *R.* v. *Pedly*, 1 A. & E. 822; 3 Nev. & M. 627, a case in which sinks were left in a neglected state. See 2 Ld. Raym. 1089.
(*u*) *Reg.* v. *Stephens*, 35 L. J., Q. B. 251.
(*x*) *R.* v. *Wood*, 3 B. & Ad. 657, and cases cited in note, *ibid.* p. 659.
(*y*) 10 & 11 Will. 3, c. 17; *Reg.* v. *Crawshaw*, Bell, C. C. 303; 30 L. J., M. C. 58.
(*z*) *R.* v. *Higginson*, 2 Burr. 1232; *Garrett* v. *Messenger*, 36 L. J., C. P. 338, *per Byles*, J.
(*a*) 3 Geo. 4, c. 114.
(*b*) The charge being the criminal *management* of the house, which the law considers to be principally in the woman's department, 4 Bla. C. 29; *R.* v. *Williams*, 1 Salk. 383.
(*c*) *R.* v. *Pierson*, 2 Ld. Raym. 1197.
(*d*) *Reg.* v. *Stannard*, L. & C. 349; 33 L. J., M. C. 61.
(*e*) *Reg.* v. *Barrett*, L. & C. 263; 32 L. J., M. C. 36.
(*f*) Hawk. b. 1, c. 74.

Nuisances in mode of using Premises.

duct should be perceptible from the exterior of the house (*i*). Ground near a highway, within two miles of London, was kept for shooting at targets and at pigeons; in consequence of which numbers of persons assembled outside the ground, and in the fields adjacent, to shoot at those birds which escaped, causing thereby great noise and disturbance, and doing injury with the shots fired. The owner of the shooting ground was indicted for causing and occasioning such persons to assemble near and about his premises, discharging fire-arms, and making a great noise and riot, whereby the king's subjects were disturbed and put in peril; and it was held that he was so indictable, as the acts of such persons were the probable consequences of his keeping a ground for shooting pigeons in such a vicinage, for which he is answerable as if it was his actual object (*k*).

The making great noises in the night-time (*l*); negligently blasting stone in a quarry, and thereby throwing large pieces of stone so as to endanger the safety of persons in houses, and on the highways adjoining the quarry (*m*); and keeping ferocious animals without proper control (*n*), are indictable nuisances.

Indecencies.

(3.) All violations of decency, as the publication or exhibition of indecent books or pictures, or the indelicate exposure of the person in public places, are indictable misdemeanours at common law.

The publishing an obscene book is a misdemeanour, if sale and circulation would be calculated to prejudice good morals, though the object of the person publishing it was not to injure public morality, but to expose the errors of a particular church or a particular practice of that church (*o*).

Power is given to justices to seize and destroy any such book, prints or articles, if they think that they are of such a character that the publication of them would be a misdemeanour, and proper to be prosecuted as such (*p*).

Exposing persons infected with contagious or loathsome diseases in public (*q*); so bringing and exposing a mare infected with the glanders in a fair (*r*), or exposing by a herbalist of a picture of a man naked to his waist and covered with sores, though the motive for the exhibition was innocent (*s*).

(*i*) *Reg.* v. *Rice*, 35 L. J., M. C. 93; L. R., 1 C. C. R. 21.

(*k*) *R.* v. *Moore*, 3 B. & Ad. 184; *Walker* v. *Brewster*, 37 L. J., Chan. 33. Drawing together, by whatever means, numbers of disorderly persons, as by rope dancing and gaming-houses, &c., cannot but be inconvenient to the neighbourhood, and is indictable; Hawk. P. C. b. 1, c. 75, ss. 6, 7; *Betterton's case*, 5 Mod. 142; Skinner, 625.

(*l*) *R.* v. *Smith*, 2 Stra. 704.

(*m*) *Reg.* v. *Mutters*, L. & C. 491; 34 L. J., M. C. 22.

(*n*) Burn, J., *tit.* "Nuisance," 1.

(*o*) *Reg.* v. *Hicklin*, 37 L. J., M. C. 89.

(*p*) 20 & 21 Vict. c. 83.

(*q*) *R.* v. *Vantandillo*, 4 M. & S. 73.

(*r*) *Reg.* v. *Henson*, Dears. C. C. 24.

(*s*) *Reg.* v. *Grey*, 4 F. & F. 73.

Acts of Indecency.

An indecent exposure of a man's person to the view of one person only though in a public place, there being no other persons present, is not indictable as a nuisance (*t*); but a public omnibus is a public place, so as to make an indecent exposure therein to the view of two or more passengers indictable (*u*); a place is sufficiently public if it is a place where a great number of persons may be affected by his acts, and have been, as the roof at the back of a London house not visible from the street, but visible to the windows of the backs of the houses of another street whence he was seen by seven persons (*x*). It has been said that a public urinal is not such a public place (*y*).

Evidence of a house being a common gaming-house.

In default of other evidence proving any other house or place to be a common gaming-house, it shall be sufficient in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet. And every such house or place shall be deemed a common gaming-house such as is contrary to law and forbidden to be kept by the act of King Henry 8 (*z*), and by all other acts containing any provision against unlawful gaming and gaming-houses (*a*). And where any constable or officer authorized under 8 & 9 Vict. c. 109, s. 1, to enter any house, room or place is wilfully prevented from, or obstructed or delayed in entering the same or any part thereof, or where an external or internal door or means of access to any such house, room or place so authorized to be entered, shall be found to be fitted or provided with any bolt, bar or chain, or any means or contrivance for the purpose of preventing, delaying or obstructing the entry into the same, or any part thereof, of any constable or officer authorized as aforesaid, or for giving an alarm in case of such entry, or if any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming, it shall be evidence until the contrary be made to appear that such house, room or place is used as a common gaming-house within the meaning of this act and

Obstructing constables in entering gaming-houses.

(*t*) *Reg.* v. *Webb*, 1 Den. C. C. 338; and see *Reg.* v. *Elliott*, L. & C. 103.
(*u*) *Reg.* v. *Holmes*, Dears. C. C. 207.
(*x*) *Reg.* v. *Thallman*, 33 L. J., M. C. 55.
(*y*) *Reg.* v. *Orchard*, 3 Cox, C. C. 248, but see *contra*, *Reg.* v. *Martin*, 41 L. J., M. C. 113; L. R., 1 C. C. R. 378.
(*z*) 33 Hen. 8, c. 9.
(*a*) 8 & 9 Vict. c. 109, s. 2.

Keeping Gaming-houses.

of the former acts relating to gaming, and that the persons found therein were unlawfully playing therein (*b*).

Betting-houses.

Betting-houses, within the 16 & 17 Vict. c. 119, are to be taken to be common gaming-houses within 8 & 9 Vict. c. 109 (*c*).

(4.) By 16 & 17 Vict. c. 119, s. 1, "No house, office, room or other place shall be opened, kept or used for the purpose of the owner, occupier or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper or person as aforesaid, as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid: and every house, office, room or other place opened, kept or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

When the legislature declares an act to be a public nuisance, the person doing the act is indictable (*d*).

Indictment for carrying on the Trade of a Trunk-maker near to Houses so as to become a Nuisance.

That A. B., on the ——— day of ———, A.D. ——, and on divers days and times between that day and the taking of this inquisition, at, &c. in a certain workshop there situate, near the dwelling-houses of divers subjects of our lady the Queen, and also divers public Queen's highways, there unlawfully and injuriously did set up, exercise, and carry on the trade and business of a trunk-maker, and on, &c. and on the other days and times aforesaid, there, at unseasonable hours in the morning and in the day-time, and at late hours of the nights of the days aforesaid, unlawfully and injuriously did make, and did cause and procure to be made, divers loud and annoying sounds and noises, by then and there hammering and striking, and causing and procuring to be hammered and stricken, divers trunks and boxes made of wood, iron and copper, and divers pieces of wood, tin, brass, copper, iron, and other metals, with divers large hammers and other instruments made of wood and iron, by reason whereof the said subjects of our said lady the Queen residing in the said dwelling-houses near to the said workshop, on the several days and times aforesaid, were and still are greatly annoyed, disturbed, and incommoded in the use, occupation, and enjoyment of their said dwelling-houses, and greatly interrupted in the exercise and pursuit of their lawful businesses and transactions, and deprived of their natural

(*b*) 17 & 18 Vict. c. 38, s. 2.
(*c*) 16 & 17 Vict. c. 119, ss. 1, 2.
(*d*) *Reg.* v. *Gregory*, 5 B. & Ad. 555; *Reg.* v. *Crawshaw*, Bell, C. C. 303, 316.

sleep and rest, and rendered and made in other respects uncomfortable, and thereby also the subjects of our said lady the Queen, in, and through, and along the common highway aforesaid, passing, repassing, and travelling, were and are greatly annoyed and disturbed; to the great damage, &c., and against the peace, &c.

Forms of Indictment.

Indictment for keeping a Bawdy-house.

That C. D., on the ——— day of ———, A.D. ——, and on divers other days and times between that day and the taking of this inquisition at the parish of ———, in the county of ———, a certain common bawdy-house, situate at ———, unlawfully and wilfully did keep and maintain, and in the said house for filthy lucre and gain, divers evil-disposed persons, as well men as women, then and on the said other days and times there unlawfully and willingly did cause and procure to frequent and come together, and the said men and women in the said house of him the said J. S. at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain drinking, tippling, whoring (*e*), and misbehaving themselves, unlawfully and wilfully did permit, and yet does permit, to the great damage and common nuisance of all the liege subjects of our said lady the Queen therein habiting, being, residing, and passing, and against the peace, &c. (*f*).

The 22 & 23 Vict. c. 17, s. 1, must be complied with before preferring this indictment. This offence is triable at borough quarter sessions as well as county (*g*).

Indictment against a Person for keeping a common Gaming-house.

That M. M., being an idle and ill-disposed person, on the ——— day of ———, A.D. ——, and on divers other days and times between that day and the day of the taking of this inquisition, at, &c. a certain common gaming-house there situate, for his lucre and gain, unlawfully and injuriously did keep (*h*) and maintain, and in the same common gaming-house, on the said, &c. and on the said other days and times there, unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to frequent and come together to game and play, and the same idle and ill-disposed persons to be and remain in the said common gaming-house, and to game and play together, on the said, &c. at, &c. and on the said other days and times, there, did unlawfully and injuriously procure, permit, and suffer, by means whereof divers noises, disturbances, and breaches

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(*e*) Particular instances of illicit intercourse may be proved under this general charge, *Clark* v. *Periam*, 2 Atk. 339; a prosecutor need not prove what particular persons went in, but must show facts in themselves sufficient to induce the conclusion that the house was "kept," which is the offence. See *J'Anson* v. *Stewart*, 1 T. R. 754.

(*f*) See the enactments 25 Geo. 2, c. 36, ss. 5—10, as enforced by 58 Geo. 3, c. 70, s. 7, for facilitating prosecutions of these nuisances by parish officers and constables; also *Burgess* v. *Boetefur*, 7 M. & G. 481; 13 L. J., C. P. 122, in which an inhabitant who gave information of a disorderly house recovered on 25 Geo. 2, c. 36, s. 5, the reward of 10*l.* from the two defendants, who, though not overseers at the time the keeper of the house pleaded guilty, were so when he was brought up for judgment.

(*g*) *Reg.* v. *Charles*, 31 L. J., M. C. 69; L. & C. 90.

(*h*) Keeping a common gaming-house, and for lucre and gain unlawfully causing and procuring divers idle and ill-disposed persons to frequent and come to play together at a game called rouge et noir, and permitting the said idle, &c. to remain playing at the said game for divers large and excessive sums of money, is indictable at common law; *R.* v. *Rogier*, 1 B. & C. 275; 2 D. & R. 431.

Indictment for keeping Gaming-house.

of the peace of our said lady the Queen, then, and on the said other days and times, were there occasioned and committed; to the great encouragement of idleness and dissipation, to the great damage and common nuisance of all the liege subjects of our said lady the Queen, and against the peace, &c. [*Second count like the first, only saying, "a certain common gaming-room in a certain house."*]

Indictment for boiling Bullock's Blood for making Colours near to Public Ways (i).

That T. D., on the ——— day of ———, A.D. ——, and on divers other days and times between that day and the day of the taking of this inquisition, at, &c. aforesaid, in a certain building belonging to the dwelling-house of the said J. B. there situate and being, and also near the dwelling-houses of divers subjects of our said lady the Queen, and near divers public streets and common highways there, did unlawfully boil and cause to be boiled a great quantity of bullock's blood and other filth, for the making and mixing of colours, whereby divers nauseous and unwholesome smells, on, &c. aforesaid, and on the said other days and times during the time aforesaid, at, &c. aforesaid, did from thence arise, so that the air was thereby greatly corrupted and infected, to the great damage and common nuisance of all the liege subjects of our said lady the Queen, not only there inhabiting and residing, but also going, returning, passing, and repassing through the said streets and highways there, against the peace, &c.

Indictment for laying Dung near a Public Street, whereby the Air was infected and Inhabitants annoyed.

That B. B., on the ——— day of ———, A.D. ——, and on divers other days and times between that day and the day of the taking of this inquisition, at, &c. aforesaid, to wit, in a certain common and public highway there, called Bishop's Wharf, unlawfully and injuriously did put, place, and leave, and caused and procured to be put, placed, and left, divers large quantities of dung and filth, whereby divers noxious and unwholesome smells from the said dung and filth did then and there arise, and thereby the air there became and was greatly corrupted and infected; to the great damage and common nuisance not only of all the liege subjects of our said lady the Queen inhabiting and residing near the place where the said dung and filth was so put, placed, and left as aforesaid, but also of all other liege subjects of our said lady the Queen, in, by, and through the said highway, and near the place aforesaid, going, returning, passing, and repassing, and against the peace, &c.

Indictment for keeping a furious Dog unmuzzled near a Highway.

That J. B., on the ——— day of ———, A.D. ——, and on divers other days and times between that day and the day of the taking of this inquisition, at, &c. aforesaid, near unto the Queen's common highway there, unlawfully did keep, and still doth keep, a certain large dog, of a very fierce and furious nature, and the said dog, on, &c. and on the said other days and times, at, &c. aforesaid, near unto the said highway there, unlawfully did permit and suffer, and still doth permit and suffer, to go unmuzzled, and at large, he the said J. B. at the said several days and times well knowing the said dog to be of a very fierce and savage nature and disposition, and prone to bite,

(*i*) See *ante*, pp. 466, 594. If the prosecutor be one of the persons whose comfort the annoyance particularly affected (and the indictment be moved by *certiorari*), and a conviction ensue, he will be entitled to his costs as a "party grieved" within 5 W. & M. c. 11, s. 3. And if the indictment were removed at the instance of the defendant, see 16 & 17 Vict. c. 30, s. 5, *ante*, p. 360.

Forms of Indictment.

worry, and injure all persons passing and repassing on the said highway, by reason whereof the liege subjects of our said lady the Queen, on the said, &c. at, &c. aforesaid, could not, nor can they now, go, return, pass, and labour in and through the said highway there, without great hazard and danger of being bit, maimed, and torn by the said dog, and losing their lives; to the great damage, terror, and common nuisance, &c., and against the peace, &c.

Indictment for exposing a Child infected with Small-Pox in the Public Streets (k).

That on, &c. E. R. an infant of tender age, to wit, about the age of four years, was infected, ill, and sick of and with a certain contagious, infectious, and dangerous disease and sickness, called the small-pox, at, &c. And that M. B. the wife of C. B., having the care and nurture of the said E. R. well knowing the premises aforesaid, afterwards, and whilst the said E. R. was so infected, ill, and sick as aforesaid, to wit, on, &c. aforesaid, unlawfully and injuriously did take and carry the said E. R. into and along a certain open public street and passage, called Market Street, situate in the parish of St. John, in the town of N. in the county of N. aforesaid, used for all the liege subjects of our said lady the Queen, on foot, to go, return, and pass in, along, and through, in which said public street and passage there were divers liege subjects of our said lady the Queen, and near unto and by divers dwelling-houses, habitations, and residences of divers liege subjects of our said lady the Queen, then and there dwelling, inhabiting, and residing, and unto and into a certain common highway, situate and being in, &c. aforesaid, used for all the liege subjects of our said lady the Queen, on foot, and with horses, coaches, carts, and carriages, to go, return, pass, ride, and labour in, along, and through, and in and along which said common highway there, divers liege subjects of our said lady the Queen were then going, returning, passing, riding, and labouring, and amidst and among divers liege subjects of our said lady the Queen, who then and there, to wit, in the same common highway, in the parish and county aforesaid, had met and assembled together; and that the said M. B. afterwards, and whilst the said E. R. was so infected, ill, and sick as aforesaid, to wit, on, &c., and on divers other days and times, between that day and the ——— day of ——— in the same year, at, &c. aforesaid, wrongfully and injuriously did take and carry the said E. R. into and along the aforesaid open and public street and passage, called, &c. and near unto and by the aforesaid dwelling-houses, habitations, and residences of divers liege subjects of our said lady the Queen, there dwelling, inhabiting, and residing, and also near unto and by divers liege subjects of our said lady the Queen, in the said open and public way and passage, on, &c. and on the said other days and times there being, to the great and manifest danger of infecting with the said contagious, infectious, and dangerous disease and sickness called the small-pox, all the liege subjects of our said lady the Queen, who, on the several days and times aforesaid, were in and near the aforesaid open and public way and passage, dwelling-houses, habitations, residences, and common highway, and who had not had the said disease and sickness; to the great damage and common nuisance, &c., and against the peace, &c.

And the jurors, &c. that the said M. B. well knowing that the said E. R. was so infected, ill, and sick as aforesaid, afterwards, and whilst the said E. R. was so infected, ill, and sick, to wit, on the said, &c., and on divers other days and times between that day and the said, &c. in the same year, unlawfully and injuriously did take and carry the said E. R. into and along the aforesaid open and public way and passage, called, &c., situate and

(k) See *R.* v. *Vantandillo*, 4 M. & S. 73; *R.* v. *Sutton*, 4 Burr. 2116; *R.* v. *Barrett*, 4 M. & S. 272.

Of Nuisances.

being, &c. and near unto and by the aforesaid dwelling-houses, habitations, and residences of divers liege subjects of our said lady the Queen, there dwelling, inhabiting, and residing, and also near unto and by divers liege subjects of our said lady the Queen, in the said open and public way and passage, on, &c. and on the said other days and times as last mentioned there being, to the great and manifest danger of infecting with the said contagious, infectious, and dangerous disease and sickness called the small-pox, divers of the liege subjects of our said lady the Queen, who, on the said day and on the said other days and times, were in the said open and public way and passage, and who dwelled, inhabited, and resided there and near thereto, and who were liable to take the said disease and sickness; to the great damage and common nuisance, &c., and against the peace, &c.

For exposing the Person in a Public Vehicle.

For that in a certain public vehicle or conveyance called an omnibus, and employed for the purpose of carrying passengers for hire, and frequented and used by divers liege subjects of our said lady the Queen, passing and repassing in and out of the said vehicle, in the sight and view of A. B. and C. D., and divers of the liege subjects of our said lady the Queen, in the said omnibus, being then and there, unlawfully, wickedly, and scandalously did expose to the view of the said persons so present as aforesaid the body and person of him the said J. S. naked and uncovered for a long space of time, to wit, for the space of half an hour, to the great scandal of the said liege subjects of our said lady the Queen, her crown and dignity.

The indictment need not conclude ad commune nocumentum (*m*).

Indictment for digging up and taking away a Dead Body from a Churchyard (*n*).

That A. B. on, &c. at, &c. the churchyard of and belonging to the parish church of the same parish there situate, unlawfully did enter, and the grave there, in which the body of one M. B. deceased had lately before then been interred, and then was, with force and arms unlawfully, voluntarily, wilfully, and indecently did dig, open, and afterwards, to wit, on the same day and year aforesaid, at, &c. the body of him the said M. B. out of the grave aforesaid unlawfully and indecently did take and carry away, against the peace, &c.

Indictment for preventing the Interment of a Dead Body by an Arrest.

That A. B. and C. D. on, &c. at, &c. in, &c. a certain dead body, to wit, the body of M. B. then and there being, unlawfully and wickedly did arrest (*o*), take and carry away, cause and procure to be arrested, taken,

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(*m*) 14 & 15 Vict. c. 100; *Reg.* v. *Holmes*, Dears. C. C. 207.

(*n*) This has always been holden a misdemeanour indictable at common law; 4 Bla. Com. 235; 2 T. R. 733; *R.* v. *Lynn;* and so was selling the dead body of a person, capitally convicted, for dissection, whether there was direct evidence or not that the defendant sold the body for lucre and gain and for dissection; *R.* v. *Cundick*, 1 D. & R. N. P. C. 13, *Graham*, B. If the shroud, coffin, or any other chattel accompanying the dead body be taken away, with intent to steal, such taking is a larceny. See 2 & 3 Will. 4, c. 75 (Anatomy schools); and *Reg.* v. *Feist*, D. & B. 590. A child has no right to remove the body of his parent from the grave, though for the purpose only of taking it from unconsecrated ground to consecrated; *Reg.* v. *Sharpe*, D. & B. 160.

(*o*) A vulgar notion at one time prevailed, that it was lawful to arrest the corpse of a person deceased for a civil debt due from the party in his lifetime. But it is now clearly ascertained that no such practice is lawful; indeed, to prevent the body from being interred, is an offence against de-

and carried away, with an unlawful and wicked intention, to prevent the interment and burial of the said dead body of the said M. B. which ought to have been done and performed according to the rites and ceremonies of the church of that part of this realm called England, against the peace, &c.

Forms of Indictment.

Indictment for Bathing publicly near Public Ways and Habitations.

That H. O. G. unlawfully, deliberately, and wilfully did expose and exhibit himself naked, near to, and in front of, divers houses of the liege subjects of our said lady the Queen, situate at, &c. aforesaid, and also near to a certain public and common Queen's highway there, and also in the presence of divers liege subjects of our said lady the Queen, both male and female, with intent to vitiate and corrupt the morals of her Majesty's liege subjects, and against the peace, &c. (*p*).

And the jurors, &c. that the said H. O. G. on, &c. at, &c. unlawfully, deliberately, and wilfully did expose himself naked to divers of her said Majesty's liege subjects, against the peace, &c.

Indictment for indecently exposing the Person in indecent Postures (*q*).

That H. O. G. intending, as much as in him lay, to vitiate and corrupt the morals of her Majesty's liege subjects, and to stir up and excite in their minds filthy, lewd, and unchaste desires and inclinations, on, &c. at, &c. unlawfully, wickedly, deliberately, and wilfully did expose and exhibit his private parts, in an indecent posture, situation, and practice, to divers of the liege subjects, both male and female, of our said lady the Queen, with intent to vitiate and corrupt the morals of her Majesty's liege subjects, and to stir up and excite in their minds filthy, lewd, and unchaste desires and inclinations, against the peace, &c.

Quære as to this offence on an open common or place, but in the presence of only one person (*r*).

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cency, and as such indictable under the class of misdemeanours; *Jones* v. *Ashburnham*, 4 East, 465; *Young's case*, 2 T. R. 734; 2 Bla. Com. 472, 8th ed.; 1 Burn's Ecc. Law, by Tyrwhitt, 258, 259. An indictment will lie against a person whose duty it is to bury a dead body for keeping it unburied for a long time so as to be a nuisance; but a father is only bound to find burial for his deceased child if he has the means, and he is not obliged to incur debt to enable him to do so; *Reg.* v. *Vann*, 2 Den. C. C. 331.

(*p*) Undressing on a beach and bathing in the sea, so near inhabited houses as to be distinctly visible from them, is an offence, though the houses are recently erected, and the bathing at that place was previously general; *R.* v. *Crunden*, 2 Campb. 89.

(*q*) When an indictment contained two counts, two instances of exposure were allowed to be given in evidence, *viz.*, one on each of two separate days, or two separate instances on the same day; for, as the day laid in the first count was immaterial, exposure on another day may be proved on that count. Then as the second count charged the offence as done on the "day and year aforesaid," a second exposure, *viz.*, the day laid in the first count may be shown; and if different days are laid in different counts any number of acts of exposure may be shown; *Rowbottel's case*, 1 Lewin's Cr. R. 83. It is necessary to allege distinctly the act done, and it is not sufficient to allege that two persons met together with the intention of committing "divers unnatural and sodomitical practices," and did "then and there commit such practices;" *Reg.* v. *Rowed*, 3 Q. B. 180.

(*r*) *Reg.* v. *Elliott*, L. & C. 103, *ante*, p. 595.

Section 22.

Offices—refusing to accept, abusing, or neglecting.

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1. Refusing to accept offices.

(1.) The refusal to accept offices which parties are liable to serve, and to which they are duly appointed, is an indictable offence. Thus a person duly chosen is indictable for refusing to take on himself the office of constable of a parish which he inhabits (*r*); or the office of overseer of the poor (*s*), or any other ministerial office; but notice of the appointment must first be given him; and the indictment must show the duty he has violated, by setting out the mode in which he was appointed, and how he became liable to serve (*t*).

The form of an indictment for refusing to take the oath of constable of a manor, to which office defendant was duly elected at a court-leet, and for refusing to be sworn into office, after a certificate from the steward to two justices, and notice to do so, will be found in *R.* v. *Mosley* (*u*). It is not inserted here, the recent act relating to constables having materially abridged its utility.

Indictment for refusing to serve the Office of Overseer (*x*).

That on, &c. at, &c. B. C. esquire, and D. E. esquire, then and yet being two justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in the said county of M. and also to hear and determine divers felonies, trespasses, and other misdemeanours committed in the same county (one of them then being of the quorum), and both dwelling near the said parish of A. in the county of M. aforesaid, did under their hands and seals nominate and appoint F. G., then being a substantial householder in the said parish of A. in the county aforesaid, to be overseer of the poor of the said parish for the year then ensuing, according to the form of the statute in such case made and provided. And that afterwards, to wit, on, &c. at, &c. he the said F. G. had due notice of the said nomination and appointment, and was duly and legally served therewith; yet he the said F. G. of the parish aforesaid, in the county aforesaid, yeoman, on the said —— day of —— in the year aforesaid, and continually afterwards, until the day of the taking of this inquisition, during all which time he the said F. G. was and continued, and yet is an inhabitant and householder within the same parish, in the county aforesaid, at, &c.

(*r*) *R.* v. *Harper*, 5 Mod. 96. Refusing to take the oath of office is *primâ facie* evidence of refusal to take on himself the execution of it, and that refusal need not be stated in the indictment; *R.* v. *Brain*, 3 B. & Ad. 614.

(*s*) *R.* v. *Jones*, 2 Str. 1145.

(*t*) *R.* v. *Harper*, 5 Mod. 96.

(*u*) 3 A. & E. 488.

(*x*) As to what constitutes a householder for the purpose of liability to serve this office, see *R.* v. *Poynder*, 1 B. & C. 178, and *Reg.* v. *Spurrell*, 35 L. J., M. C. 74. And so an appointment of only one overseer, because there is no other householder in the parish, is bad, and liable to be quashed. *Reg.* v. *Cousins*, 33 L. J., M. C. 87; 4 B. & S. 849.

unlawfully, obstinately, and contemptuously did, and yet doth, neglect and refuse to take upon himself the execution of the said office of overseer of the poor of the said parish of A. in the said county of M. to which he was so nominated and appointed as aforesaid, or to intermeddle or act therein; against the form of the statute in such case made and provided, and against the peace, &c.

Indictment for refusing to act as Overseer.

(2.) Extortion is the unlawful taking by an officer, by colour of his office, of any money or thing of value, when none is due; or when less is due; or when the money taken is not yet due (*y*). Thus, if a churchwarden obtain any valuable thing by colour of his office (*z*); if a coroner refuse to take an inquisition till his fees are paid (*a*); if an under-sheriff refuse to execute process till he has received his fees, or take a bond for them before execution is sued out; they will be respectively guilty of extortion. At common law this offence was punishable as a high misdemeanour, by fine, imprisonment, and removal from office. The statute of Westminster the First (3 Edw. 1, c. 26), which is in affirmance of the common law, declares and enacts that it shall be extortion for any sheriff, or other minister of the king, whose office in any way concerns the execution and administraton of justice or the common good of the subject, to take any reward, except what he receives of the king; and this statute, in addition to the common law penalties, provides that the party offending shall yield twice as much as he has taken; thereby giving to the party aggrieved an action to recover double the value. But the stated and known fees allowed by the courts of justice to their officers are not affected by this statute, and may be lawfully claimed as of right by the officers (*b*).

2. Committing extortion, oppression, or fraud in office.

In cases of extortion, all who assist in making or enforcing the unlawful demand are guilty as principals; there being no accessories in offences below felony; and all may be indicted jointly (*c*). The indictment must state a certain sum as extortionately taken; but it will be supported on proof of any less or greater sum being so taken (*d*). The sessions have power to try and determine this offence by the express words of their commission (*e*).

All magistrates guilty of exercising the powers of their office corruptly, to the injury of others, are liable to be indicted or proceeded against by criminal information in the Queen's Bench; but they are not so liable for mere error; and the difficulty of proving a corrupt motive, even where it exists, generally renders such proceedings ineffectual.

(*y*) Co. Litt. 368.
(*z*) *R.* v. *Eyre*, 1 Sid. 307.
(*a*) 3 Inst. 149.
(*b*) 2 Inst. 210.
(*c*) *R.* v. *Loggen*, 1 Stra. 75; *R.* v. *Atkinson*, 2 Ld. Raym. 1248.
(*d*) *R.* v. *Burdett*, 1 Ld. Raym. 149; *R.* v. *Gillam*, 6 T. R. 267.
(*e*) *R.* v. *Loggen*, 1 Stra. 75.

Forms of Indictment.

Indictment against a Constable for extorting and obtaining Money under colour of discharging a Bench Warrant.

That A. B., on the ——— day of ———, A.D. ——, then being one of the constables of the said parish, at, &c., did take and arrest one C. D. by colour of a certain warrant called a bench warrant, which he the said A. B. then and there alleged that he had in his possession; and that the said A. B. afterwards and while the said C. D. so remained in his custody as aforesaid, on, &c. at, &c. unlawfully, corruptly, deceitfully, and extorsively, and by colour of his said office, did extort, receive, and take of and from the said C. D. the sum of two guineas (*f*) as and for a fee due to him the said A. B. as such constable as aforesaid, for the obtaining and discharging of the said warrant, as he the said A. B. then and there alleged; whereas in truth and in fact no fee whatever was then due from the said C. D. to the said A. B. as such constable in that behalf; in breach of the duty of his said office of constable, and against the peace, &c. (*g*).

Indictment against a Toll Collector for extorting Toll from a Person who had Compounded (*h*).

That O. B., by colour of being collector and receiver of the monies and tolls at a certain turnpike or toll-bar gate, situate in, &c. aforesaid, on, &c. at, &c. aforesaid, unlawfully, extorsively, and deceitfully, and of his own wrong, extorted, exacted, asked, demanded and received of one A. Z., husbandman, the sum of one shilling and sixpence, for a cart and two horses, that is to say, sixpence for a cart, and sixpence for each of two horses then and there drawing the said cart belonging to him the said A. Z. for permitting the same to pass through the said turnpike or toll-bar gate, under colour and pretence that the said A. Z. had neglected to take out and obtain from him the said O. B. such a ticket or certificate of composition, and

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(*f*) An information against the ferryman over the Menai, laid the ferry to be ancient from time out of mind, and "that 1*d.* was usual rate for passage of man and horse, 7*d.* for 20 cattle, 2*d.* for 20 sheep, &c., and that defendant being the common ferryman, between, &c. and day of exhibiting information, injuste oppressive et deceptive cepit et extorsit de diversis ligeis et subditis domini regis ignotis to the attorney-general, passing that way, diversas denariorum summas excedent' antiquam ratam et pretium pro passagio et transportatione suis et averiorum suorum, *viz.*, pro passagio *cujuslibet* personæ cum equo suo, 2*d.*, et pro *quibuslibet* 20 *catallis*, 2*s.* et sic secundum ratam prædictam pro majori vel minori numero averiorum." Judgment arrested for accumulating several offences under a general charge: each extortion from every particular person being a separate offence which should have been laid singly, so as to enable the court to proportion the fine to each offence; *R.* v. *Roberts*, Carth. 226; Shower, 189; see *R.* v. *Rowed*, 3 Q. B. 180.

(*g*) If *any* fee may be taken, the legal amount must be stated, or the indictment will be bad; *Reg.* v. *Levy*, in Q. B., 8 June, 1839; *Blake's case*, 3 Leon. 268. If the extortion is in levying an execution, the amount of extortion must be laid and shown; *Reg.* v. *Levy*.

(*h*) Two observations particularly apply to this precedent:—

1st. That stat. 3 Edw. 1, c. 26, was only in affirmance of the common law, and therefore all *public* officers, properly so called, whether mentioned in that statute or not, seem to be subject to indictments for extortion; Dalt. c. 41; 1 Russ. C. & M. 144.

2nd. That the question of exempt, or not exempt, from toll of a turnpike gate cannot be tried on an indictment of a bar-keeper for extortion, the general right to take not having been denied, nor the ground of exemption notified; *R.* v. *Hamlyn*, 4 Campb. 379.

exemption from toll, as is permitted by a certain act of parliament passed in the thirty-sixth year of the reign of his late Majesty King George the Third, intituled [*here insert the title of the act*]; whereas in truth and in fact he the said A. Z. had taken and obtained from the said O. B., and was then in possession of, such ticket or certificate of composition and exemption as aforesaid, signed with the name of the said O. B. and dated [*here set out the date to show that it was within the terms of the act*], as in the said mentioned act is specified; against the peace, &c.

Indictment for Extortion by Toll Collector.

(3.) All wilful or gross neglects of duty in public officers, especially where the neglect operates as a hinderance of public justice are indictable offences; and where a duty is cast on a body of several persons, and all neglect it, each is individually liable to prosecution and punishment (*i*). A coroner is liable to indictment for corruptly inducing a jury to find an erroneous verdict; or for refusing to take an inquisition on a dead body; or for not coming in convenient time after notice to view a body and take an inquest thereon (*k*). A constable is indictable for neglecting to apprehend an offender, or to make hue and cry after him (*l*); and an overseer for wilfully neglecting to provide for the poor (*m*), refusing to render his accounts (*n*), neglecting to make a rate to reimburse constables for expenses of passing vagrants, &c., under 14 Car. 2, c. 12, s. 18 (*o*), and for refusing to receive a pauper sent under a legal order of removal (*p*). Whether an indictment in ordinary cases will lie against an overseer or guardian of the poor for not relieving a pauper, when no order has been made for his relief, seems doubtful (*q*); but there is no doubt that he would be indictable for refusing to do so in cases of pressing emergency; or for neglecting to provide necessary food and medical attendance for the paupers in his actual charge (*r*). And where an overseer received money from the reputed father of a bastard child, born within the parish, as a composition for the maintenance of the child, he was held liable to an indictment for fraudulently omitting to give credit for this sum in his accounts, although the contract was wholly illegal, and the money might have been recovered back in an action by the party who paid it (*s*).

3. Neglecting the duties of a public office.

(*i*) *R.* v. *Holland*, 5 T. R. 607.

(*k*) See 2 Hale, 58. The court of King's Bench in one instance granted an information against a coroner of Shropshire for misconduct in taking an inquisition of death, on which he was convicted.

(*l*) *The Queen* v. *Wyatt*, 1 Salk. 381.

(*m*) *Tawney's case*, 2 Nolan, 476.

(*n*) *R.* v. *Commings*, 5 Mod. 179.

(*o*) *R.* v. *Barlow*, 2 Salk. 609. For the word "*may*," when occurring in an act directing anything of a public nature, is read "*shall*," and cases on 23 Hen. 6, c. 9: but the word used in 14 Car. 2, is "*shall;*" see 16 East, 309.

(*p*) *R.* v. *Davis*, Say, 163.

(*q*) *R.* v. *Meredith*, Russ. & Ry. 46.

(*r*) *R.* v. *Booth*, Russ. & Ry. 47, n. (*a*).

(*s*) *R.* v. *Martin*, 3 Campb. 268.

Quære, whether an indictment will lie against a clergyman for refusing to marry persons who have obtained a registrar's certificate for that purpose (*t*).

Indictment against a Constable for neglecting to execute a Justice's Warrant for the Apprehension of a Person.

Neglecting to execute a warrant.

That heretofore, to wit, on, &c., W. N., esquire, then and still being one of the justices assigned, &c., did make (*u*) a certain warrant in writing under his hand and seal, bearing date on, &c., directed to the constable of the parish of G., in the county of D., thereby in her Majesty's name charging and commanding the said constable that, &c. [*here set forth the warrant*], which said warrant, afterwards, to wit, on, &c. at, &c. aforesaid, was duly indorsed for execution by and in the name of X. Y., esquire, then being mayor, and one of her Majesty's justices of the peace in and for the borough of D. in the said county of D. and which said warrant so indorsed, afterwards, to wit, on, &c. at, &c. was delivered to T. O. then and still being constable of the said parish of G. in the county aforesaid, in due form of law to be executed; and the said T. O. was then and there required to execute the same by bringing the body of the said E. R. before the said W. N. at the time and place and for the purpose in the said warrant mentioned. And the jurors, &c., that although the said T. O. could and might and ought to have executed the said warrant accordingly, the said T. O. so being constable of the said township of G., in the county of D. aforesaid, not regarding the duty of his said office, did not, nor would, execute the said warrant as aforesaid, or otherwise howsoever, but unlawfully, wilfully, obstinately, and contemptuously neglected and refused so to do, and therein failed and made default; to the great hinderance of public justice, in contempt, &c., to the evil, &c., and against the peace, &c. (*x*).

Indictment for refusing to assist a Constable in the execution of his Duty.

—— } The jurors for our lady the Queen upon their oath present, that to wit. } heretofore and before the committing of the offence hereinafter mentioned, to wit, on the —— day of ——, A.D. ——, J. B. and W. B. were in the custody of J. N. and J. P., constables of the East Sussex Constabulary, and James Baldwin, a peace officer in the parish of Rotherfield, in the said county of Sussex, upon a charge of felony, and that the said J. N., J. P. and J. B. had then reasonable cause to suspect the said J. B. and W. B. of having committed the said felony, and the said J. B. and W. B. then and there committed an assault upon the said constables and breach of the peace with intent to resist their lawful apprehension. And the jurors aforesaid, upon their oath aforesaid, do further present that the said constables, there being a reasonable necessity for them so to do, called upon C. S., the defendant, for assistance in order to prevent the said assault and breach of the peace. And the jurors aforesaid, upon their oath aforesaid, further present that the defendant C. S. then and there did unlawfully, wilfully, and knowingly refuse to aid and assist the said constables in the execution of their duty as aforesaid, or to prevent an assault and breach of the peace against the peace of our said lady the Queen, her crown and dignity.

(*t*) *Reg.* v. *Moorhouse*, 3 C. & K. 167.

(*u*) This should be positively stated, and not by way of recital after a "whereas," *R.* v. *Crowhurst*, Ld. Raym. 1363; see *Reg* v. *Wyatt*, *id.* 1196, that a conviction on which a warrant of distress is founded, need not be set out in this indictment.

(*x*) The 33 Geo. 3, c. 55, gives a summary jurisdiction to justices to punish parish officers for neglect of duty, but that remedy does not supersede the ancient one by indictment. See *ante*, p. 466.

Forms of Indictment.

A Form of Indictment against a Surveyor of the Highways for not making a Rate on all the Occupiers of Land liable to Repairs to pay for such according to Warrant to him directed, is given in 2 *Chitt. Crim. Law,* 285.

Indictment against an Innkeeper for not receiving a Guest, he having room in his Inn at the time (*y*).

That before, and at the time next herein mentioned, T. I. was an innkeeper, and did keep a common inn for the accommodation of travellers, that is to say, a certain common inn, called the Bell Inn, together with certain stables for horses attached to the said inn, and which said inn and stables are situate in the parish and county aforesaid, and that whilst the said T. I. was such innkeeper, and so kept the said inn and stables as aforesaid, to wit, on, &c. at, &c. one S. P. W. then and there being a traveller, came to a certain outer door of the said inn, such outer door then and there being a usual door of entrance into the said inn, for travellers and other persons, and then and there required the said T. I. to suffer and permit him the said S. P. W. to enter, and to stay, and to lodge at the said inn for and during the night of the same day, and to suffer and permit a certain horse, upon which the said S. P. W. then and there rode, to enter and stay, and lodge in the said stables for and during the time aforesaid,† and that the said S. P. W. was then and there ready and willing, and then and there offered the said T. I. to pay him a reasonable sum of money for such lodging for himself the said S. P. W. and his said horse.†* And that neither was the said inn, nor were the said stables, at the time of such application by the said S. P. W. as aforesaid, fully occupied, but there was then and there sufficient room in the said inn for the accommodation and entertainment of the said S. P. W. therein, and there was then and there sufficient room in the said stable for the accommodation and entertainment of the said horse for and during the time aforesaid;* but that the said T. I. not regarding his duty as such innkeeper, did not, nor would, at the said time when he was so requested as aforesaid, suffer or permit the said S. P. W. to enter to stay or lodge at the said inn as aforesaid, during the time aforesaid, nor did nor would the said T. I. at the said time when he was so requested as aforesaid, suffer or permit the said horse of the said S. P. W. upon which the said S. P. W. rode as aforesaid, to enter or lodge in the said stables for or during the time aforesaid, but so to do the said T. I. then and there, without any sufficient cause, wholly neglected and

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(*y*) This was the form used in *R.* v. *Juens*, 7 C. & P. 213. The defendant was convicted and fined 20*s*. The marginal note is this:—"An indictment lies against an innkeeper, who refuses to receive a guest, he having room in his house at the time; [and it is not necessary for the guest to tender the price of his entertainment, if his rejection is not on that ground, doubted by Lord *Abinger*, C. B., in *Fell* v. *Knight*, 8 M. & W. 276,] and it is no defence for the innkeeper, that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing those particulars; but if the guest come to the inn drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him." Hawk. b. 1, c. 78, s. 2, is full on this point, and adds, "Also it is said, that a person keeping a common inn may be compelled by the constable of the town to receive and entertain as his guest such a person as above, being a traveller. A traveller is entitled to reasonable accommodation, but cannot select a particular room, or insist on sitting up all night in a bed-room when a sitting-room is offered; an innkeeper must admit all persons who apply peaceably to be admitted as guests; *Hawthorn* v. *Hammond*, C. & Kir. 404; see *Sunbalf* v. *Alford*, 3 M. & W. 248.

Indictment against an innkeeper for refusing to receive a guest.

refused; to the great damage of the said S. P. W., to the evil example of all persons in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Second Count.—That whilst the said T. I. was such innkeeper, and so kept the said inn and stables as aforesaid, to wit, on, &c. at, &c. the said S. P. W. then being a traveller, came to a certain outer door, &c. (*as in the first count, omitting the words between the* † *and* †*).

Third Count.—Similar to the second, except that it also omitted the allegation between †* and * and all mention of the horse.

Fourth Count.—That whilst the said T. I. was such innkeeper, and so kept the said inn as aforesaid, to wit, on, &c. at, &c. the said S. P. W. then and there being a traveller, came to the said inn, and then and there required the said T. I. to suffer and permit him the said S. P. W. to enter, and to stay, and to lodge at the said inn for and during a reasonable time for the rest and refreshment of him the said S. P. W. in the said inn, and that the said T. I not regarding his duty as such innkeeper, did not, nor would, at the said time when he was so requested as last aforesaid, suffer or permit the said S. P. W. to enter or stay, or lodge at the said inn, as last aforesaid, but so to do the said T. I. then and there, without any sufficient cause, wholly neglected and refused; to the great damage, &c. &c. (*z*).

Section 23.

Orders of Justices—Disobeying.

Offence indictable.

Disobedience to an order of sessions (*a*), or to an order made by justices out of sessions, in a matter over which they have jurisdiction (*b*), whether by statute (*c*) or at common law, and whether for the payment of money or otherwise (*d*), as for disobedience to an order of maintenance in bastardy on the putative father (*e*), or for payment of a church rate (*f*), is a misdemeanour at common law, as a contempt of public justice, whether another and more summary remedy is or is not available. And this rule applies to corporations aggregate (*g*) as well as all other persons mentioned in the order, and on whom it had been duly served; and though particular officers of a society may have ceased to hold the offices in respect of which it was addressed to them in particular, they are still bound, as members, to use their best

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(*z*) This precedent may be classed under neglects of duties imposed by common law.

(*a*) *R.* v. *Robinson*, 2 Burr. R. 799, 800; *R.* v. *Bartlett*, 2 Sess. Cas. 176.

(*b*) *R.* v. *Balme*, Cowp. 650; *R.* v. *Fearnley*, 1 T. R. 316.

(*c*) *Reg.* v. *Birmingham and Gloucester Railway Company*, 3 Q. B. 223.

(*d*) *Reg.* v. *Brisby*, 1 Den. C. C. 416; 18 L. J., M. C. 157; *Reg.* v. *Ferrall*, 2 Den. C. C. 51; but *Reg.* v. *Ferrall* is met by 35 Vict. c. 3, s. 40, and c. 4, s. 54 (Mutiny Act).

(*e*) *Ibid.* See for a form of indictment for this offence, *post*, Part III., "Bastardy," p. 752.

(*f*) *Reg.* v. *Bidwell*, 1 Den. C. C. 222.

(*g*) See *Reg.* v. *Birmingham and Gloucester Railway Company*, *supra*.

endeavours to cause it to be obeyed (*h*). But before any indictment for disobedience of such an order can be sustained, it must be personally served on the parties who are bound to obey it; and, therefore, an indictment charging a contempt, by six persons, of an order which was only stated to be served on four of them, was holden bad on demurrer (*i*). Upon an indictment for disobeying an order of sessions made on the dismissal of appeal against a poor rate that the appellant should pay costs "immediately upon service of this order or a true copy thereof," with an averment that a true copy of the order was served upon the defendants, it was held sufficient to prove the contents of the minute book of the sessions "that an authentic extract was put on parchment and a copy thereof served, the contents being read out without notice to the defendants to produce the copy served (*j*). On the trial of such indictment, the court will not enter into any of the merits of the original case, nor into formal objections to the indictment which do not appear on the order itself (*k*); for it would be absurd that a party should, by a contempt, procure a revision of the judgment of a competent tribunal; but if it appear on the face of the conviction that the justices had no jurisdiction to make the order, which was disobeyed, it is utterly void, and the defendant should be acquitted at the trial, without being left to bring a writ of error, though the want of jurisdiction may appear on the record (*l*); but if an order in bastardy for payment of money in maintenance of a bastard child on the putative father be bad on its face and a nullity, another petty sessions may hear the case on a fresh application and make a valid order, for disobedience of which latter order by the father an indictment will lie (*m*). Though such previous orders as are the foundation of the magistrate's power must be recited, or at least referred to in the indictment (*n*), the bare recital in such orders of the facts necessary to give the magistrates jurisdiction to make them, will not prove those facts to exist, nor will reciting the orders in *hæc verba* dispense with the necessity of establishing the truth of the facts there stated (*o*). The punishment, on conviction, may be fine and imprisonment, in the discretion of the court.

Order must be personally served.

Order made within jurisdiction cannot be disputed on trial of this indictment.

Punishment.

(*h*) *R.* v. *Gash*, 1 Stark., N. P. C. 441. See *R.* v. *Wade*, 1 B. & Ad. 861.

(*i*) *R.* v. *Kingston*, 8 East, 41; *Reg.* v. *Bidwell*, 1 Den. C. C. 222.

(*j*) *Reg.* v. *Mortlock*, 7 Q. B. 459.

(*k*) *R.* v. *Mytton*, 4 Doug. 333; 3 Esp. 200, note; Caldecot, 536.

(*l*) *R.* v. *Hollis*, 2 Stark. N. P. C. 536. *Abbott*, C. J. There magistrates acting under the Building Act, 14 Geo. 3, c. 78, had ordered a building to be removed, as an encroachment on a highway, and their order was confirmed at the sessions; when, in fact, it was not stated in the conviction to extend so far into the road as to be contrary to the act, so that the order of justices was utterly void.

(*m*) *Reg.* v. *Brisby*, 1 Den. C. C. 416.

(*n*) *R.* v. *White*, Cald. 183; *Reg.* v. *Bidwell*, 1 Den. C. C. 222.

(*o*) *R.* v. *Gilkes*, 8 B. & C. 439.

Disobedience of Orders of Justices.

We may add, that it is essential to the validity of orders made under special statutory power, that every fact necessary to warrant the exercise of the authority should appear *on the face* of them, unless the legislature has dispensed with the ordinary rule of law by giving some more compendious form for better carrying the act into execution (*o*), but in indictment for refusing to obey an order, it is sufficient to set out the substance of the order correctly, and it is not necessary to set out the order according to its tenor (*p*).

Form of indictment.

Indictment against a High Constable for not obeying an Order of Sessions.

Disobedience of orders of justices.

That at the general quarter sessions of the peace holden for the county of Berks, at the Guildhall, Reading, in and for the county aforesaid, on, &c. before A. B., C. D., E. F., and G. H. esquires, and others their fellows, justices of our said lady the Queen, assigned, &c., it was ordered by the said court there [*here set out the order of sessions in the past tense*], as by the said order, reference thereto being had, will more fully and at large appear, which said order was afterwards, to wit, on, &c. at, &c. personally served (*q*) on the said C. D. one of the high constables in the said order named, and the said C. D. then and there had notice of the said order, and was then and there requested to obey the same as therein mentioned; nevertheless, the said C. D., then being one of the high constables in the said order mentioned, unlawfully and contemptuously, upon being so served with the said order as aforesaid, did neglect and refuse to [*here state what the order required the defendant to do*], as by the said order he the said C. D. was required to do, nor hath he the said C. D. at any time since complied with or obeyed the said order, although often requested so to do; in contempt of the said justices, and against the peace, &c.

Section 24.

Riots, Routs, and Unlawful Assemblies.

Riot, what.

Hawkins says a riot seems to be a tumultuous disturbance of the peace, by *three persons or more*, assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature; and afterwards *actually executing* the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful (*r*).

Rout, what.

A rout is said to be a disturbance of the peace, by persons assembling together with an *intention* to do a thing, which, if

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(*o*) *Marsh* v. *Woolley*, 12 L. J., C. P. 247; also 10 B. & C. 152; 11 A. & E. 372. Instances collected, 1 B. & Ad. 869, and *Reg.* v. *Read*, 9 A. & E. 619, *post*, Part III., *tit.* "Bastardy," p. 730.

(*p*) *Reg.* v. *Bidwell*, 1 Den. C. C. 222.

(*q*) This is necessary; and the want of this allegation will not be supplied by the allegation that the defendant was requested to comply with the terms of the order; *R.* v. *Kingstone*, 6 East, 52; *R.* v. *Moorhouse*, Cald. 554.

(*r*) Hawk. b. 1, c. 65, s. 1; *R.* v. *Soley*, 11 Mod. 116.

it be executed, will make them rioters; and actually making a motion towards the execution thereof (*s*). *Rout, what.*

An unlawful assembly, according to the common opinion, is a disturbance of the peace, by persons barely assembling together with an intention to do a thing, which, if it were executed, would make them rioters, but neither actually executing it, nor making a motion towards the execution of it (*t*). Unlawful assembly, what.

But (Hawkins adds) this seems altogether much too narrow a definition. For any meeting whatever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the Queen's subjects, seems properly to be an unlawful assembly; as where great numbers complaining of a common grievance (*e. g.*, the inclosure of land, in which they all claim a right of common (*u*)) meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests: for no one can foresee what may be the event of such an assembly (*x*). It has been lately laid down that the meeting must be under such circumstances as would give firm and rational men reasonable ground to fear breach of the peace (*y*).

Also an assembly of a man's friends for the defence of his person, against those who threaten to beat him, if he go to such a market, or the like, is unlawful; for he who is in fear of such insults ought to demand surety of the peace, and not make use of such violent methods which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. Yet an assembly of a man's friends *in his own house*, for the defence of the possession thereof against those who threaten to make an unlawful entry thereinto, or for the defence of his person against those who threaten to beat him therein, is allowed by law; for a man's house is looked

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(*s*) Hawk. b. 1, c. 65, s. 8; 19 Vin. Abr. *tit.* "Riots."

(*t*) Hawk. b. 1, c. 65, s. 9. See *R.* v. *Birt*, 5 C. & P. 154, and the Charge of *Tindal*, C. J., at Stafford Special Commission in 1842: C. & Mar. 661.

Training or Drilling to Use of Arms, &c.]—By 60 Geo. 3, c. 1, every person who shall be present at any meeting or assembly for the purpose of training and drilling any other person to use of arms, or the practice of military exercise, movements, &c. or who shall train or drill any person to such practices, &c. or who shall aid and assist therein, without lawful authority from his majesty, or lord-lieutenant or two justices of the county, riding, &c. being legally convicted thereof (*i. e.*, by indictment and verdict), shall be liable to fine and imprisonment for a space not exceeding two years. And all persons so assembled, &c. may be detained and committed for trial, unless sufficiently bailed until next assizes or sessions, general or quarterly. But prosecutions must be commenced within six months after the commission of the offence.

(*u*) This instance is put by Hawkins, b. 1, c. 65, s. 8, in defining a "rout."

(*x*) Hawk. b. 1, c. 65, s. 9; 4 Bla. Com. 142.

(*y*) *Alderson*, B., in *Reg.* v. *Vincent*, 9 C. & P. 91 (*a Chartist's case*).

Riots, &c.

upon as his castle (*z*). But the like liberty is not allowed by the law to a man in defence of other property, *ex. gr.*, his close (*a*).

On an indictment for a riot against three or more, if a verdict acquit *all but two*, and find them guilty, the finding is repugnant and void, unless the indictment charge them with having made such riot *together with divers other persons unknown;* for otherwise it appears that the defendants are found guilty of an offence whereof it is impossible that they should be guilty, for there can be no riot where there are no more than two persons (*b*). And let it be observed, that though women are amenable to the law as rioters, infants of either sex, under the years of discretion, are not (*c*). But where six were indicted for a riot, and two of them died before trial, two were acquitted, and two only found guilty, yet judgment was given upon this verdict, for, by Lord *Mansfield*, they must have been found guilty with one or both of those who had not been tried, or it could not have been a riot (*d*).

If a number of persons being met together at a fair or market, or any other lawful or innocent occasion, happen on a sudden quarrel to break the peace, it seems agreed that they are not guilty of a riot, but of sudden affray only, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it (*e*). Yet it is said, that if persons innocently assembled together, do afterwards, upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot; because, upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design (*f*).

Also it seems to be certain, that if a person, seeing others actually engaged in a riot, do join himself unto them, and assist them therein, he is as much a rioter as if he had at first assembled with them for the same purpose; inasmuch as he has no pretence to contend that he came innocently into the company, but appears to have joined himself unto them, with an intention to second them in the execution of their unlawful enterprise; and it would be endless as well as superfluous, to examine whether every particular person engaged in a riot

(*z*) Hawk. b. 1, c. 65, s. 10; 11 Mod. 116.
(*a*) *R.* v. *The Bishop of Bangor*, 1 Russ. C. & M. 255; *ante, tit.* "Forcible Entry."
(*b*) *R.* v. *Sudbury*, 1 Ld. Raym. 484.
(*c*) Hawk. b. 1, c. 65, s. 14.
(*d*) *R.* v. *Scott*, 3 Burr. 1262.
(*e*) Hawk. b. 1, c. 65, s. 3.
(*f*) *Id. ibid.*

were, in truth, one of the first assembly, or actually had a previous knowledge of the design of its movers (*g*). *What amounts to a Riot.*

It has been holden, that the enterprise ought to be accompanied with some offer of violence, either to the person of a man or to his possessions, as by beating him, or forcing him to quit the possession of his lands or goods, or the like; and from hence it seems to follow, that persons riding together on the road with unusual weapons, or otherwise assembling together in such a manner as is apt to raise a terror in the people, without any offer of violence to any one in respect either of his person or possessions, are not properly guilty of a riot, but only of an unlawful assembly (*h*), but this must be considered doubtful since Lord *Mansfield* said, speaking of the O. P. riots at Covent Garden, "If people endeavour to effect an object by tumult and disorder, they are guilty of a riot; it is not necessary to constitute this crime that personal violence should have been committed, or that a house should have been pulled in pieces" (*i*). However, it seems clearly to be agreed, that in every riot there must be some circumstance either of actual force or violence, or at least of an apparent tendency thereto, as is naturally apt to strike a terror into the people, as the show of arms, threatening speeches, or turbulent gestures (*j*): for every such offence must be laid to the terror of the people (*k*). And from hence, adds Hawkins, "it clearly follows that assemblies at wakes or other festival times, or meetings for exercise of common sports or diversions, as bull-baiting [but see now 5 & 6 Will. 4, c. 59, s. 3], wrestling, and such like, are not riotous. And from the same ground also it seems to follow, that it is possible for three persons or more to assemble together with an intent to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a competent number of people assemble together in order to carry off a piece of timber to which one of the company has a pretended right, and afterwards do carry it away without any threatening words or other circumstances of terror." He adds, that by parity of reasoning the assembling together in a peaceful manner to do a thing contrary to a statute (*e. g.*, to celebrate mass), and afterwards peaceably performing the thing intended, cannot be a riot (*l*).

Whether the proclamation from the Riot Act, 1 Geo. 1, c. 5, be read or not, the common law misdemeanour of riot remains, and magistrates, constables, and even private persons may disperse the offenders, and by force if it cannot be otherwise accomplished (*m*).

(*g*) Hawk. b. 1, c. 65, s. 14.
(*h*) *Id.* s. 4.
(*i*) *Clifford* v. *Brandon*, 2 Camp. 358, 369.
(*j*) Hawk. b. 1, c. 65, s. 4.
(*k*) Hawk. b. 1, c. 65, s. 3; *R.* v. *Hughes*, 4 C. & P. 373.
(*l*) Hawk. b. 1, c. 65, s. 5.
(*m*) *R.* v. *Furzy*, 6 C. & P. 81.

Riots, &c.

Rioters injuring building, machinery, &c.

By 24 & 25 Vict. c. 97, s. 12, If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggon-way, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than five (*n*) years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

The 11th section enumerates "any building or erection used in farming land or in carrying on any trade or manufacture or any branch thereof, or any building other than such as are before mentioned belonging to the Queen or to any county, riding, division, city, borough, poor law union, parish or place, or belonging to any university or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam-engine or other engine for sinking, working, ventilating or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk for conveying minerals from any mine."

Evidence.

Declarations made by the parties assembling may be made evidence for the purpose of showing the object of the assembly (*o*). Parol evidence of inscriptions and devices on banners and flags displayed at a meeting, is admissible without producing the originals (*p*). If any person encourages or promotes or takes part in riots, whether by words, signs or gestures, or by wearing a badge or ensign of the rioters, he is himself to be considered a rioter, and he is liable to be arrested for a breach of the peace. In this case all are principals (*q*).

Indictment for a Riot at Common Law.

That A. B., C. D. and E. F. with divers evil-disposed persons, to the number of ten or more, to the jurors aforesaid as yet unknown, on, &c., with force and arms, at, &c., did, unlawfully, riotously, routously, and tumultuously assemble and meet together to disturb the peace of our lady the Queen (*r*), and being so then and there assembled and

(*n*) 27 & 28 Vict. c. 47, s. 2.
(*o*) *Redford* v. *Birley*, 3 Stark. 76.
(*p*) *R.* v. *Hunt*, 3 B. & A. 566.
(*q*) Per *Mansfield*, L. C. J., *Clifford* v. *Brandon*, 2 Camp. 370.
(*r*) It is said that an unlawful purpose of assembly must be shown; but this seems doubtful, as a riot may occur, though the original object of the meeting was lawful. See *R.* v. *Gulston*, 2 Ld. Raym. 1210.

gathered together, did then and there make great noise, riot, tumult, and disturbance, and then and there unlawfully, riotously, routously, and tumultuously remained and continued together, making such noises, tumults, and disturbances for a long space of time, to wit, &c., to the great terror (*s*) and disturbance, not only of the liege subjects of our said lady the Queen there inhabiting and residing, but of all the other liege subjects of our said lady the Queen there passing and repassing in and along the public streets and Queen's common highways there, in contempt, &c. and against the peace, &c. Evidence.

Hard labour may be ordered on conviction under 24 & 25 Vict. c. 97, s. 12, *supra*, and for a riot under 3 Geo. 4, c. 114; and costs of prosecution are allowed, 7 Geo. 4, c. 64, s. 23. Punishment of riot.

This offence is not affected by the 39 Geo. 3, c. 79, s. 1.

Section 25.

SOLICITATIONS TO COMMIT OFFENCES.

Every solicitation of another to commit an indictable offence, whether felony or misdemeanour, is itself an act amounting to a misdemeanour at common law (*t*). Thus, to solicit a servant to steal the goods of his master is a misdemeanour, although no felonious act be done in pursuance of the incitement, or any farther step beyond the soliciting be taken towards the commission of the felony (*u*), and this is so notwithstanding the 24 & 25 Vict. c. 94, s. 2, which makes it a felony to "counsel, procure or command any other person to commit any felony," for that act contemplates that a felony should have been committed (*x*). Again, to solicit a member of the privy council to accept a bribe for the disposal of an office (*y*); to promise money to a member of a corporation if he will vote for a particular individual as mayor (*z*); or to offer a bribe to a juryman (*a*), are themselves misdemeanours; and the same principle applies to all cases where an ineffectual attempt is made to induce another to commit an offence. On a prosecution for a misdemeanour in inciting another to commit felony, it is not necessary for the prosecutor to show negatively that the felony was not completed; but he may leave it to the defendant to show, if he

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(*s*) These words are essential to sustain a charge of *riot;* but if the indictment omit them, and riotous acts, as cutting down fences, &c. are proved, it will still support a conviction of an "unlawful assembly," *R.* v. *Cox*, 4 C. & P. 538. *Parke*, B.:—So, if after assembling for what, if executed, would make the parties rioters, they separate without carrying the purpose into effect, *R.* v. *Birt*, 5 C. & P. 154, *Patteson*, J.

(*t*) *Ante*, p. 467.

(*u*) *R.* v. *Higgins*, 2 East, 5.

(*x*) *Reg.* v. *Gregory*, 36 L. J., M. C. 60; L. R., 1 C. C. R. 77.

(*y*) *R.* v. *Vaughan*, 4 Burr. 2494.

(*z*) *R.* v. *Plympton*, 2 Ld. Raym. 1377.

(*a*) *Young's case*, cited 2 East, 14, 16.

Solicitation to commit Perjury.

think fit, that the misdemeanour was merged in the greater offence; or, in the absence of such proof, he may be convicted of the solicitation (*b*).

The subject of attempts to commit offences is to be found treated of at pp. 467, 491.

Indictment for soliciting a Woman to commit Perjury, by swearing a Child to an Innocent Person (*c*).

That A. B., being a wicked and evil-disposed person, and minding and intending great injury to one C. D. a good and valuable subject of our said lady the Queen, and unjustly to cause and procure him to be put to great charges and expense of his monies, and to give security for the maintenance of a child, of which one E. F., spinster, was on, &c. pregnant, and which by the laws of this realm was likely to become a bastard, did on the same, &c. aforesaid, at, &c. aforesaid, unlawfully and wickedly, solicit, instigate, persuade, and procure the said E. F. to go before one of the justices of our said lady the Queen, assigned, &c. and that she the said E. F. in consequence of such solicitation, instigation, persuasion, and procurement, did go in her own proper person before G. H. one of the justices of our said lady the Queen, assigned, &c. and then and there did, &c. [*state the filiation*], whereas in truth and in fact he the said A. B. at the time when he so endeavoured to persuade, solicit, and instigate the said E. F. to make oath and swear, as aforesaid, then and there well knew that the said C. D. would be put to great charges and expense of his monies, if she the said E. F. would swear as aforesaid; and whereas in truth and in fact he the said A. B. at the said time when he so endeavoured to persuade, solicit, and instigate the said E. F. to make oath and swear as aforesaid, had no reasonable or probable cause whatsoever to suspect or imagine that the said C. D. was the father of such child, but on the contrary thereof, the said A. B. was then and there informed by the said E. F. that he the said A. B. was the father of such child, of which she the said E. F. was so pregnant as aforesaid; and whereas in truth and in fact she the said E. F. never told or informed him the said A. B. that the said C. D. was the father of such child; and whereas in truth and in fact he the said A. B. so wickedly and unlawfully endeavoured to persuade, solicit, and instigate the said E. F. to swear as aforesaid, in order that he the said A. B. might be exonerated, freed, and discharged from divers expenses which might accrue to him as being the father of such child after the same should be born of the body of her the said E. F.; against the peace, &c.

Indictment for soliciting a Witness to disobey a Subpœna to give Evidence before the Grand Jury (*d*).

That on, &c. a certain writ of our said lady the Queen, called a *subpœna ad testificandum*, had been and was duly issued and tested by and in the name of P. Q. of, &c. at, &c. the same day and year aforesaid, the said P. Q. then and there being custos rotulorum in and for the said county, which said writ was directed to B. B. and D. D., by which said writ our said lady the Queen commanded, &c. [*recite the writ*]. And the jurors,

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(*b*) *R.* v. *Higgins*, 2 East, 19, 20. Per *Grose*, J. See Index, *tit. Merger.*

(*c*) To solicit, or attempt to persuade a witness to swear falsely, though such solicitation be ineffectual, is a misdemeanour at common law; *R.* v. *Edwards*, cited in *Scofield's case*, Cald. 400.

(*d*) This is an offence indictable at common law, Hawk. b. 1, c. 21. The mere attempt to stifle evidence is criminal, though the persuasion should not succeed, on the general principle that an incitement to commit any crime is itself criminal, *R.* v. *Phillips*, 6 East, 464.

Indictment for soliciting a Witness to disobey a Subpœna.

&c. that a copy of the said writ was on, &c. at, &c. duly served on the said H. H. who then and there had notice to appear and give evidence according to the exigency of such writ, and that the evidence of the said H. H. at the time of issuing the said writ, and from thence until and upon the said, &c. therein mentioned, was material and necessary to have been given before the said grand jury on the said bill of indictment, so to be preferred against the said A. B. as aforesaid, and that at the sessions of the peace holden at, &c. in and for the said county, on, &c. aforesaid, such bill of indictment was preferred against the said A. B. to and before a certain grand jury then and there duly assembled in that behalf. And the jurors, &c. that A. B., being an evil-disposed person, and contriving and intending to obstruct and impede the due course of justice, on, &c. at &c., unlawfully and unjustly solicited, persuaded, and prevailed upon the said H. H. to absent himself from the said sessions of the peace, holden as aforesaid, and not to appear there before the justices then and there assembled, to testify the truth and give evidence before the said grand jury on the said bill of indictment so preferred against the said A. B. as aforesaid (and the said H. H. in consequence of such solicitation and persuasion, did not so appear and give evidence according to the exigency of said writ); to the great obstruction, hinderance and delay of public justice, in contempt, &c. to the evil, &c. and against the peace, &c. And the jurors aforesaid, upon their oath aforesaid, do further present that on the said, &c. a certain other writ of our said lady the Queen had duly issued, directed to the said B. B. and D. D., by which said last-mentioned writ our said lady the Queen commanded the said B. B. and D. D. that, &c. [*recite the writ*]. And the jurors, &c. that the evidence of the said H. H. at the time of issuing the said last-mentioned writ, and from thence until and upon the said, &c. therein mentioned, was material and necessary to have been given before the said grand jury in the said bill of indictment so to be preferred against the said A. B. as aforesaid. And the jurors, &c. that the said A. B. being an evil-disposed person, &c. [*same as first count, saying* "endeavoured to dissuade," *&c., and omitting the allegations that the solicitation was successful*].

Soliciting an artificer to leave the kingdom is no longer an indictable offence, stats. 5 Geo. 1, c. 27, 23 Geo. 2, c. 13, s. 1, and 25 Geo. 3, c. 67, ss. 6, 7, having been repealed by 5 Geo. 4, c. 97.

Section 26.

SETTING SPRING-GUNS AND MAN-TRAPS.

Setting spring-guns, &c. with intent.

By 24 & 25 Vict. c. 100, s. 31, whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine, calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years (*e*), or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall knowingly and wilfully permit any such spring-gun,

(*e*) 27 & 28 Vict. c. 47, s. 2.

Setting Spring-Guns and Man-Traps.

man-trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent aforesaid; provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin; provided also, that nothing in this section shall be deemed to make it unlawful to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling-house for the protection thereof.

Fines and sureties for keeping the peace are authorized by sect. 71, and costs are allowed by sect. 77.

Indictment for unlawfully setting a Spring-Gun.

That A. B. on, &c. at, &c. knowingly and unlawfully did set and place, and cause to be set and placed, in a certain wood of him the said A. B. there situate, a spring-gun, the same being then and there loaded with gunpowder and leaden shot, with intent that the same might inflict grievous bodily harm upon a trespasser coming in contact therewith; against the form of the statute, &c. and against the peace, &c. [*Add a second count, substituting the words* "whereby the same," *for the words* "with intent that the same."]

Section 27.

CONCEALMENT OF TREASURE TROVE.

The Queen has a right to treasure concealed which has no owner, and a person is bound not to wilfully prevent the knowledge of it coming to the Queen's officers (*f*). Treasure trove means any gold or silver coin, plate, or bullion found hidden in the earth or other private place, the owner thereof being unknown (*g*).

Section 28.

LARCENY, ETC., OF DOGS.

Dogs.

No indictment for larceny can be maintained for stealing dogs (*h*); but by 24 & 25 Vict. c. 96, s. 18, Whosoever shall steal any dog, shall on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction there to be imprisoned, or to be imprisoned and kept

(*f*) 3 Inst. 132; *Reg.* v. *Thomas*, 33 L. J., M. C. 22.
(*g*) 1 Bl. Com. 293. For Form of Indictment, see *Reg.* v. *Thomas*, *ubi sup.*
(*h*) *Reg.* v. *Robinson*, 28 L. J., M. C. 58.

to hard labour for any term not exceeding six months, or shall forfeit and pay over and above the value of the said dog such sum of money not exceeding 20*l.* as to the said justices shall seem meet; and whosoever having been convicted of any such offence, either against this or any former act of parliament, shall afterwards steal any dog shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour. *Stealing a Dog after a previous Conviction for the like Offence.*

As to appeals against convictions under this act, see Chapter on Appeals against Convictions.

Sect. 19. Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen, or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money not exceeding 20*l.* as to such justices shall seem meet; and whosoever having been convicted of any such offence, either against this or any former act of parliament, shall afterwards be guilty of any such offence as in this section before mentioned shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour. Having stolen dog on premises after a previous conviction for a like offence.

Sect. 20. Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour. Taking reward to recover stolen dog.

Sect. 21. Whosoever shall steal any bird, beast or other animal ordinarily kept in a state of confinement, or for any domestic purpose, not being the subject of larceny at common law, or shall wilfully kill any such bird, beast or animal, with intent to steal the same or any part thereof, shall, on conviction thereof before a justice of the peace at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding six months, or else shall forfeit and pay over and above the value of the bird, beast or other animal, such sum of money not exceeding 20*l.* as to the justice shall seem meet; and whosoever having been convicted of any such offence, either against this or any former act of parliament, shall afterwards commit any offence in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such time not exceeding twelve months as the convicting justice shall think fit. Birds and other animals.

Possession of stolen birds, &c.

Sect. 22. If any such bird, or any of the plumage thereof, or any dog, or any such beast, or the skin thereof, or any such animal, or any part thereof, shall be found in the possession or on the premises of any person, any justice may restore the same respectively to the owner thereof; and any person in whose possession or on whose premises such bird, or the plumage thereof, or such beast, or the skin thereof, or such animal, or any part thereof shall be so found, such person knowing that the bird, beast or animal has been stolen, or that the plumage is the plumage of a stolen bird, or that the skin is the skin of a stolen beast, or that the part is a part of a stolen animal, shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment as any person convicted of stealing any beast or bird is made liable by the last preceding section.

As to appeal, see *post*, Part III.

Pigeons.

Sect. 23. Whosoever shall unlawfully and wilfully kill, wound or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay over and above the value of the bird any sum not exceeding 2*l*.

As to appeal, see *post*, Part III.

Where pigeons kept by one person were in the habit of feeding upon the land of another, and the latter after complaining of the damage done, and giving notice that he would destroy them if they were not prevented, shot one of them, it was held that the killing was not unlawful within the section (*i*).

(*i*) *Taylor* v. *Newman*, 32 L. J., M. C. 186.

PART II.

CHAPTER I.

OF THE ORIGINAL JURISDICTION OF THE SESSIONS IN PENAL AND CIVIL MATTERS.

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SECTION 1.

OF THE ORIGINAL JURISDICTION OF THE SESSIONS.

WE come now to that part of the business of the sessions, which is entirely submitted to the judgment of the court, without the intervention of a jury; and which, as opposed to the criminal trials, may be termed the civil jurisdiction of the court of quarter sessions.

The far greater part of the civil business of the sessions comes before the justices as a *court of appeal* deriving authority from various statutes. But the sessions have in some matters an original jurisdiction, which will be shortly considered in this Chapter.

In general, the sessions have an original jurisdiction to do whatever may be done by two magistrates; except where the statute, empowering the latter to act, gives an appeal to the sessions (*a*).

The cases in which the sessions most usually exercise an original jurisdiction are in cases of apprenticeship; in the allowance of articles of the peace; and in the disposal of incor-

(*a*) Per *Holt*, C. J., *R.* v. *Boughton* (*Inh.*), 1 Ld. Raym. 426. Thus they cannot make an original order of removal, *R.* v. *Bond*, 2 Show. 503.

Original Jurisdiction of Sessions.

rigible rogues (*b*) committed to the general or quarter sessions for punishment. The granting of licenses for keeping houses for the sale of intoxicating liquors by the county licensing committee of the quarter sessions is an anomalous proceeding, which will be treated of under *tit.* "Licensing of Houses for the Sale of Intoxicating Liquors," *post*, Part III.

Section 2.

OF THE JURISDICTION OF THE SESSIONS IN CASES OF APPRENTICESHIP.

Ill-treatment and misconduct of apprentices.

Stat. 5 Eliz. c. 4, s. 35, enacts, "That if any *such* master (*c*) shall misuse or evil intreat his apprentice, or the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice being aggrieved, and having cause to complain, shall repair unto one justice of the peace within the said county, or to the mayor, or other head officer of the city, town corporate, market town, or other place where the said master dwelleth, who shall by his wisdom and discretion make such order and direction between the said master and his apprentice as the equity of the case shall require; and if for want of good conformity in the said master, the said justice of the peace, or the said mayor, or other head officer, cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor, or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, or within the said city, town corporate, or market town, to be before the justices of the said county, or the mayor, or head officer of the said town corporate, or market town, if the said master dwell within any such; and upon his appearance, and hearing of the matter before the said justices, or the said mayor, or other head officer, if it be thought meet unto them to discharge the said apprentice of his apprenticehood, then the said justices, or four of them at the least, whereof one to be of the quorum, or the said mayor, or other head officer, with the assent of three other of his brethren, or men of best reputation within the said city, town corporate, or market town, shall have power by authority hereof, in writing under their hands and seals, to pronounce and declare, that they have discharged the said apprentice of his apprenticehood; and the cause thereof and the said writing so being made and enrolled by the clerk of the peace and town clerk amongst the records that he keepeth, shall be a sufficient discharge for the said apprentice against his master, his executors, and administrators, the in-

(*b*) Formerly the quarter sessions had original jurisdiction in matters relating to orders for the maintenance of bastardy, but their jurisdiction in that matter has been made appellate.

(*c*) *Viz.* "householder having and using half a plough land at the least in tillage," requiring "an apprentice to serve in husbandry or any other art, mystery or science," in the act expressed.

denture of the said apprenticehood, or any law or custom to the contrary notwithstanding. And if the default shall be found to be in the apprentice, then the said justices, or the said mayor, or other head officer, with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him as by their wisdom and discretion shall be thought meet."

In the construction of this act it was at one time doubted whether the sessions could interfere except on appeal; but it is clearly settled that they have jurisdiction to act without any application previously made to a magistrate (*d*). Their jurisdiction extends not only to apprentices bound to the trades enumerated in the statute, but to apprentices in all other trades (*e*): but, as it would seem, is restricted to compulsory bindings, without premium paid (*f*); and even if the master be a freeman of the city of London, and the indentures are enrolled in London, the sessions for the county of Middlesex have jurisdiction to discharge the apprentice, notwithstanding the saving in section 40 of the act of the privileges of London and Westminster (*g*).

If the master be bound over or summoned to appear, the sessions may proceed in his absence to hear the case; and may, if they see fit, discharge the apprentice from his indentures (*h*). It has been lately held that the justices in session have not power to order the return of any part of a premium already paid to the master, or to order that any part remaining unpaid shall not be paid (*i*). The order made in session must be under the hands and seals of at least four of the justices (*k*).

The sessions under this act have power, on proof of the misbehaviour of an apprentice, to order him to be corrected by corporal punishment, or by imprisonment and hard labour in the house of correction (*l*).

Now the definition of servant in the Master and Servants Act (30 & 31 Vict. c. 141) includes apprentices.

See for the law generally relating to apprentices, Burn's Justice, vol. 1, *tit.* "Apprentice," 29th ed., and prior editions.

Section 3.

OF ARTICLES OF THE PEACE.

The consideration of articles of the peace may either come before the sessions on a complaint originally made in court, or

(*d*) *R.* v. *Johnson*, 1 Salk. 68; *R.* v. *Gill*, 1 Stra. 143; *R.* v. *Davies*, 2 Stra. 704.
(*e*) *R.* v. *Collingbourn*, 2 Ld. Raym. 1410.
(*f*) *East* v. *Pell*, 4 M. & W. 665, per *Alderson*, B.,
(*g*) *Id. ibid.*
(*h*) *Ditton's case*, 2 Salk. 490.
(*i*) *East* v. *Pell*, 4 M. & W. 665; *R.* v. *Vandeleer*, 1 Stra. 69. As to power of justices *out* of session, see 32 Geo. 3, c. 57.
(*k*) *R.* v. *Gately*, Carthew, 198.
(*l*) *Hawkesworth* v. *Hillary*, 1 Saund. 313, 314.

Articles of the Peace.

in consequence of the party being previously bound by a magistrate to appear at the sessions.

Recognizance for the peace may be taken by a single justice for an indefinite period.

It was once contended that a recognizance taken by a single justice to keep the peace, or be of good behaviour, for any certain period, or for life, or without expressing any specific time, and without fixing any certain period for the offender's appearance, was not legal and sufficient (*m*); but it appeared on all hands to have been the ancient practice (*n*), and was supported by the greatest authorities (*o*).

The right, however, in an individual magistrate to require securities without restriction as to time, and the other circumstances above referred to, was confirmed in *Willes* v. *Bridger* (*p*), which was an action against the defendant, a justice of the peace for the county of Sussex, for falsely imprisoning the plaintiff under a warrant of commitment (on failure of finding sureties) to the house of correction, which directed the gaoler the plaintiff "safely to keep *for the space of two years*, unless he shall in the meantime find sureties, &c. for keeping the peace towards our lord the king and all his liege people, and especially towards *James Martyn Lloyd* (the party demanding sureties), for the space of two years from the date hereof;" but this power is now restrained by 16 & 17 Vict. c. 30, s. 3, and it is enacted that no person committed to prison under any warrant or order of *one justice of the peace* for or on account of not entering into recognizances, or not finding sureties to keep the peace or to be of good behaviour, shall be detained under such warrant or order for *more than twelve calendar months* from the time of such commitment. When the party against whom the peace is required is bound to appear at the next session of the peace, and in the meantime to keep the peace to the Queen and all her liege people, especially to the party claiming the security, though the recognizance for keeping the peace should be removed by *certiorari*, it is no discharge of the obligation to appear (*q*). If the party refuses to be bound, it seems he may be committed to gaol till he shall comply (*r*), or till the next session.

Time of detention of persons committed to prison for not entering into recognizance.

There is no distinction between good behaviour and of the peace (*s*), nor between the rules relative to the ex-

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(*m*) Even Hawkins speaks doubtfully, b. 1, c. 60; *R.* v. *Bowes*, 1 T. R. 696.

(*n*) Dalt. c. 119; 2 Hale, c. 136.

(*o*) 4 Bla. Com. 253.

(*p*) 2 B. & A. 278; 1 Chit. Rep. 273.

(*q*) Hawk. b. 2, c. 27. The following is the condition of the recognizance to keep the peace:

"The condition of this recognizance is such, that if the above bounden —— shall keep the peace towards her Majesty the Queen, and all her liege people, and especially towards A. B. of —— in the said county, yeoman, and —— his wife for the term of [*twelve calendar months*], now next ensuing, then the said recognizance shall be void, or else shall remain in full force."

(*r*) 2 Hawk. c. 16, s. 2.

(*s*) See Burn's Justice of the Peace, *tit.* "Surety." *Haylock* v. *Sparke*, 22 L. J., M. C. 67; 1 E. & B. 471.

hibitory articles of the peace, and demanding sureties of the peace (*t*).

Power of Justices in Session to take Security.

The power of the justices in session to take surety for the peace is derived from stat. 34 Edw. 3, c. 1, which authorizes them "to take of all them that be not of good fame where they shall be found sufficient surety and mainprize of their good behaviour towards the king and his people," and from the first clause of their commission (*u*), by which this power is given to any one justice; and not from the second clause, which relates to the taking and trial of indictments, &c.; therefore, if a single justice cannot take security for a longer period than till the next session, it will be difficult to show that a number of justices assembled in session may take it for a longer time.

It may, in some cases, be expedient that the time and amount of the security should be settled by the concurrent sentiments of several persons, rather than by the single opinion of an individual. On the other hand, expense and trouble are saved by an adjustment of the whole matter in the first instance; and therefore there may be *other* cases in which *this* may be the more convenient course.

It has been said, that, if the offender be a dangerous person, the binding him only to the next session is insufficient security; and if he be then called upon anew to give a security for further keeping the peace on account of the original offence, it is punishing a person twice for one offence. But first, it may be answered, that finding sureties of the peace is merely a proceeding of precaution against the *future*, and not a punishment for the *past*, although it be true that breaches already committed form the ground of apprehension for the future; secondly, even if it be taken in the light of a punishment, the penalty is likely rather to be diminished, than augmented, by this practice; because it gives the prosecutor the option of being satisfied with a security of shorter duration than would otherwise have been, in all probability, required.

Every justice who takes a recognizance for keeping the peace, shall certify the same at the next sessions (*v*), that the person bound may be called upon his recognizance before the justices in session. If the party does not answer, his recognizance may be estreated; if he does, the court may make proclamation, that "if any man can show cause why the peace granted against *such a one* shall be continued, he shall speak;" and, if no person come to demand the peace against him, or to show cause why it should be continued, then the court may discharge his recognizance (*w*).

But if a man be thus bound, and especially to keep the peace towards a certain person, then, though such person come not to desire the surety of the peace to be continued, yet the court, by

(*t*) *Steward* v. *Gromett*, 29 L. J., C. P. 174.
(*u*) *Ante*, p. 6.
(*v*) See stat. 3 Hen. 7, c. 1, s. 6, *infra*.
(*w*) Dalt. c. 120.

Articles of the Peace.

their discretion, may bind him over till the next session, and that may be to keep the peace against that person only, if they shall think good; for it may be, that the person who first craved the peace is sick, or otherwise prevented, so as he cannot come to that session to demand the continuance of the peace further (*x*). But this has been questioned in Burn's Justice of the Peace (*y*).

If the applicant appear, his counsel may then move that the court do receive articles of the peace exhibited by him against the offender in the form subjoined (*z*). They should be ready engrossed on parchment, so as to be handed to the clerk of the peace to be read by him, after which the exhibitant must be sworn or affirm to the truth of them (*a*). The court then on the motion of counsel declare in what sum, and for what period, the defendant's recognizance shall be taken. Upon his entering into it with two sureties, his former recognizance may be discharged, but if he cannot procure sureties, the court on motion will commit him till he does so. The party is usually bound by recognizance to the next session; and so on from session to session, so long as the applicant shall be able to make it appear that his reasonable apprehensions continue. Or the justices may bind him for a certain definite period, without reference to any succeeding session, at their discretion, as the individual justice might have done in the first instance.

Here let it be observed that a person demanding sureties of the peace (whether in the first instance before a single justice for immediate security, or by exhibiting articles before the justices in session) swears only to his own apprehensions, of which no other persons can form an adequate judgment; from

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(*x*) Dalt. c. 120, citing Lambard, 112.

(*y*) 30th ed., vol. v. p. 749, citing *R.* v. *Bowes*, 1 T. R. 700.

(*z*) The following is the form of the articles of the peace:—

Michaelmas Sessions, 1836.

Middlesex. { Articles of the peace exhibited by A. B. of —— cabinet maker, on behalf of himself and Ann his wife, against C. D. of —— shoemaker, in order to preserve the lives of himself this exhibitant, and of the said Ann his wife, from bodily harm.

This exhibitant on his oath saith, that, &c. [*stating some act of the party complained against, forming a portion of the matter of complaint*]. And this exhibitant upon his oath further saith, that, &c. [*stating in each article some distinct portion of the complaint in such manner as to render the statement intelligible*]. And this exhibitant upon his oath further saith, that (the said Ann, the wife of this exhibitant, is now so sick and weak that she cannot be removed from her house to attend this honourable court to join in the exhibition of this complaint, and that) he this exhibitant, by means of the premises aforesaid, conceives himself and his said wife to be in great danger, and he further saith, that he doth not make this complaint against the said C. D. through any hatred, malice or ill-will, which he hath or beareth towards the said C. D., but merely for the preservation as well of his own life, as of the life of his said wife, and also of their persons, from bodily harm.

A. B.

Sworn at, &c.

(*a*) 24 & 25 Vict. c. 66.

For what Cause Sureties may be demanded.

which it has been deduced by the judges, in many cases, as a general rule, that *articles* of the peace cannot be resisted by reading affidavits on his own behalf, in contradiction of the facts there sworn to against him on any ground, except by showing *direct* evidence of express malice; such as declarations to that effect; and not *implied* malice, supported by general reasoning or collateral circumstances; and moreover, that wherever *particular facts* of violence are stated by the complainant, it is not permitted for the defendant to controvert them; for they must be taken to be true, till negatived through the medium of an appropriate prosecution (*b*). The defendant can take no other advantage than what arises from ambiguity of expression on the face of the articles (*c*).

Here it will be proper to introduce some notice of what provocations are deemed sufficient cause for demanding sureties of the peace, as well as respecting the persons *at whose* suit, and *against whom* they ought to be granted, since these considerations are equally applicable to such demand before justices *out of* session, and by articles exhibited *in* session.

By the commission of the peace, one or more justices have power "to cause to come before them all those who, to any of the king's people concerning their bodies, or the firing of their houses, have used threats, to find sufficient security for the peace, or their good behaviour, towards the king and his people; and, if they shall refuse to find such security, to cause them in the king's prisons to be safely kept, until they shall find such security."

It seems clear that wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, or that he will procure others to do so, he may demand the surety of the peace against such person, and that every justice of the peace is bound to grant it, upon the party's giving him satisfaction upon oath that he is actually under such fear, and that he has just cause to be so, and that he does not require it out of malice or vexation (*d*).

It also seems that he who is threatened to be *imprisoned* by another has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man. And the objection that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the peace, is as strong in the case of battery as in that of imprisonment; and yet there is no doubt,

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(*b*) 13 East, 171. The three cases from which this doctrine is deduced, are those of *Lady Vane*, 2 Stra. 1202; the *Countess of Strathmore's case*, 1 T. R. 606; and *R.* v. *Dogherty*, 13 East, 171. See *Steward* v. *Gromett*, 29 L. J., C. P. 170.

(*c*) See *R.* v. *Tregarthen*, *post*, p. 635; *R.* v. *Bringloe*, MSS. 13 East, 174, note.

(*d*) Hawk. b. 1, c. 60, s. 6.

Of Articles of the Peace.

but that one threatened to be beaten may demand the surety of the peace (*b*), and sureties for good behaviour may be required in some cases of libel against private individuals (*c*). So it is said words of contempt, or *contra bonos mores*, uttered by an alderman against the chief officer or his brethren may be good cause to commit him till he has found good sureties of his good behaviour, but not to disfranchise him (*d*); but rash words of anger are not (*e*).

Where demanded through malice or vexation.

But if the justice shall perceive that surety is demanded merely of malice, or for vexation only, without any just cause of fear, it seems he may safely deny it; here, however, the justice shall do well to persuade him, and to show him the danger of his oath which he is to take; but yet if he will not be persuaded, but will take his oath that he is in fear, where indeed he neither doth fear, nor hath cause to fear, this oath shall discharge the justice, and the fault shall remain on such complainant (*f*).

If a man require the peace, merely because he is *at variance* or in *suit* with his neighbour, it shall not be granted (*g*).

But this fact must appear directly from the declarations of the party, for otherwise the justice, collecting such motives inferentially, will take on himself a responsibility not justified by the cases just cited.

But all the authorities agree that fear lest another will hurt a man's servant, or his cattle, or goods, is not sufficient ground for requiring surety of the peace.

But it is otherwise as to his *wife* or *child*, for he may crave the peace for their protection at the justice's hands, by the words of the commission, and the justice ought to grant it (*h*).

If the children be under the age of discretion, there can be no doubt respecting the parent's claim on the authority of the justice for protection, on his (the father's) oath.

The surety of the peace shall not be granted but where there is a fear of some present or future danger, and not for any breach of the peace that is past; for his surety of the peace is only for the security of such as are in fear: but the party wronged may punish the offender by indictment; and the justice may bind over the affrayer to answer unto the indictment.

Where a partner by violence forces his co-partner out of the business premises of the firm, and threatens such co-partner with violence and danger to his life if the latter should venture

(*b*) Hawk. b. 1, c. 60, s. 7; *R.* v. *Mendez*, 1 Stra. 473.
(*c*) *Haylock* v. *Sparke*, 1 E. & B. 471; 22 L. J., M. C. 67.
(*d*) *Bagg's case*, 11 Rep. 93 b, 98 a.
(*e*) *Stampe* v. *Hyde*, 2 Roll. Rep. 199, 227.
(*f*) Dalt. c. 116, s. 16; *Steward* v. *Gromett*, per *Erle*, C. J., 29 L. J., C. P. 172.
(*g*) Dalt. c. 116; 2 Hawk. P. C., b. 1, c. 61, ss. 3, 4.
(*h*) *Ibid.*

to enter again on the premises, and it is necessary for such co-partner to enter and use the premises for the purpose of carrying on his ordinary business as partner, it is a fit case for articles of the peace (*i*). So, where a man assaulted another for writing a letter to a young lady, and threatened him if he wrote again he would flog him within an inch of his life, and repeated this threat on a subsequent occasion (*j*). *What amount of Threat sufficient.*

It seems to be agreed that all persons whatsoever, under the Queen's protection, being of *sane memory*, whether they be natural and good subjects, or *aliens* or *excommunicate*, or attainted of *treason*, have a right to demand surety of the peace. And it is certain a *wife* may demand it against her husband, and that a husband also may have it against his wife (*k*). And there is no doubt but it ought, upon cause of complaint, to be granted by any justice of the peace, against any person whomsoever, under the degree of nobility, whether he be a magistrate or private person, and whether he be of full age or under age. But infants and femes coverts ought to find security by their friends, and not to be bound themselves. And the safest way of proceeding against a peer, is by complaint to the Court of Chancery or Queen's Bench (*l*). Who may demand surety. Against whom it may be demanded.

The usual practice of courts of quarter session, we have seen, is to continue a recognizance for keeping the peace, from session to session, until it be discharged by order of the court. That of the Court of Queen's Bench is to continue the person bound to keep the peace upon his recognizance for twelve months; and if no indictment be, in the interim, preferred against him, to discharge it at the expiration of that time (*m*). But these courts are not confined to any particular period, for they may require bail for such a length of time as they shall think necessary for the preservation of the peace (*n*).

This seems likewise to be the practice of the Court of Chancery; for, upon a motion to discharge a writ of *supplicavit*, it was said by Lord Chancellor *Macclesfield*, "the application is too early; let the party stay till a year be expired, and in the meantime let him take care to behave peaceably" (*o*).

And if a man be bound to keep the peace during his life (which, as we have already seen, a court of session, upon sufficient cause, *may* legally do), or generally without any time or day limited; in such case neither the king, the justice, the party, nor the sessions, can discharge this recog-

(*i*) *Reg.* v. *Mallinson*, 20 L. J., M. C. 33; 1 L. M. & P. 619.
(*j*) *Ex parte Hulse*, 21 L. J., M. C. 21. But see *Reg.* v. *Tollemache*, 2 L. M. & P. 401.
(*k*) *Sims's case*, 2 Stra. 1207.
(*l*) Hawk. b. 1, c. 28, ss. 2, 3, 4, and 5; 4 Bla. Com. 254; 21 Jac. 1, c. 8, s. 2.
(*m*) *R.* v. *Lewis*, 2 Stra. 835; *Baynum* v. *Baynum*, Ambler, 64.
(*n*) *R.* v. *Bowes*, 1 T. R. 696.
(*o*) 2 P. Wms. 202, *Clavering's case*.

Of Articles of the Peace.

nizance during the life of the party so bound, by release or otherwise (*m*).

Recognizances, how discharged.

But if the person who has entered into a recognizance for keeping the peace die, the recognizance may be discharged (*n*).

Also the demise of the king is a discharge of a recognizance for keeping the peace; for as the condition is "to keep our peace," his successor cannot take advantage of a breach (*o*).

But it seems, according to the better opinion, that a release from the person upon whose complaint it was entered into, is in no case a discharge of a recognizance for keeping the peace; for, as the recognizance was entered into to the king, and not to the subject, it is not in the power of that subject, who is no party to it, to discharge it; however, such a release may be a good inducement to the court, to which such a recognizance shall be certified, to discharge it, if it be within their power (*p*).

After the condition of a recognizance for keeping the peace is broken, the king may pardon the forfeiture; but the king cannot release the condition before it is broken; because the person upon whose complaint the recognizance was entered into, has a kind of interest in the condition (*q*).

The demand of a recognizance for surety of the peace has been treated of as being *first made* before a single justice, and *continued* by articles exhibited before the justices in session. It must not be understood, however, to come before the latter in the manner of an appeal from the former, for there is no reason why an original application should not be made to the justices in session, if the party complaining consider such application sufficiently early for his protection. In that case, a warrant must of course proceed from the bench, against the offender; but the recognizances, both for the immediate preservation of the peace, and for his future appearance at the next session, may be taken before a single justice, if not apprehended before the adjournment, or termination, of the court. The warrant or order of quarter sessions in such a case, for the taking of recognizances before a single justice or individual justices, must direct the commitment, in case of default, for if it omit to do the latter, in case of disobedience of the order to enter into recognizance, the justice or justices before whom they were ordered to be taken have no power to commit the defaulting parties (*r*).

Form of the warrant from the bench.

The Court of Queen's Bench rejected articles of the peace which a person residing in a distant part offered to swear against a person resident in the same place, saying, "he might have gone before a justice of the neighbourhood and claimed the security of the peace there" (*s*). If the justice is averse to act,

(*m*) Lambard, 113.
(*n*) 1 Hawk. bk. 1, c. 28, s. 17.
(*o*) *Ibid.*
(*p*) *Id. ibid.*; 4 Bla. Com. 254.
(*q*) 1 Hawk. bk. 1, c. 28, s. 17.
(*r*) *Re Ashton*, 7 Q. B. 169.
(*s*) *R.* v. *Waite*, 2 Burr. R. 780.

he may be compelled to do so as a ministerial officer, by writ of *supplicavit* issued out of the Queen's Bench or Chancery; but that writ is seldom used, for the recognizances are generally taken by the superior court itself when applied to (*t*); but since the 11 & 12 Vict. c. 44, if a justice refused to act on some legal ground of objection, probably the Court of Queen's Bench, upon motion by the applicant, and upon affidavit of the facts, would grant a rule to the justice ordering him to act under sect. 5.

Discharge of the Recognizance.

The amount of security to be found by the defendant for preserving the peace, is in the discretion of the court, or the single magistrate. An application to the superior court to reduce it, when fixed by the latter, has been refused (*u*), on the ground that the court could not interfere with the exercise of his discretion, if he has proceeded on a sufficient information on oath (*v*). It is for him, before he calls on a party to enter into recognizances to keep the peace, to judge in what sense the language alleged to be threatening is used; and the court will not discharge recognizances to keep the peace on the ground that such words were used by way of metaphor, and not literally (*x*). A person committed to prison in default of finding sureties of the peace till the next sessions, and at the next sessions is discharged, no one appearing to prosecute, is not entitled to a copy of the examinations upon which he was ordered to find sureties, and committed in default, as such a case is not within the 11 & 12 Vict. c. 42, s. 27 (*y*).

If the warrant for apprehending the offender be issued, in the first instance, by the justices in session assembled, it should be in the following form, or to the like effect, in the name of the Queen, but under the teste of the chairman, and one, or more, of the other justices.

County of —— } Victoria, by the grace of God of the United Kingdom
to wit. } of Great Britain and Ireland Queen, Defender of the Faith, and so forth; to our sheriff of our county of —— *the high constable of the hundred of* —— the petty constables of the town of —— and to all and singular our bailiffs and other ministers in the said county of —— greeting. Forasmuch as P. O. of —— in the said county, yeoman, hath personally come before A. B. and other our justices assigned to keep the peace within the county aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanours in the said county committed, and hath taken a corporal oath that the said P. O. is afraid that D. D. of —— in the said county, yeoman, will beat [*wound, maim or kill*] him, [*or burn his house*], and hath prayed surety of the peace [*or of the good behaviour, if it be so*] against him the said D. D. Therefore we command and charge you, jointly and severally, but immediately upon receipt hereof, you omit not, by reason of any liberty within the county aforesaid, but that you take the aforesaid D. D. if he can be found in the county

(*t*) 4 Bla. Com. 253.
(*u*) *R.* v. *Holloway*, 2 Dowl. P. C. 525.
(*v*) *R.* v. *Tregarthen*, 5 B. & Ad. 680; *Parke*, J.
(*x*) Per *Cur. ibid.*
(*y*) *Ex parte Humphrys*, 19 L. J., M. C. 189.

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aforesaid, and bring him before the said A. B. and other our justices so as aforesaid assigned to keep the peace within our county aforesaid, if they shall then be sitting: and if not, then before some one or more of our said justices in and for our county aforesaid, to find sufficient surety and mainprize, as well for his personal appearance at the next general quarter session of our peace, to be holden at —— or elsewhere, in and for the said county, as also for our peace in the meantime to be kept towards us and all our liege people; and more especially towards the said P. O.; that is to say, that he the said D. D. shall not do, nor by any means procure or cause to be done, any of the said evils to any of our said people, and particularly to the said P. O.; [or, *if it is for the good behaviour* —— as also for his good behaviour, in the meantime, towards us and all our liege people; and more especially towards him the said P. O. &c.]

Every justice taking a recognizance for keeping the peace shall certify the same at the next sessions, that the party bound may be called there. If he make default, the default shall be there recorded, and the recognizance may be estreated or put in force under the 7 Geo. 4, c. 64, s. 31 and 3 Geo. 4, c. 46, *post.* If the party have any good excuse, such as sickness, imprisonment, inundation of waters, snow storm, &c. for his not appearing, the sessions are not bound peremptorily to put in force his recognizance, but may equitably consider of the reasonableness of such excuse (*a*). The general practice was conformable with this doctrine before the 7 Geo. 4, c. 64; and as the recognizance might be taken by a single justice at any time, so soon as the offender was able to attend, a respite of proceedings by the session, till that opportunity arrived, seemed only consistent with justice (*b*).

There is no doubt that the recognizances taken may be forfeited by any actual violence to the person of another, whether it be done by the party himself, or by others through his procurement, as manslaughter, rape, robbery, unlawful imprisonment, and the like (*c*). And even by threatening to do any act of violence against another *in his presence;* and it is said, in *his absence* also, if accompanied by lying in wait to execute it (*d*); but not by mere words of anger or abuse (*e*).

And the justices may now proceed against the party for a forfeiture of his recognizance, either in respect of his not appearing, or of his breaking the peace under the 3 Geo. 4, c. 46; 4 Geo. 4, c. 37, and 7 Geo. 4, c. 64; and the recognizance itself, with the record, on default of appearance, are no longer removed into some of the courts at Westminster. And now under 16 & 17 Vict. c. 30, s. 2, where any recognizance to keep the peace or to be of good behaviour is entered into by any person as principal or surety before the court

(*a*) Hawk. b. 1, c. 28, s. 18; Dalt. c. 120.
(*b*) Carr. Cr. L. 131.
(*c*) Hawk. b. 1, c. 60, s. 20.
(*d*) *Id.* s. 21; *R.* v. *Mendez,* 1 Stra. 473.
(*e*) Hawk. b. 1, c. 60, s. 22.

Default of Recognizance at Sessions.

of general or quarter sessions of the peace of any county, riding, division, city, borough or place, or before any justice or justices of the peace of any county, riding, division, city, borough or place, it shall be lawful for any such court of general or quarter sessions of the peace as aforesaid, upon applications made to such court to declare such recognizance to be forfeited upon *proof of a conviction of the party* bound by such recognizance of any offence which is in law a breach of the condition of the same; and upon further proof that a notice in writing signed by the person seeking to put such recognizance in force has seven clear days before the commencement of such sessions been personally served upon or left at the usual place of abode of the party, or each of the parties, if more than one, who entered into such recognizances that an application will be made to the said general or quarter sessions that the said recognizance shall be declared forfeited; and if such recognizance shall be declared forfeited, all such proceedings shall be had thereon as in the case of a recognizance forfeited at such court of general or quarter sessions, and all the provisions of 3 Geo. 4, c. 46, and 4 Geo. 4, c. 37, applicable to a recognizance so forfeited at such court shall apply to a recognizance which shall, upon such application and proof as is hereinbefore mentioned, be declared to be forfeited; and upon notice in writing of such intended application to the said general or quarter sessions being given to any justice or justices before whom any such recognizance shall have been taken, four clear days before the commencement of the said sessions, the said justice or justices shall transmit the said recognizance to the clerk of the peace of the county, riding, division, city, borough or place within which the said recognizance shall have been taken, with a certificate that the said recognizance is sent to him by reason of such last-mentioned notice having been so given as aforesaid.

A warrant of committal of a party until he find sufficient sureties to keep the peace is bad if it omit to specify the time for which, in default of sureties, he is to be kept in prison (*f*). And so it ought to be, if it be presented by the jury or grand inquest, that the party hath forfeited his recognizance by breach of the peace (*g*). And since the 16 & 17 Vict. c. 30, the proceeding to enforce the estreat of such a recognizance is no longer by *scire facias*, but the sessions or recorder have the power, by virtue of that statute, to declare such recognizances to be forfeited (*h*).

A list must be prepared by the officer of the court, specifying the name of every person bound by such recognizance, and defaulting to appear, together with the residence, trade or calling of every of them, distinguishing the principals from the

(*f*) *Prickett* v. *Gratrex*, 8 Q. B. 1020; 15 L. J., M. C. 145.
(*g*) Dalt. c. 119.
(*h*) See *Reg.* v. *Justices of Ely*, 5 E. & B. 489.

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sureties, and stating the cause of non-appearance, if known, and whether, by reason of such non-appearance, the ends of justice have been defeated or delayed. In counties not corporate, the officer must lay this list before the chairman or two other justices of the peace who have attended the court, or in boroughs, before the recorder, who are to examine it and make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just; and the officer cannot estreat or put it in process without the written order of the chairman, &c. (*k*).

The numerous hardships arising from indiscriminately estreating all forfeited recognizances into the Exchequer have been checked by this salutary provision.

Section 4.

SLAUGHTER-HOUSES—LICENSING OF.

Annual licences for slaughter-houses.

By 26 Geo. 3, c. 71, s. 1, "No person or persons shall keep or use any house or place for the purpose of slaughtering or killing any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, which shall not be killed for butchers' meat without first taking out a licence for that purpose at the general quarter sessions held for the county, riding, city, town, district, division or liberty wherein such slaughtering-house or place shall be situate, and the justices of the peace at their general quarter sessions assembled are hereby authorized and empowered to grant such licences as aforesaid, upon a certificate under the hands and seals of the minister and churchwardens or overseers, or of the minister and two or more substantial householders of the parish wherein the person or persons applying for such licence shall dwell, that such person or persons is or are fit and proper to be trusted with the management and carrying on such business as aforesaid: provided always, that in case of the death of any person to whom such licence as aforesaid shall be granted, it shall and may be lawful for the widow or personal representative of such person so dying to carry on the said business until the then next ensuing general quarter sessions of the peace."

Certificates of churchwarden.

By 7 & 8 Vict. c. 87, s. 1, "Such licences are to be in force for a period not exceeding one year from the date at which the same was granted, determinable as hereinafter provided; provided nevertheless, that in the case of the renewal of any such licence to any person to whom any such licence may have been previously granted as aforesaid, it shall not be necessary for

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(*k*) 7 Geo. 4, c. 64, s. 31; and see 3 Geo. 4, c. 46, ss. 5, 6, *ante*, p. 59, and *post*.

such person to obtain or produce to the justices at such general quarter sessions a certificate under the hands and seals of the minister, churchwardens or overseers or householders as required by the said last-mentioned act." *Licences for Slaughter-houses.*

By 26 Geo. 3, c. 71, s. 2, "Every such licence shall be signed by the justices of the peace assembled at such general quarter sessions, or by the major part of them, and a copy of every such licence shall be entered in a book to be kept for that purpose by the clerk of the peace of the county wherein the same shall be so granted as aforesaid, and that all and every person and persons shall have liberty to search at all times, Sundays excepted, between the hours of ten and twelve of the clock in the forenoon, the office of such clerk of the peace wherein any such copy shall be entered or kept, and to make an extract from the same, paying for every such search the sum of sixpence." Form of licence.

By 7 & 8 Vict. c. 87, s. 2, "It shall be lawful for the justices assembled at any general quarter sessions of the peace to be holden for any county upon application and complaints made to them in writing by any person, and upon due proof being made to them that the party so complaining had given fourteen days' notice in writing thereof to the clerk of the peace for such county, and also to the party complained against; and upon due proof to their satisfaction that any person so licensed as aforesaid has been guilty of any breach or violation of this act or either of the two therein-recited acts, or any part or parts thereof respectively, to cancel and wholly put an end to any and every licence which may have been granted to the person or persons so complained against, and from thenceforth the same shall be of no force or effect." Power to cancel licences.

Penalties are imposed for various offences against the acts, recoverable before justices, and certain offences are indictable.

By 26 Geo. 3, c. 71, s. 5, "Inspectors are to be appointed in vestry, who are to keep books, and enter in them an account of their inspection." And by sect. 12, "The book or books of all and every the inspector and inspectors of every parish shall be produced at every general quarter sessions of the peace to be holden in and for the county wherein any such licence shall be granted and delivered to the justices of the peace at such general quarter sessions assembled then and there to be examined by them as they shall think fit." Inspectors.

Section 5.

of incorrigible rogues and vagrants.

The disposal of vagrants constitutes a portion of the business of a quarter session of the peace. Idleness in any of the members of a community is a disadvantage to it, because on the diffusion of active and productive labour depends its vigour and its wealth. More weight has been attached to these axioms in this kingdom

perhaps than in most others, whence the numerous statutes that have been enacted against this evil. The laws against vagabonds may be traced up as high as the reign of Henry 2. Under that of Queen Elizabeth they became numerous and more systematic, because the dissolution of monasteries by her father had thrown on the bounty of the public a numerous herd of beggars, who had before been under the protection of those communities. The act now in force, and which embodies and extends numerous former provisions, is 5 Geo. 4, c. 83, which points out three classes of persons; 1. *Idle and disorderly persons.* 2. *Rogues and vagabonds.* 3. *Incorrigible rogues.* It will be perceived that it is in the case of the last class only that the justices in session have an original jurisdiction to exercise; but it may be well here to present the whole effect of the provisions.

Under Vagrant Act, 5 Geo. 4, c. 83.

Idle and disorderly persons.

The following are, under the 5 Geo. 4, c. 83, to be deemed idle and disorderly persons, whom any justice of the peace is empowered to commit (being convicted before him on his own view or by the confession of the offender, or by the evidence of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month (*l*); subject to an appeal to the sessions, on giving notice in writing of the grounds of appeal to the convicting magistrate within seven days, and entering into recognizance with sufficient surety personally to appear and prosecute the appeal; on which the party convicted is to be discharged.

1. Every person being able wholly, or in part, to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place (*m*).

2. Every person returning to *and becoming chargeable* in any parish, township, or place from whence he or she shall have been legally removed by order of two justices of the peace, unless he or she shall produce a certificate of the churchwardens and overseers of the poor of some other parish, township, or place, thereby acknowledging him or her to be settled in such other parish, township, or place.

(*l*) The commitment must be for a precise definite time expressed in the warrants, see *Baldwin* v. *Blackmore*, 1 Burr. 596; *R.* v. *Hall*, 3 Burr. R. 1636. The warrant must state that the offender had been *convicted* of the offence, and not merely that he was *charged; R.* v. *Rhodes*, 4 T. R. 220; *R.* v. *Hooper*, 6 T. R. 225. It must also show the authority of the committing justice; *R.* v. *York*, 5 Burr. R. 2684.

(*m*) The warrant for commitment for vagrancy in deserting a family must state that the family were actually chargeable; *R.* v. *Hall*, 3 Burr. R. 1636. And a man is not legally bound to maintain his wife who has left him and is living in adultery; *R.* v. *Flintan*, 1 B. & Ad. 227; nor if she leave him though her leaving is caused by his ill-usage. *Flannagan* v. *Bishop Wearmouth* (*Overseers*), 27 L. J., M. C. 46.

3. Every petty chapman or pedlar wandering abroad, and trading without being duly licensed, or otherwise authorized by law. *Idle and Disorderly Persons.*

4. Every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous and indecent manner.

5. Every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing, or procuring, or encouraging any child or children so to do.

6. Every person asking alms under a certificate, or other instrument prohibited by the act, or applying for relief, having money in their possession or control (*n*).

Rogues and vagabonds.

The following are under 5 Geo. 4, c. 83, to be described as rogues and vagabonds, whom it is lawful for any justice of the peace to commit (being convicted before him by the confession of the offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour, for any time not exceeding three calendar months, subject, as in the case of "idle and disorderly persons" to an appeal on the same conditions to the sessions.

Appeal.

1. Every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person.

2. Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device by palmistry, or otherwise, to deceive and impose on any of her majesty's subjects.

3. Every person wandering abroad, or lodging in any barn or outhouse, or in any deserted or unoccupied buildings, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself.

4. Every person unlawfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition, or exposing, or causing to be exposed, to public view in the window or other part of any shop, or other building situate in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition, shall be deemed to have wilfully exposed such obscene print, picture, or other indecent exhibition to public view within the intent and meaning of the above act (*o*).

5. Every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female.

6. Every person wandering abroad, and endeavouring, by the exposure of wounds, or deformities, to obtain or gather alms.

(*n*) 11 & 12 Vict. c. 110, s. 10.

(*o*) 1 & 2 Vict. c. 38, s. 2; and see *Reg.* v. *Dugdale*, 22 L. J., M. C. 50.

Under Vagrant Act (5 Geo. 4, c. 83), and other Statutes.

7. Every person going about as gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence.

8. Every person running away and leaving his wife (*p*), or his or her child (*q*) or children chargeable, or whereby she, or they, or any of them, shall become chargeable to any parish, township, or place.

9. Every woman neglecting to maintain her bastard child, being able wholly or in part so to do, whereby such child becomes chargeable to any parish or union (*r*).

10. Any person received into an asylum (for houseless poor), under 7 & 8 Vict. c. 101, who shall wilfully give a false name, or make a false statement, or shall be proved to have given two or more different names on two or more different occasions when so received into any such asylum, such person not having lawfully changed her name in consequence of marriage, shall be deemed a rogue and vagabond (*s*).

11. Every poor person returning to and becoming chargeable in the asylum (for houseless poor) of any district, after removal from any parish in such district, shall be deemed to have returned and become chargeable without a certificate to the parish, &c. (*t*).

12. Every person playing or betting in any street, road, highway, or other open or public place, at or with any table, or instrument of gaming, at any game or pretended game of chance. Tossing with halfpence is not within this section (*u*). As to whether a railway carriage is a place within the section, see *Re Freestone* (*v*).

13. Every person playing or betting by way of wagering on any street, road, highway or other open or public place, or in any place in which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token or other article used as an instrument or means of such wagering or gaming at any game or pretended game of chance (*w*).

Betting odds on one of several dogs at a coursing meeting, and paying half a sovereign to the person laying the odds against, is not betting with a coin within the meaning of the

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(*p*) A wife who has left her husband, and committed adultery, is not within this term, though the husband has also committed adultery since her departure; *R.* v. *Flintan*, 1 B. & Ad. 227. As to what is a running away, see *Guardians of Cambridge Union* v. *Parr*, 30 L. J., M. C. 241; 10 C. B., N. S. 99.

(*q*) This refers to the desertion of legitimate and not of illegitimate children; *R.* v. *Maude*, 2 Dowl. N. S. 58.

(*r*) 7 & 8 Vict. c. 101, s. 6.

(*s*) *Ibid.* s. 53.

(*t*) *Ibid.* s. 55.

(*u*) *Watson* v. *Martin*, 34 L. J., M. C. 50.

(*v*) 25 L. J., M. C. 121.

(*w*) 31 & 32 Vict. c. 52, s. 3.

Rogues and Vagabonds.

above section (*x*). The *pari mutuel* is an instrument of wagering or gaming, and the game a game of chance within the above statute (*y*).

15. Every person having in his or her custody or possession any picklock, key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or out-building, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit any felonious act (*z*).

16. Every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any inclosed yard, garden, or area, for any unlawful purpose.

17. Every suspected person, or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway or place adjacent, with intent to commit felony (*a*).

This section is to be construed as if instead of the words "highway or place adjacent" there were inserted the words "or any highway or any place adjacent to a street or highway;" and secondly, in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony (*b*). This section was passed since *Ex parte Tinson* (*c*).

A platform on a railway station is a place of public resort (*d*), and so an alehouse (*e*), or a private house in which a sale by auction is being held (*f*).

18. And every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace officer, so apprehending him or her, and being subsequently

(*x*) *Hirst* v. *Molesbury*, 40 L. J., M. C. 76; L. R., 6 Q. B. 130.
(*y*) *Tollett* v. *Thomas*, 40 L. J., M. C. 209; L. R., 6 Q. B. 514.
(*z*) 5 Geo. 4, c. 83, s. 4. The conviction under this head of vagrancy must state that the implements, or some of them, were found upon the prisoner at the time of his apprehension; *R.* v. *Brown*, 8 T. R. 26.
(*a*) Persons found by night in the company of the servants of the house, for the purpose of joining in the consuming of provisions of the master without his consent or knowledge, may or may not be there for the purpose of feloniously stealing the provisions, but, if so, are there for an unlawful purpose within the act. *Kirkin* v. *Jenkins*, 32 L. J., M. C. 140.
(*b*) 34 & 35 Vict. c. 112, s. 15.
(*c*) 39 L. J., M. C. 129; L. R., 5 Ex. 257.
(*d*) *Ex parte Davis*, 26 L. J., M. C. 178.
(*e*) *Cole* v. *Coulton*, 29 L. J., M. C. 125.
(*f*) *Sewell* v. *Taylor*, 29 L. J., M. C. 30; *Ex parte Cross*, 26 L. J., M. C. 28; 1 H. & N. 651.

Right of Appeal.

convicted of the offence for which he or she shall have been so apprehended.

Right of appeal.

The power of appeal is given by 5 Geo. 4, c. 83, s. 14, which enacts, that any person aggrieved by any act or determination of any justice or justices of the peace out of sessions in or concerning the execution of this act, may appeal to the next general or quarter sessions for the county, riding, division, or place, in or for which such justice or justices shall have so acted, giving to the justice or justices of the peace, whose act or determination

Notice of appeal.

shall be appealed against, notice in writing of such appeal and of the ground thereof within seven days after such act or determination, and before the next general or quarter sessions, and entering within such seven days into a recognizance with sufficient

Recognizance to prosecute the appeal.

surety before a justice of the peace for the county or place in which such person has been convicted, personally to appear and prosecute such appeal; and upon such notice being given, and such recognizance being entered into, such justice is hereby empowered to discharge such person out of custody, and the court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said court seem meet, and in case of the dismissal of the appeal, or the affirmance of the conviction, shall issue the necessary process for the apprehension and punishment of the offender according to the conviction.

By 1 Vict. c. 38, when any person aggrieved by any act or determination of any justice or justices of the peace out of sessions in or concerning the execution of the said act shall have appealed against such act or determination according to the provisions of the said act, and shall thereupon have been discharged out of custody, and such person shall not personally appear and prosecute such appeal at the general or quarter sessions according to the recognizance entered into on such appeal, it shall be lawful for the justices assembled at such general or quarter sessions, or for any justice of the peace for the county or place in which such person shall have been convicted, on proof of the said conviction, and on proof by certificate under the hand of the clerk of the peace for the said county or place, or of the person acting as his deputy, that the person

Warrant of apprehension on failure to support appeal.

so convicted did not personally appear to prosecute such appeal, to issue a warrant for the apprehension and committal of such person for such period of time as, together with the days during which such person so convicted shall have been imprisoned, if any, previous to being discharged by reason of appeal, shall complete the full term for which such person was adjudged to be imprisoned at the time of his or her said conviction.

Prosecutors and witnesses may be bound over to appear on appeal and then expenses may be ordered.

By 5 Geo. 4, c. 83, s. 9, when any justice shall convict such incorrigible rogue to the house of correction, there to remain till the next general or quarter sessions, or when any such idle or disorderly person, rogue, and vagabond, or incorrigible rogue shall give notice of his or her intention to appeal against the conviction of him or her, and shall enter into recognizance as

hereinafter directed to prosecute such appeal, such justice shall require the person by whom such offender shall be apprehended, and the person or persons whose evidence shall appear to him to be material to prove the offence and to support such conviction, to become bound in recognizance to his Majesty, his heirs and successors, to appear at the said general or quarter sessions to give evidence against such offender touching such offence; and the justices of the peace at their said general or quarter sessions are hereby authorized and empowered, at the request of any person who shall have become bound in any such recognizance, to order the treasurer of the county, riding, division, or place in which the offence shall have been committed, to pay unto such prosecutor, and unto the witness or witnesses, on his or her behalf, such sum or sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and such witness or witnesses respectively for the expenses he, she, or they shall severally have been put to, and for his, her, or their trouble and loss of time in and about such prosecution, which order the clerk of the peace is hereby directed and required forthwith to make out and deliver unto such prosecutor, or unto such witness or witnesses, upon being paid for the same, the sum of two shillings, and no more.

Rogues and Vagabonds.

By sect. 10, when any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the house of correction, and be there kept to hard labour for any time not exceeding one year from the time of making such order, and to order further, if they think fit, that such offender (not being a female) be punished by whipping at such time during his imprisonment, and at such place within their jurisdiction as according to the nature of the offence they in their discretion shall deem to be expedient.

Punishment—hard labour—whipping.

The following persons are to be deemed incorrigible rogues under 5 Geo. 4, c. 83, s. 5:—

Incorrigible rogues.

1. Every person breaking or escaping out of any place of legal confinement, before the expiration of the term for which he or she shall have been committed, or ordered to be confined by virtue of this act.

2. Every person committing any offence against this act, which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be, and duly convicted thereof (*g*).

(*g*) A question has been raised whether persons once convicted under the previous vagrant acts as *rogues and vagabonds* were under these words to be deemed *incorrigible rogues* for a second offence of a like nature Upon this Lord *Lyndhurst*, when attorney-general, gave an opinion, inserted in Chetwynd's 24th ed. of Burn's Justice, p. 568, answering the question in the affirmative.

Rogues and Vagabonds.

3. And every person apprehended as a rogue and vagabond, and violently resisting any constable, or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended.

As to these it is enacted, "That it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witnesses) to the house of correction, there to remain until the next general or quarter sessions of the peace; and every such offender, who shall be so committed to the house of correction, shall be there kept to hard labour during the period of his or her imprisonment" (*h*).

(*h*) Sect. 5.

PART III.

OF APPELLATE JURISDICTION.

CHAPTER I.

OF MATTERS OF PRACTICE IN APPEALS GENERALLY.

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SECTION 1.

OF THE JURISDICTION OF THE SESSIONS TO ENTERTAIN APPEALS; —OF THE RIGHT TO APPEAL, AND THE PARTIES THERETO.

WE now come to the consideration of appeals; generally one of the most intricate, as well as important, of the subjects submitted to sessions of the peace. The most cursory acquaintance with any book on the office and duties of a justice of the peace must be sufficient to induce a conviction that it would be an unprofitable labour to introduce indiscriminately, under this division, all the subjects on which an appeal lies to the session from the adjudications of individual magistrates.

What it is.

Appeal, according to the general use of the word, signifies a complaint to a superior tribunal of the erroneous judgment of an inferior one, and is in the nature of a writ of error (*i*) brought in order to avoid or quash it. The only application of this remedy with which we have any concern here, is in reference to its use in bringing the orders or convictions of justices acting out of general or general quarter sessions, to the review of those tribunals.

(*i*) See per *Buller*, J., *Proser* v. *Hyde*, 1 T. R. 414.

An Appeal, what it is.

Where an appeal is given generally the court is judge of law as well as fact, so that where there are no words which restrain the appellate jurisdiction, there is no principle of law which prevents the party aggrieved from having his remédy by appeal, where the grievance is matter of law more than where it is matter of fact, as, for instance, where an order appealed against appears on the face of it to be bad in substance (*f*).

On questions both of law and fact.

Where, therefore, the party aggrieved by a decision of the justices, or by an order, made within their jurisdiction, has two grounds of complaint, one of law as well as one of fact, he would, of course, resort to the court of appeal, but if his objection is one only of law, he has the choice of appealing to the court of appeal, or of going direct to a superior court on a case which he may require justices to state under the 20 & 21 Vict. c. 43; but if his objection is one only on the facts he must make his complaint by appeal if an appeal lies.

And a statute by giving an appeal to quarter sessions against orders or judgments of justices does not thereby impliedly take away the right to have a case stated by justices on a matter of law (*g*).

Appeal, when it lies.

The right of appeal is a qualified right, which can only exist by the express provision of some statute (*h*); and thus, inasmuch as the 8 & 9 Vict. c. 109, under which billiard licences are granted, gives no appeal except against convictions under that act, and the 9 Geo. 4, c. 61, gives an appeal only with reference to the refusal to grant alehouse licences, there is no appeal against a refusal to grant a billiard licence (*i*); and the right of appeal thus differs from the remedy by *certiorari*, which, as we shall hereafter see, is a common law right for the purpose of obtaining the judgment of one of the superior courts on some act of a court below; but the right to appeal, though not created by express affirmative language, may arise by an inference absolutely necessary where language is used tantamount to an express enactment (*k*). Nor can a right of appeal be extended by equitable construction, to cases not distinctly enumerated in the act. The 12 Car. 2, c. 24, after empowering *two justices*, on complaint, to hear and determine matters respecting breaches of the excise law, and on their neglect, giving similar power to the sub-commissioners, proceeds to allow persons "aggrieved by any judgment of the *sub-commissioners*," to appeal to the sessions, but makes no mention of any appeal from the judgment of the two justices. It has been accordingly held, that neither under this act,

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(*f*) *Reg.* v. *Justices of Worcestershire*, 3 E. & B. 488, per *Coleridge*, J.

(*g*) *Steele* v. *Brennan*, 41 L. J., M. C. 85.

(*h*) *Reg.* v. *Justices of Warwickshire*, 6 E. & B. 837; 25 L. J., M. C. 119; *R.* v. *Cashiobury*, 3 D. & R. 35; *R.* v. *Hanson*, 4 B. & A. 521; *R.* v. *Justices of Oxfordshire*, 1 M. & S. 448.

(*i*) *Ex parte Chamberlain*, 8 E. & B. 644.

(*k*) *Reg.* v. *Justices of Worcestershire*, per *Coleridge*, J, *ubi sup.*; *Reg.* v. *Justices of Warwickshire*, *ubi sup.*

nor any subsequent one which adopts or refers to its provisions respecting appeals, is any appeal given, by equitable construction, from the judgment of the two justices, as the authority conferred by the act cannot be extended by inference (*l*). But, on the other hand, the operation of a general clause of appeal cannot be excluded by mere inference drawn from other clauses (*m*). But where a statute, upon which power to make an order of justices was given, gave an appeal against the order, and a subsequent statute in *pari materiâ* varied the terms in which such order might be made, and further enacted that such order should be 'final and conclusive,' the appeal was held to be taken away (*n*). And where one of several acts passed in *pari materiâ*, and incorporated together to be construed as one act contained a general appeal clause, and one of the subsequent acts provided that on a fresh proceeding under that act "the like proceedings" should be had, as under the former act, these words were held to carry the right of appeal; thus, where proceedings were taken under the 27 & 28 Vict. c. 101, to obtain an order of justices directing that a highway should cease to be a highway repairable by the parish, and that act was to be construed as one with the Highway Act, 1862, which latter act was construed as one with the Highway Act, 1835, and the 27 & 28 Vict. c. 101, provided that the like proceedings should be had on obtaining such an order, as when application was made to stop up a highway under the Highway Act, 1835, by which last-mentioned act an appeal was given, an appeal against the order under 27 & 28 Vict. c. 101, was holden to lie (*o*).

When Appeal lies.

"Like proceedings."

It may be fit here to notice the distinction between appeals against the *orders* of justices, and those against their *convictions* and judgments. The *orders*, which have been said to partake most of the nature of convictions, are orders in bastardy under the 7 & 8 Vict. c. 101, and the 8 Vict. c. 10 (*p*); orders against a person continuing to keep a public-house after an order of justices to suppress it, pursuant to 5 & 6 Edw. 4, c. 25, before its repeal by 9 Geo. 4, c. 61, s. 35; orders under 11 Geo. 2, c. 9, against tenants fraudulently removing goods to avoid distress; and orders in disputes between friendly societies and their individual members.

To these, however, our present purpose requires that several others should be added, *e. g.*, those which respect the settlement, maintenance, and removal of the poor.

(*l*) *R.* v. *Justices of Surrey*, 2 T. R. 504. See *R.* v. *Skone*, 6 East, 514; *R.* v. *Justices of Staffordshire*, 12 East, 572; Paley on Conv. 5th ed. 342.

(*m*) *R.* v. *Justices of Salop*, 2 B. & Ad. 145; *R.* v. *Justices of Hants*, 1 B. & Ad. 654; *R.* v. *Justices of Cumberland*, 1 B. & C. 64.

(*n*) *Reg.* v. *Bedwell*, 4 E. & B. 213; 24 L. J., M. C. 17.

(*o*) *Reg.* v. *Justices of Surrey*, 39 L. J., M. C. 49; L. R., 5 Q. B. 87. As to appeal given by one of several statutes in *pari materiâ*, which *quoad alia* were afterwards consolidated by a subsequent act, see *R.* v. *Mayor of Liverpool*, 3 D. & R. 275; *Reg.* v. *Nuisances Removal Commissioners of Middleton*, 1 E. & E. 98; 28 L. J., M. C. 40.

(*p*) *Reg.* v. *Rose*, 3 D. & L. P. C. 359; 15 L. J., M. C. 6.

Distinction between Convictions and Orders.

The reason for noticing any distinction here between orders and convictions, is for the purpose of observing, that less technical strictness is necessary respecting the former than the latter (*o*). Thus, in an order, it is not always necessary that it should appear on the face of the record that the defendant was summoned (*p*), which is absolutely necessary in the case of a conviction (*q*), except when his appearance renders it immaterial. So an order has been holden good in the case of removing goods to avoid distress under 11 Geo. 2, c. 19, when the offence was expressed in the alternative, "removed *or* concealed goods," &c.; whereas the same allegation in a conviction would be fatal to it (*r*); for, as was said by Lord *Mansfield* in one case (*s*), though in indictments and convictions the court is bound by a long succession of cases to require certainty to the greatest degree of technical precision, in orders more latitude is allowed; and if the record be substantially right, the court will intend that all the necessary formalities have been observed. Again, the result of the evidence is all which need be stated in an order, whereas the evidence itself must be stated in a conviction, unless it be dispensed with by statute (*t*).

But these remarks must now be taken subject to the provisions contained in 11 & 12 Vict. c. 43, with respect to the forms of orders and convictions, which will be considered when we come to treat appeals against particular descriptions of orders, as well as against particular descriptions of convictions; and to the provision of 12 & 13 Vict. c. 45, s. 7, under which the order or conviction may be amended on appeal. We must now proceed to other matters respecting appeals in the abstract, and first of the parties to the appeal.

Parties to the appeal who are.

The parties to be made appellants are sometimes specifically pointed out by the act which gives the appeal, and sometimes left at large under the general terms, "parties aggrieved." Before considering the persons who have in various cases been held to fall within the latter words, it must be remarked, that

Appellants may jointly appeal.

parties may jointly appeal against a poor rate, whether they rely on the same, or separate grounds of appeal (*u*). Again, where a local act gave an appeal against *any* rate or assessment, it was held that a party might, in one appeal, question several rates; though if the sessions should think that injustice would be done by hearing the appeal against the several rates jointly,

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(*o*) *R.* v. *Morgan*, Cald. C. 156; 1 Burr. R. 399; but see *Reg.* v. *Rose*, 15 L. J., M. C. 6.

(*p*) *R.* v. *Justices of Oxfordshire*, 1 M. & S. 448.

(*q*) *R.* v. *Venables*, 2 Ld. Raym. 1405; *R.* v. *Hawker*, Cald. Ca. 391.

(*r*) *R.* v. *Sadler*, 2 Chitt. R. 519; *R.* v. *North*, 6 D. & R. 143. See Cowp. 682; 1 Ld. Raym. 171; 3 T. R. 159; Dougl. 278; *R.* v. *Pain*, 7 D. & R. 678.

(*s*) *R.* v. *Middlehurst*, 1 Burr. R. 399.

(*t*) *R.* v. *Justices of Cheshire*, 5 B. & Ad. 439; 2 N. & M. 827.

(*u*) *R.* v. *Justices of Sussex*, 15 East, 206; *R.* v. *White*, 4 T. R. 771. So their notice of appeal may be joint.

they were at liberty, though not bound, to determine them separately (*x*). *Parties to the Appeal.*

Where an appeal is given to a party grieved, as for instance, by the Alehouse Licensing Act, 9 Geo. 4, c. 61, which enacted, sect. 27, that "any person who shall *think himself aggrieved* by any act of the justice done in execution of that act, may appeal against such act to the quarter sessions," the party appealing must be a person *immediately* aggrieved; *e.g.*, in the case just put, by fine or refusal of licence to himself, and not consequentially only, as by the grant of a licence to a neighbour (*y*). A notice of appeal against an order for stopping a footway under 55 Geo. 3, c. 68, s. 3, stated that the appellant and his tenant, occupiers of a farm and lands near the said way, and who had heretofore used, and had a right to use it, and also other persons and the public would be put to great inconvenience by the stoppage. As it there sufficiently appeared that the result of stopping the way of necessity constituted that special and peculiar injury (*z*) to the party, which entitled him to the privilege of appeal conferred by the act, not on every captious person, but on parties "injured or aggrieved," it was held sufficient (*a*); but a notice on the same act which in no way stated the appellant to be aggrieved was held bad (*b*). A pauper may himself appeal against the order for his removal as aggrieved by it (*c*). Under the old Highway Act (13 Geo. 3, c. 78, now repealed), any inhabitant might appeal against a bad appointment of a surveyor of the highways, for every inhabitant must be deemed to be aggrieved by it (*d*). But if parish officers are empowered to appeal, when they find that the parish is aggrieved, no appeal can be instituted by less than a majority, for they are to exercise a judgment before bringing it (*e*); but such an enactment only means to give an appeal to one who has legal ground for saying that he is aggrieved, that is to say, a person may so act as to preclude himself from objecting to what might otherwise be ground of appeal, as by himself authorizing and requiring the act to be done which he afterwards desires to appeal against (*f*); thus, where a local act for rating purposes gave an appeal to any person who might think himself aggrieved by any rate or order,

Appellants, who.

Party grieved.

(*x*) *R.* v. *Justices of Suffolk*, 1 B. & A. 640.
(*y*) *R.* v. *Justices of Middlesex*, 3 B. & A. 938.
(*z*) See the language of the court, 5 B. & C. 433.
(*a*) *R.* v. *Justices of Yorkshire* (*West Riding*), 4 B. & Ad. 685.
(*b*) *R.* v. *Justices of Essex*, 5 B. & C. 431; *R.* v. *Justices of Yorkshire* (*West Riding*), 7 B. & C. 678; *R.* v. *Blackawton* (*Inh.*), 10 B. & C. 792.
(*c*) *R.* v. *Hartfield*, Carthew, 222; Comb. 478.
(*d*) *R.* v. *Justices of St. Albans*, 3 B. & C. 698; but see now 5 & 6 Will. 4, c. 50, s. 6.
(*e*) *R.* v. *Justices of Lancashire*, 5 B. & A. 755; appeal by overseers on 18 Geo. 3, c. 19, s. 4, against allowing a constable's accounts.
(*f*) *Harrup* v. *Bayley*, 6 E. & B. 218; 25 L. J., M. C. 107; *R.* v. *Bishop Wearmouth*, 5 B. & Ad. 942.

Parties to the Appeal.

Person aggrieved.

it means to give an appeal to any one who has legal ground for saying that he is aggrieved, and a ratepayer cannot appeal against an order for the payment of money out of rates made to carry out a resolution which he himself expressly authorized, and approved for the incurring of the expenses to meet which the order was made (*g*); and where an order of removal was directed to a parish, which being divided into two townships, which each maintained its own poor, had no existence for the purpose of maintaining the poor. One of the townships was of the same name as the parish. The paupers were really intended to be removed to the other township, but the overseer of the latter township, seeing the order was addressed to the parish, refused to receive the paupers, who were then taken by the removing overseer to the churchwarden of the parish, who lodged the paupers in the workhouse of the township, and they were maintained by the township; it was held, that though the township was not bound to receive the paupers under the above order, yet there was reasonable grounds for the inhabitants of the township to think they might be fixed with the paupers if they did not appeal, and they were consequently entitled to appeal (*h*). Still, there should be an existing grievance to give the right of appeal, as where an appeal was given to persons "aggrieved by a judgment or determination of justices" by an act relating to the removal of the poor, an order of removal cannot be appealed against if there has been no service of the notice of chargeability, for till such service there is no power of removal, and the time for appealing dates from such service, and service merely of the order of removal is a nullity (*i*).

Turnpike trustees.

Such a body as turnpike trustees, who are empowered by a local act to sue or be sued in the name of one of them, may appeal under the words "party grieved," and one of the body may give the notice of appeal and enter into the necessary recognizances on behalf of himself and his co-trustees, though not personally aggrieved (*k*).

Corporation.

A corporation may be a "person" aggrieved (*l*).

Respondents, who.

The parties to whom the statute directs notice of appeal to be given are usually the respondents; but where the parties to

When justices parties.

whom notice of appeal is to be given are justices, it does not follow that they are parties to the appeal for the purpose of a liability for costs (*m*); and if the parties to whom notice of appeal is to be given are not mentioned, then it seems that the party at whose instance, and for whose interest, the magistrate

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(*g*) *Harrup* v. *Bayley*, 6 E. & B. 218; 25 L. J., M. C. 107.

(*h*) *R.* v. *Bishop Wearmouth* (*Inh.*), 5 B. & Ad. 942.

(*i*) *Reg.* v. *Recorder of Shrewsbury*, 1 E. & B. 711; 22 L. J., M. C. 98, overruling *R.* v. *Brixham*, 8 A. & E. 375.

(*k*) *R.* v. *Justices of Surrey*, 5 A. & E. 701, n.

(*l*) *Cortis* v. *Kent Waterworks Co.*, 7 B. & C. 315.

(*m*) *Reg.* v. *Purdey*, 5 B. & S. 909; 34 L. J., M. C. 4; *Reg.* v. *Smith*, 29 L. J., M. C. 216; *Reg.* v. *Justices of Hants*, 1 B. & Ad. 654; *Reg.* v. *Goodall*, 3 L. J., M. C. 119.

was called on to act, and in fact acted, as well as the magistrate or magistrates themselves, should be made respondents. But if the magistrate or magistrates acted without the prompting of any interested party, they should be made respondents (*n*). An inclosure act allowed an appeal on giving the commissioner and the *parties concerned* ten days' notice in writing. It was held that these words meant parties directly interested in the soil, including among others the lady of the manor; and that for want of giving her notice of the appeal it could not be heard at sessions, or respited on order to a hearing there (*o*): so that it seems she should have been one of the respondents.

To what Sessions.

Parties concerned.

The question of what sessions the appeal must be preferred to, is discussed in the next section.

Section 2.

OF THE SESSIONS TO WHICH AN APPEAL MUST BE PREFERRED.

An appeal is not usually given by a statute to the next *general* sessions, if there be such holden distinct from the quarter sessions; but to the next quarter (or general quarter) sessions, as distinguished from other general sessions, and from special sessions (*p*).

To what sessions.

The appeal must be to the sessions of the jurisdiction in which the order or the conviction is made, unless it is otherwise specially provided by statute: *viz.*, from the orders and convictions of county magistrates to the county sessions, and from those of magistrates acting within a borough to the sessions for the borough (*q*). Where a quarter sessions held under one commission of the peace for the whole county is assembled, first in one division of a county or riding, and afterwards by adjournment in another, as in Sussex, &c., an appeal which is by law limited to the "next quarter sessions" may be preferred either to the next practicable adjourned sessions, which is held for the division in which the order of removal is made, instead of the next original sessions, if so allowed by the practice of the sessions (*r*); or to the next practicable original sessions,

As to place.

(*n*) It seems that if two or more magistrates act together by a joint authority, notice to one would suffice; *R.* v. *Justices of Staffordshire*, 4 A. & E. 844; *R.* v. *Sillifant*, *id.* 354.

(*o*) *R.* v. *Justices of Lancashire*, 1 B. & A. 630.

(*p*) *R.* v. *Justices of Middlesex*, 4 Q. B. 807; *R.* v. *Justices of London*, 15 East, 632. Where, in a borough being a county of itself, the only sessions (before 5 & 6 Will. 4, c. 96) were general sessions held twice a year, it was held that appeals against orders of removal must be tried at the next of those general sessions; *R.* v. *Justices of Carmarthen*, 4 B. & A. 291.

(*q*) *South Molton case*, Skinner's R. 222; Burr. Sett. C. 592.

(*r*) *R.* v. *Justices of Sussex*, 7 T. R. 107; and see *R.* v. *Coyston*, 1 Sid. 149. Cited 3 B. & C. 549. See *Reg.* v. *Justices of Sussex*, 4 B. & S. 966; 34 L. J., M. C. 69, *post*, p. 668.

Appeal to what Sessions in point of Place.

though by the practice it might have been entered at the preceding original or adjourned session (*u*); for the statute giving the appeal to the "next quarter session" does not contemplate the continuance of the sessions, but takes the holding of them as the point of time to which it refers the appeal, the sessions being always considered in law as one day, to whatever length they may be extended by accidental causes (*x*).

Against orders of removal.

Appeals against orders of removal for relief of the poor from a parish within a borough, when made by justices of a borough not being a county of itself, were limited by 8 & 9 Will. 3, c. 30, to be prosecuted at the sessions for the county, division, or riding at large, and not otherwise or elsewhere. This was intended to prevent appeals *ab eodem ad eundem*, but since 5 & 6 Will. 4, c. 76, s. 105, such appeals can be tried at the quarter sessions of the borough as now constituted (*y*). And the union is now substituted for the parish by the 30 & 31 Vict. c. 106, and under the 27th section of that act it has been held, that where a pauper becomes chargeable in a union, which includes a borough having a separate court of quarter sessions, the guardians may obtain an order for the removal of such pauper to his place of settlement from the justices of the borough, although the particular parish from which he is to be removed is not within the borough, and in such case the proper tribunal to hear an appeal against the order is the quarter sessions for the borough, and not the quarter sessions for the county (*z*); but an appeal against the decision of borough justices refusing to grant a licence for keeping an inn lies to the county sessions, and not to the recorder of the borough (*a*).

It had been decided under 16 & 17 Vict. c. 97, ss. 97—108, that an appeal against an order adjudging the settlement of a lunatic pauper confined in a borough asylum and obtained by a parish situate wholly within the same borough which had separate quarter sessions, and made by two justices of the same borough, lay to the county quarter sessions, and not to the borough sessions, under the 108th section (*b*); so, under the same act and section, where such an order was obtained by the guardians of a union which was made up of parishes some of which were within a city, which, though in the county, had a separate quarter sessions, and some in the

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(*u*) *R.* v. *Justices of Surrey*, 1 M. & S. 479. See *Reg.* v. *Justices of Sussex*, *ante*, p. 653.

(*x*) *Ibid.*

(*y*) *Reg.* v. *Justices of Shropshire*, 2 Q. B. 85.

(*z*) *Reg.* v. *Justices of Staffordshire*, 41 L. J., M. C. 78; L. R., 7 Q. B. 288.

(*a*) *Reg.* v. *Deane*, 2 Q. B. 96; 10 L. J., M. C. 126; *Reg.* v. *Cockburn*, 4 E. & B. 265; 24 L. J., M. C. 43.

(*b*) *Reg.* v. *Justices of Warwickshire*, 28 L. J., M. C. 249. See also under 8 & 9 Vict. c. 126, *R.* v. *Justices of Lancashire*, 12 Q. B. 305; 18 L. J., M. C. 121.

county without the city, it has been held that the appeal lay to the quarter sessions for the county, and not to the sessions of a borough in which the asylum was situate, inasmuch as the latter place of appeal was only in cases where the union or parish extended into several jurisdictions which meant counties, and not such a jurisdiction as the city in question (*c*); but how far these two last decisions may be affected by the 30 & 31 Vict. c. 106, s. 27, is a matter of some difficulty, for that section enacts, that where a union extends into several distinct jurisdictions every matter, act, charge or complaint by which the guardians thereof are affected, or in which they have any interest, shall for the purpose of jurisdiction be deemed to arise or exist equally throughout the union (*d*).

To what Sessions in point of Time.

The period within which an appeal is to be preferred is generally pointed out by the statute which gives it; but when it is not, the rule is, that it must be preferred within such time as shall be decided by the justices to be reasonable (*e*). Where a public general act gave a remedy by appeal to sessions, without limitation as to time of appealing, this power was held to override a clause of appeal in a previous local act, by which a time was limited after which no such appeal could be made (*f*). Where a certain time is given within which a party may appeal, the intention is to give that time for the exercise of his judgment as to whether he will appeal or not, and therefore he has that limit of time within which he may signify his intention of appealing by giving notice of appeal, and is not required to lodge the appeal, or bring it on to be heard within that time; thus, where a statute made it lawful for a person convicted by justices "within three calendar months after such conviction to appeal," an appellant was held to be in time, who was convicted on the 2nd of January, gave notice of appeal on the 29th of March, for the sessions which were held on the 13th of April, when the appeal was ordered by the sessions to be heard on the 17th of April, and was called on after an adjournment on the 29th of April, though there had been a quarter sessions held on the 13th of January (*g*). And under the General Inclosure Act, 8 & 9 Vict. c. 118, s. 63, a person within four months after the first Sunday on which a notice of intention to stop up a way has been given on the church door "may make his complaint by appeal" to the

When appeal to be within three calendar months after conviction.

When complaint by appeal to be within four months.

(*c*) *Reg.* v. *Justices of Kent*, 7 B. & S. 394; 35 L. J., M. C. 201.

(*d*) And see *Reg.* v. *Justices of Staffordshire*, 41 L. J., M. C. 78, *ante*, p. 654.

(*e*) *R.* v. *Justices of Oxfordshire*, 1 M. & S. 448; *R.* v. *Justices of Gloucestershire*, 3 M. & S. 127; *R.* v. *Justices of Herts*, *id.* 459. See *Reg.* v. *Trafford*, 15 Q. B. 200, sub nom. *Reg.* v. *Justices of Lancashire*, 19 L. J., M. C. 199.

(*f*) *R.* v. *Justices of Bucks*, 7 B. & C. 3; appeal against a county rate on 55 Geo. 3, c. 51, s. 14. The local act was 54 Geo. 3, c. 103.

(*g*) *R.* v. *Justices of Middlesex*, 6 M. & S. 279.

Appeal to what Sessions in point of Time.

quarter sessions, on giving fourteen days' notice of appeal and grounds, and such person was held to be in time when the notice was affixed on the 28th of February, notice of appeal given on the 24th of March, but the appeal did not come on for hearing till the quarter sessions held on the 29th of June (*f*).

When appeal to be to a quarter session holden within six months.

But where an appeal was given by statute to "any quarter session, to be holden *within* six months after the conviction, on condition of the appellant giving ten days' notice of his intention to appeal, and entering into recognizance four days after such notice," and an appeal lodged within the time was dismissed at the hearing for want of proof of the proper recognizance, it was held that the right to appeal was gone, and that the appellant could not lodge a second appeal, though within the six months; the court saying that the first judgment on the formal objection was conclusive, and that the sessions could not take cognizance of a second appeal on the same subject. The appellant might indeed have stopped his first appeal from being heard at all, when he discovered his deficiency of proof, and might have lodged a second within the limited time, giving fresh notices, and being prepared with proof of entering into recognizance to prosecute that second appeal: but having proceeded to judgment he was concluded (*g*). The stat. 16 Geo. 3, c. 30, gave an appeal to the "sessions next after the expiration of twenty days from the time of conviction; but the person so appealing was required to give six days' notice, and to enter into a recognizance." On the hearing of the appeal, the respondents objected that no notice was proved according to the act. The magistrates doubted, and adjourned the appeal to the next sessions, when they allowed the objection, and dismissed the appeal. A rule for a mandamus (*h*) having been obtained to compel them to enter continuances to their next sessions, and to hear it, Lord *Ellenborough* said, that the entering into recognizance, and giving six days' notice, were both made by the act conditions precedent; so that if either had not been complied with, the appeal could not be duly entered, and unless duly entered, could not be legally adjourned. *Le Blanc*, J., added that it would be nugatory for the court to order continuances of that, which the parties had no right originally to bring before the sessions in the first instance, for want of compliance with a material condition which gave that right.

Next session.

Most statutes limit the appeal to the "*next* session"; words which, unaccompanied by more express directions, have occasioned much controversy with respect to the moment from

(*f*) *Reg.* v. *Justices of Essex*, 34 L. J., M. C. 41.

(*g*) *R.* v. *Justices of Yorkshire* (*West Riding*), 3 T. R. 776, and Paley on Conv., 4th ed. 319; *Reg.* v. *Glynne*, 41 L. J., M. C. 56; L. R., 7 Q. B. 16.

(*h*) *R.* v. *Justices of Oxfordshire*, 1 M. & S. 442; and see *R.* v. *Justices of Lincolnshire*, 3 B. & C. 548.

which the time for entering an appeal begins to be reckoned. Generally speaking, in the absence of more explicit provision, the terms "next session," or "next quarter session," mean the next possible or practicable session after the principal act done in each case—whether that be the execution of an order of removal by the actual removal of the pauper to the parish to be charged (*i*), the publication of a poor's rate (*k*), the render of their accounts by parish officers to their successors (*l*), or a conviction (*m*)—at which session, an appeal, effectual with respect to the preliminaries of sufficient notice, recognizance, &c. can be lodged, not for respite or adjournment only, but for hearing. For it is obvious that the next actual sessions may often happen so soon after the necessity for appealing arises, that appellants would not have a reasonable time to consider, in the first instance, whether they should appeal or not, or, next, to prepare for trial by searching for evidence, giving the proper notice of appeal, drawing briefs, &c. If, however, all that takes place at the first practicable session is not all that the appellant could have done, and will not put him in a condition to be then heard, *e. g.*, if he has not given the proper notices, and only offers to enter an appeal for hearing at a still subsequent session, the quarter sessions have no jurisdiction to receive the appeal (*n*).

To what Sessions in point of Time.

"Next sessions," what.

The next sessions for appealing against an overseer's account are the next practicable sessions after the accounts have been published, that is, after they have been deposited with the churchwardens and overseers for public inspection, and the fact of depositing bonâ fide made known (*o*).

It was formerly held in the case of an appeal from an order of removal under 13 & 14 Car. 2, c. 12, s. 2, which gives to parties who "think themselves aggrieved by any such judgment of the justices" an appeal to the next quarter sessions,

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(*i*) *R.* v. *Justices of Surrey*, 1 M. & S. 479; *R.* v. *Justices of Essex*, 1 B. & Ald. 210. Only one clear working day, exclusive of Sunday, intervened in those cases, between the execution of the order of removal, and the next immediate quarter sessions. So also in *R.* v. *Justices of Sussex*, 7 T. R. 137; and *R.* v. *Justices of Yorkshire* (*West Riding*), Dougl. 192. The appellant parishes were in each of these cases from thirty to sixty miles distance from the sessions town. Four days was held too short a time for appealing in *R.* v. *Justices of Flintshire*, 7 T. R. 200. See also by *Buller*, J., *Proser* v. *Hyde*, 1 T. R. 417. The same rule prevails where irregular or too late service of the order of removal is the ground of appeal against it; *R.* v. *Penkridge*, 3 B. & Adol. 538.

(*k*) And in *R.* v. *Hendon*, 2 D. & R. 149, three clear days, and in *R.* v. *Justices of Sussex*, 15 East, 206, only one day intervened, *R.* v. *Micklefield*, 1 Bott, 279.

(*l*) *R.* v. *Thackwell*, 4 B. & C. 62. Overseers' accounts rendered on the day the sessions were held thirteen miles off; *R.* v. *Justices of Dorsetshire*, 15 East, 200.

(*m*) *Proser* v. *Hyde*, 1 T. R. 414; *Re Blues*, 5 E. & B. 291; 24 L. J., M. C. 138.

(*n*) *R.* v. *Justices of York* (*West Riding*), 4 M. & S. 327.

(*o*) *R.* v. *Watts*, 7 A. & E. 461; *R.* v. *Thackwell*, 4 B. & C. 62.

Appeal to what Sessions in point of Time.

"Next sessions," what.

that if two working days, including the first day of the next immediate session, intervened after the execution of the order, the appeal should have been lodged or entered at that session, though there had not been sufficient time before it to give reasonable notice of appeal, so as to try it there; for it was said it might have been then adjourned (or respited) to the next session, according to 9 Geo. 1, c. 7, s. 8 (*p*). But this is now decided otherwise, and the entering an appeal merely for the purpose of having it adjourned, is treated as a useless, and therefore an unnecessary, act. It is now sufficient to enter it at the sessions at which the appellant, by his notice, is bound to try it, in order to make it imperative on that sessions to hear it (*q*). So that when an order of removal is served on a day within the time required by the practice of sessions for giving notice of appeal at the then next sessions, the appeal need not be entered at those sessions, but is in time if lodged at the next following (*r*); but the appellant cannot by his negligence or dilatory conduct, such as lying by and taking all the time allowed by the 11 & 12 Vict. c. 31, s. 9, and so depriving himself of giving an effectual notice of appeal, or of sending notices of appeal in due time, make those sessions impracticable which were in fact practicable (*s*). So that if he chooses to take all the time allowed him by the 11 & 12 Vict. c. 31, s. 9, for giving notice of appeal and sending grounds, and by so doing is too late for a sessions which otherwise he might have been in time for, he must show his intention of prosecuting the appeal by entering it at the sessions which he has rendered impracticable (*t*); but whether the sessions are the first practicable is a question of fact for the sessions or recorder. The court will review the decision of the sessions or recorder upon the facts and dates relied upon to show that the sessions were or were not practicable, and if the sessions hold a prior sessions not to have been practicable and enter an appeal at a subsequent one, the court, if they think the prior sessions were practicable, will grant a writ of prohibition to the sessions as to the appeal entered (*u*).

(*p*) *R.* v. *Justices of Herefordshire*, 3 T. R. 504; *R.* v. *Justices of York* (*West Riding*), 4 M. & S. 328, *Le Blanc*, J.

(*q*) See *R.* v. *Justices of Southampton*, 6 M. & S. 394; 8 B. & C. 641, n.; *R.* v. *Justices of Kent*, 8 B. & C. 639; *R.* v. *Justices of Devon*, *id.* 640, n., and *post*, Chap. V., as to appeals against orders of removal. It was said in *R.* v. *Devon*, that the result of the above decision would be, that a removing parish might not know of the intention of the other parish to appeal, till eight days before the second sessions. Lord *Tenterden* said that the quarter sessions might remedy that inconvenience, should it prove one, by requiring under such circumstances a longer notice.

(*r*) *Reg.* v. *Justices of Surrey*, 3 D. & L. 343.

(*s*) *Reg.* v. *Justices of Sussex*, 4 B. & S. 987; 34 L. J., M. C. 69; *Reg.* v. *West Riding of Yorkshire*, E. B. & E. 713; 27 L. J., M. C. 269; and see *Reg.* v. *Sevenoaks*, 7 Q. B. 136; 14 L. J., M. C. 92; *Reg.* v. *Skircoat*, 2 E. & E. 185; 28 L. J., M. C. 224.

(*t*) *Reg.* v. *Justices of West Riding*, E. B. & E. 713; 27 L. J., M. C. 269.

(*u*) *Liverpool Gas Co.* v. *Overseers of Everton, &c.*, 40 L. J., M. C. 104; L. R., 6 C. P. 414.

To what Sessions in point of Time.

Where a statute gave to a party "grieved by the *judgment* of any justice" an appeal to the "next quarter sessions," these words were held to designate the sessions next after the conviction, and not those next after the execution or levying the penalty thereon; for the judgment, and not the execution, is the grievance to the party (*x*).

Next after the "judgment."

Where an act limited the right of appeal, upon giving notice thereof "within six days after the *cause of the complaint* arises," it was determined that the levy under, and not the signing of the warrant of distress, was the "cause of complaint;" and a sessions was held bound to hear an appeal of which notice was given within six days after the party was actually damnified by the levy under the warrant, Lord *Ellenborough* saying, "It is not necessary that he should appeal on the warrant; for *non liquet* that it would be proceeded upon" (*y*). The wording of the appeal clause in the existing Turnpike Act, 4 Geo. 4, c. 95, s. 87, is very similar. Where, under that act, justices ordered the surveyor of a township to perform certain statute duty on a turnpike road, and to pay the turnpike surveyor part of the composition, it was held that the order of the magistrates was not complete till the surveyor of the township was in possession of the order; and that the *cause of complaint* arose when the order was served; so that the sessions were bound to hear an appeal of which notice had been given six days after such service. *Bayley*, J., observed that parties are often present in court when rules are pronounced, but are not bound to take notice of them till they are served. The surveyor may or may not be present when this order is made; and it is desirable that the practice should be uniform whether he does or does not attend (*z*).

Next after "cause of complaint arises."

Cause of complaint under Inclosure Act.

An act for the enclosure of certain lands in Middlesex, contained a clause giving an appeal "within six months from *the time when the cause of complaint shall have arisen.*" The commissioner at a meeting under the act, on 18th June, 1818, showed the map to the appellant, with *the allotment marked out upon it*, which he, the commissioner, had assigned to him, the appellant. The latter raised some objections to it, and desired the commissioner to reconsider it. He did so, but did not think fit to make any alteration, and, having received no further application, on 28th August following sent a formal notice to the appellant that the land remained allotted to him according to the map exhibited to him on 18th June previous, and on the same day the said allotment was accordingly *staked out* by command of the said commissioner. According to the local act, as well as the general inclosure act, no allotment ought

(*x*) *Proser* v. *Hyde*, 1 T. R. 414.

(*y*) *R.* v. *Justices of Devonshire*, 1 M. & S. 411; decided on 13 Geo. 3, c. 78, s. 80, the old highway act, now repealed.

(*z*) *R.* v. *Justices of Lancashire*, 8 B. & C. 595; 2 M. & R. 519. See *Reg.* v. *Nuisances Removal Committee of Middleton*, 1 E. & E. 98; 28 L. J., M. C. 41, *post*, p. 661.

Appeal to what Sessions in point of Time.

to be *made*, till the roads have been *set out;* and the roads in this case could not be *staked out* till the end of July, because the crops were on the ground. The appeal was lodged on 9th January, and respited till the 29th April, when it was opposed on the ground of not having been lodged *in time, i. e.*, within six months from the *cause of complaint arising;* and the justices dismissed the appeal on this ground; but the court above granted a *mandamus* to them to hear the appeal, being of opinion that there was no actual setting out of the allotment according to the true construction of the act, till something was actually done founded on the plan (*a*).

It seems to follow from *Farrer* v. *Billing* (*b*), that, at least in cases where the provisions of a local inclosure act conform to, and do not contradict or supersede those of the general inclosure act, the grievance or foundation of appeal arises at that point of time when the allottee has notice of the portion allotted for him on the map by the commissioners, whether he obtains that knowledge from a map, or by staking out, or in any other manner. A local inclosure act gave an appeal to parties *grieved* by any thing done in pursuance of the act, to "any general quarter sessions holden for the county, within four calendar months next after *the cause of complaint* shall have arisen." An allotment was made and staked out by the commissioners in March, and the appellant cropped it. It was held that though the mere staking out the ground might not be a grievance, as it might be done without notice to the party, yet his cropping it showed him too late in lodging his appeal at the October session (*c*).

In a private enclosure act, power was given to the commissioners to set out land in a certain proportion in lieu of tithes to the vicar, with the following clause of appeal:—"And if any persons shall think themselves aggrieved by *any thing done* in pursuance of this act, they may appeal to any general quarter session of the peace for the county, &c., within six calendar months *after such cause of complaint shall have arisen.*" The commissioners made an allotment upon the map, which the vicar inspected in November, 1812, and appointed an agent who attended a subsequent meeting, when an alteration was made which such *agent approved*, and it was understood at the meeting where such agent so concurred, that all objections were reconciled, and the allotments definitively settled. In November, 1813, the commissioners gave notice that all tithes were to cease from the 29th of September last preceding. The vicar entered an appeal against the allotment at the Epiphany sessions, 1814,

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(*a*) *R.* v. *Justices of Middlesex*, (MSS.) and 1 Chitt. R. 367. See *R.* v. *Nockolds*, 1 A. & E. 245.

(*b*) 2 B. & A. 171.

(*c*) *R.* v. *Justices of Wilts*, 13 East, 353. The other point held was, that as it was too late to lodge it at the October sessions, they could not adjourn it.

being within six calendar months from *the date of the notice* of the commissioners above mentioned ; which appeal was dismissed as being out of time, the question being from what period the "grievance commenced." But the Court of King's Bench were of opinion that *the notice of the commissioners of the time from which the tithes were to cease*, was the commencement of the vicar's *grievance*, and therefore that the appeal was in time (*d*).

Appeal after "Cause of Complaint."

By a local act, certain guardians, &c. of the poor were incorporated and ordered to hold courts at which ratepayers might object to their proceedings, and if the matter could not be then settled, it was to be adjourned to the next court, to be then "*finally* heard and determined." By another clause, any person aggrieved by any thing done in pursuance of the act, "and for which no *further mode of relief* was already appointed," might appeal to the quarter sessions to be holden within four calendar months next after the "*cause of complaint* should have arisen." The directors ordered certain payments to be made for sums due on annuities and interest on loans previously granted and incurred. A ratepayer appealed within four months after the date of their order. Held, that the borrowing the money and granting the annuities were not the "cause of complaint," but the being burdened in respect of the payments by the making the order ; and the sessions were ordered to hear the appeal (*e*). The court also held that the act did not confine the party to the remedy before the directors.

So, under the Nuisances Removal Act, 1858 (18 & 19 Vict. c. 121, s. 22), where an appeal is given against the amount of an assessment under that section, the person aggrieved first giving notice of appeal with grounds within fourteen days after such assessment shall have been made, or cause of complaint shall have arisen, the notice of appeal was given in time, if given within fourteen days after notice of the assessment left on the premises, though more than fourteen days after the assessment was made (*f*).

Next after orders or proceedings had.

An act gave an appeal against orders of justices for stopping up roads "to the parties *aggrieved* by any such order or proceeding, to the next quarter sessions *after any such orders or proceedings* had;" and the question was the precise period from which the grievance was to be estimated, and whether the *terminus a quo* for an appeal was to be reckoned from the time of the order, or from that of the actual stoppage in consequence of it, and the court held the former. *Lawrence*, J., said that on the construction of the act as to the time of appealing, he saw no other line to go by, as otherwise it would be difficult to

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(*d*) *R.* v. *Justices of Gloucestershire*, 3 M. & S. 127; and see *R.* v. *Nockolds*, 1 A. & E. 245; *Smith* v. *Shaw*, 10 B. & C. 277.

(*e*) *R.* v. *Justices of Salop*, 2 B. & Ad. 145.

(*f*) *Reg.* v. *Middleton Nuisances Removal Committee*, 1 E. & E. 98; 28 L. J., M. C. 41.

Appeal to what Sessions in point of Time.

say to what period an appeal might be deferred (*g*); a principle adhered to, and ably illustrated by Lord *Ellenborough* in a subsequent case on the same act (*h*). And it is immaterial that the appellant has had no notice of the order, &c., in time to enable him to appeal in proper time, or in fact did not know it (*i*); for if the right of appeal were to depend on such personal notice of the order, the time for appealing would be indefinitely deferred, contrary to the intention of the legislature (*k*). So an order on the putative father for the maintenance of his bastard child, made under 7 & 8 Vict. c. 101, s. 4, is deemed to be made when given verbally by the justices, and not when the written order is served (*l*).

Two justices, in a special session on the 20th of June, made an order for a public footway to be diverted and turned. On the 4th of July following they made another order for the old footway to be stopped up under the act then enabling them to do so. Appeal at the next *Michaelmas* quarter session, the Midsummer quarter session having been holden on the 11th of July. The justices dismissed the appeal, conceiving that the time within which it was to be made was to be reckoned from the date of the *first* order, which was for diverting the *way*. But the court above held that the grievance commenced only from the time of the order for stopping up the old footway, not from that of the order for making a new one; and issued a *mandamus* to hear the appeal (*m*).

Appeal against "act done."

An act gave an appeal to any person aggrieved by any *act done* under it. A party grieved applied to a special sessions for an order under the act, who, after hearing the case and evidence, dismissed the complaint on a supposed want of jurisdiction. The court held this to be an *act done* against which an appeal would lie (*n*).

"Determination."

A local act vested the management of the parish poor in the churchwardens and others, and gave an appeal to them by any person thinking himself *aggrieved* by any thing to be done by virtue of the act, and if he should not be satisfied with their *determination*, then gave an appeal to the quarter sessions. A parishioner applied for relief against a poor rate to the churchwardens, &c., who, at a meeting, resolved to take no further notice of his application; the Court of King's Bench held that as the churchwardens, &c. had not come to any *determination*

(*g*) *R.* v. *Justices of Pembrokeshire*, 2 East, 212, 213; decided on 13 Geo. 3, c. 78, s. 19.

(*h*) *R.* v. *Justices of Bucks*, 2 M. & S. 234. See *Ex parte Simpkins*, 2 E. & E. 392; 29 L. J., M. C. 23.

(*i*) *R.* v. *Justices of Staffordshire*, 3 East, 151.

(*k*) Per *Le Blanc*, J., 3 East, 153.

(*l*) *Ex parte Johnson*, 3 B. & S. 947; 32 L. J., M. C. 193. See also *Reg.* v. *Justices of Derbyshire*, 7 Q. B. 193; 14 L. J., M. C. 84; *Ex parte Simpkins, ubi sup.*

(*m*) *R.* v. *Justices of Herts*, 3 M. & S. 459, on 13 Geo. 3, c. 78, s. 19.

(*n*) *R.* v. *Tucker*, 3 B. & C. 544. This proceeded on peculiar wording in an act. See also *Blakemore* v. *Glamorgan Canal Co.*, 3 Y. & J. 60.

on the subject-matter of the complaint, the remedy was by *mandamus* to them to hear the appeal; and an appeal to the sessions was held mistaken (*o*).

Right of Party to be informed by Justices of his Right of Appeal.

Where a local act gave an appeal against a rate, first to a borough sessions, and then against their order to the county sessions, the appellant was confined to the original grounds of appeal urged at the borough sessions, though he might bring forward additional evidence (*p*).

Section 3.

OF THE STEPS PRELIMINARY TO THE ENTERING AN APPEAL FOR HEARING; AND HEREIN OF NOTICES OF APPEAL GENERALLY.

Duty of justices to inform a party of his right to appeal.

By many statutes it is made a part of a magistrate's duty to acquaint the party whom he convicts of his right of appealing, and also to inform him of the necessary steps to be taken. In convicting on such statutes, if the justices neglect this duty, as, if the statute requires both a recognizance and notice in writing of appeal to be given to the justices, and the justices inform the party convicted of his right to appeal, and receive his recognizance, but are silent as to the notice, the appellant is discharged from the obligation of giving such notice to the justices, and the session is bound to receive his appeal (*q*). The necessity for informing the party that he must give notice of appeal may be waived: as, where a party was informed of his right of appeal, and replied he thought he had better pay the penalty, but afterwards appealed, his appeal was dismissed for want of notice at the time of his conviction that he intended to appeal. And *per curiam*, "All the statute positively requires is, that the justices shall make known to the person convicted his right of appeal; they do so; and if he had thereupon signified his intention to appeal, *non liquet* that they would not also have proceeded to inform him of the further steps to be taken by him. But why should they do so nugatory an act as to inform him what he must do to appeal and enforce his right, when he had declined to appeal altogether, and had waived his right?" (*r*).

Notice of appeal, when necessary.

The statutes which grant an appeal from the order or conviction of justices, commonly annex certain conditions precedent to the taking advantage of that privilege, *e. g.*, the giving notice to them, and entering into recognizance to prosecute the appeal. Where this is the case, the directions of the legislature must be strictly complied with before entering the appeal; and no contrary practice of the sessions will avail (*s*). And if

(*o*) *R.* v. *Justices of Kent*, 9 B. & C. 283.
(*p*) *R.* v. *Justices of Suffolk*, 1 B. & A. 640.
(*q*) *R.* v. *Justices of Leeds*, 4 T. R. 583.
(*r*) *R.* v. *Justices of York* (*West Riding*), 3 M. & S. 493.
(*s*) *R.* v. *Justices of Lincolnshire*, 3 B. & C. 548.

Notice of Appeal.

without the giving of the requisite notice of appeal, an appeal is entered and respited, and, in accordance with a practice of the sessions, a notice of trial of the respited appeal is duly given, the appeal cannot nevertheless be heard, because it never was duly entered (*t*). Where the party, by any act of justices, is directed to enter into a recognizance to appear at the next sessions to prosecute his appeal as the express condition of his appeal, and no mention is made of any other condition, *e. g.*, giving notice, no notice of appeal need be given (*u*). For the entry into the recognizance is held equivalent to notice to the informer and the convicting magistrate of this intention to appeal, so that any further notice to him becomes unnecessary, and the sessions are bound to hear the appeal; and this was so decided notwithstanding that by the practice of the particular sessions, eight days' notice of appeal was requisite in all cases to be given by the appellant to the respondent. For the practice of the sessions could only compel eight days' notice to be given in those cases where some notice is prescribed by the statute, without more explicit direction therein (*v*); otherwise, as by the act *sub judice* in *R.* v. *Justices of Kent,* if the conviction was made more than six days before the sessions, the party grieved must have appealed to the next sessions, and if it was made seven days before them, he must have appealed to those sessions, and yet could not give the (eight days') notice prescribed by the sessions (*x*). Nor can the practice of the sessions, requiring a notice of appeal against an order or conviction of justices out of sessions to be served on every justice who is a party to it, avail, if the act which gave the appeal does not direct such a notice; for that would be to introduce a new condition of appeal not to be found in the act (*y*): but upon principles of natural justice and common sense where an appeal is given *simpliciter* there is an implied condition that before the hearing notice should be given to the party interested in supporting the act complained of, though in such a case information given in any way on which the other side may act may be sufficient notice (*z*).

Notice, an implied condition —when.

Written or verbal.

Where an act requires notice of appeal to be given, without providing that the notice must be in writing, a verbal notice will suffice in cases not included within the 12 & 13 Vict. c. 45,

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(*t*) *Reg.* v. *Justices of Oxfordshire,* 1 M. & S. 448.

(*u*) *R.* v. *Justices of Essex,* 4 B. & A. 276; see as to this case Lord *Campbell,* C. J., in *Re Blues,* 5 E. & B. 291, 299; 24 L. J., M. C. 138; *R.* v. *Justices of Kent,* 6 M. & S. 258. See *R.* v. *Milnrow Chapelwardens,* 5 M. & S. 248. In *R.* v. *Essex,* the eight days' notice of appeal, required by the sessions practice, had been in fact given to the convicting magistrate.

(*v*) *R.* v. *Justices of Kent,* 6 M. & S. 258, decided on 55 Geo. 3, c. 99, s. 20.

(*x*) Per *Holroyd,* J., *ibid.*

(*y*) *R.* v. *Justices of Staffordshire,* 4 A. & E. 842, on 53 Geo. 3, c. 127, s. 3.

(*z*) *Re Blues,* 5 E. & B. 291, 299; 24 L. J., M. C. 138.

s. 1, *infra*, and s. 2, *post*, p. 666; and this, though the notice prescribed by the statute is "reasonable notice" (*a*), for the word "reasonable" will be held to refer to the time of the notice, and not to the manner of giving it (*b*). Where notice is made a condition of appealing, without more being required, it is more convenient to give it in writing, as being better capable of proof by an examined copy, and is now required by 12 & 13 Vict. c. 45, s. 1, in all cases except those mentioned in sect. 2. It need scarcely be added, that where an act requires a written notice, no oral notice will suffice; but it seems that a printed form of notice signed by the appellant, after being properly filled up, would (*c*). *Notice of Appeal.*

Again, though the magistrates composing a court of quarter sessions certainly have a discretion to exercise with respect to what is "reasonable time" for giving notice of appeal, or of the appellant's intention to proceed to the trial of a respited appeal, the Court of Queen's Bench has also a kind of visitatorial jurisdiction over them in the exercise of their discretionary power, and will interfere and correct it when it ought not to be given effect to (*d*); but the 12 & 13 Vict. c. 45 was passed for the purpose of making the law more uniform in these respects, and consequently the cases are much reduced in number in which magistrates are called upon to exercise their discretion. Time for giving notice. Reasonable time.

By sect. 1, in every case of appeal (except as hereinafter mentioned) to any court of general or quarter sessions, fourteen clear days' notice of appeal at least shall be given, and such shall be sufficient notice, any act or acts, or any rule or practice of any court or courts to the contrary notwithstanding; and such notice of appeal shall be in writing, signed by the person or persons giving the same, or by his, her or their attorney, on his, her or their behalf, and the grounds of appeal shall be specified in Notice under Baines' Act. Time for giving must be in writing. How signed.

(*a*) *R.* v. *Justices of Salop*, 4 B. & A. 626, decided on Bastardy Act, 49 Geo. 3, c. 68; *R.* v. *Justices of Lincolnshire*, 3 B. & C. 548. See also 4 B. & Ad. 685; *R.* v. *Justices of Yorkshire (West Riding), in re Bower.*

(*b*) *R.* v. *Justices of Surrey*, 5 B. & A. 539; 1 D. & R. 160.

(*c*) See per *Le Blanc*, J., 2 M. & S. 286; *Schneider* v. *Morris*, recognized in *Durell* v. *Evans*, 1 H. & C. 174; 31 L. J., Ex. 337. See also *Reg.* v. *Fletcher*, L. & C. 180; 31 L. J., M. C. 206; also 2 B. & P. 238, and *Strickland* v. *Maxwell*, 4 Tyr. 569. As to notices of appeal against poor rates, see *post*, Chap. IV., and against orders of removal, *post*, Chap. V.

(*d*) Per Lord *Ellenborough*, in *R.* v. *Justices of Wilts*, 10 East, 404. There, an appeal of which due notice had been given to the respondents was respited under 9 Geo. 1, c. 7, s. 8. By a rule of practice promulgated after the sessions at which the appeal was respited, it was required that in the case of respited appeals, notice of trial should be given on or before the Monday in the week next before the sessions, or that it should be deemed insufficient. The appellant's attorney was ignorant of this rule, and gave notice of trial according to the former practice, for the sessions to which the appeal was adjourned; they dismissed the appeal without hearing it, on account of insufficient notice, and held that they had no power to adjourn the appeal again even on payment of costs of the day. A *mandamus* issued to them to hear it. As to the validity of rules of practice of sessions, see *post*, pp. 677, 725, 726.

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every such notice (*e*). Provided always, that it shall not be lawful for the appellant or appellants on the trial of any such appeal to go into or give evidence of any other ground of appeal besides those set forth in such notice. By sect. 2, none of the provisions hereinbefore contained as to notices of appeal are to affect or alter the law as to notice of appeal against (1) a summary conviction, (2) an order of removal, (3) an order under any statute relating to pauper lunatics, (4) or an order in bastardy, (5) or against any proceeding under or by virtue of any of the statutes relating to the excise, customs, stamps, taxes or post office. Whether all notice can be waived by a party is not decided, but it seems that the party to whom notice is to be given by the statute may so act as to preclude him from taking the objection of want of notice (*f*); but except on very clear grounds it would not otherwise be dispensed with (*g*).

Grounds of appeal.

Exceptions.

We have seen that compliance with an act, in giving the requisite notice of appeal, will not entitle the appellant to enter, or the sessions to hear, an appeal, if the entering into a recognizance was also made by the act a condition precedent, but was not complied with (*h*); and that this rule applies, *à fortiori*, where neither the notice nor recognizance made necessary by the statute had been given, notwithstanding the practice of the sessions to dispense with them where it was only sought to enter and respite the appeal to the ensuing session (*i*).

If a statute points out the length of time within which a notice should be given before any appeal, its provisions must be strictly obeyed, and cannot be infringed by any practice of sessions. "Ten days' notice" means ten days, one day exclusive, as it would seem, of the first day, and the other inclusive (*j*). But "ten *clear* days' notice before the sessions" means a notice of ten perfect intervening days between the act done, *e. g.* the service, and the first day of the sessions; and a service of a notice of appeal, exclusive of the first and including the last

Ten days' notice.

Ten clear days' notice.

(*e*) 12 & 13 Vict. c. 45, s. 1.

(*f*) *R.* v. *Leeds*, 4 T. R. 583; *Reg.* v. *Justices of Herts*, 4 B. & Ad. 561.

(*g*) *R.* v. *Sheard*, 2 B. & C. 860, *post*, "Poor Rates," Chap. IV.

(*h*) *R.* v. *Justices of Oxfordshire*, 1 M. & S. 446.

(*i*) *R.* v. *Justices of Lincolnshire*, 3 B. & C. 548.

(*j*) *R.* v. *Justices of Yorkshire* (*West Riding*), *in re Bower*, on 55 Geo. 3, c. 68, s. 3, a case of stopping a way, 4 B. & Ad. 685; relied on *per curiam*, in *R.* v. *Goodenough*, 2 A. & E. 465; *R.* v. *Justices of Yorkshire* (*West Riding*), 5 B. & Ad. 667; *R.* v. *Justices of Staffordshire*, 4 A. & E. 842, and any rule of sessions practice to the contrary, *e. g.*, exclusive of both days, would be controlled by the Court of Queen's Bench, *ibid.*; and see *R.* v. *Justices of Lancashire*, 7 B. & C. 691; another case against the *Justices of Yorkshire* (*West Riding*), 5 B. & Ad. 666; and *R.* v. *Justices of Staffordshire*, 4 A. & E. 842. However, in a later case, where the practice of sessions required fourteen days' notice of trying a respited appeal, and the sessions refused to hear the appeal for want of such notice, *Patteson*, J., refused a mandamus; *R.* v. *Justices of Monmouthshire*, 1 H & W. 111.

day, for the 19th, that being the first day of the sessions, was accordingly held insufficient (*k*). *Notice of Appeal.*

"Fourteen days' notice *at least*," in the Lord's Day Act, has been held to mean fourteen *clear* days (*l*). And fourteen clear days is the expression used in 12 & 13 Vict. c. 45, s. 1, as above set out. In computing the number of days, Sunday is to be reckoned, though it be the last; and in such case notice of appeal must be given within the number fixed by the Sunday (*m*). "*Immediate*" notice of an appeal was required by 1 Geo. 4, c. 56, s. 5 (now repealed). The court held that a notice, not given till seven days after the date of the conviction, was not prompt enough to justify the sessions in entertaining the appeal, but they would not say that "immediate" must be construed so strictly as to require the notice to be given *forthwith* on conviction (*n*). The word "immediately" has been held to mean within a reasonable time with reference to entering into recognizances (*o*). Fourteen days at least. Immediate.

Where an act gave an appeal from an order for the payment of money upon giving notice of appeal "within six days after such order shall be made or given," the time for notice of appeal has been held to run from the making of the order, and not from the service of it (*p*). So notice of appeal against a bastardy order under 7 & 8 Vict. c. 101, s. 4, which must be given "within twenty-four hours after the adjudication and making of any order on the putative father, &c.," must be within that time of the verbal adjudication and order made at petty sessions, and not from the time of its being signed or service of the written order (*q*). So appeals from orders made under the Nuisances Removal Act, 1865 (*r*), are made when verbally given (*s*). Six days after order made.

In some counties the quarter sessions are held by adjournment at different places for the convenience of different districts. In this case they are in law but one sessions for the whole county (*t*). And the time for giving notice of appeal Where county is divided into distinct divisions.

Swift v Lancash 22 W.R. 76.
R v Lancashire 17 L.J. M.C. 161; 6 B. 563.

(*k*) *R.* v. *Justices of Herefordshire*, 3 B. & A. 581; and see *Roberts* v. *Stacey*, 13 East, 21.

(*l*) *Zouch* v. *Empsey*, 4 B. & A. 522; and see 4 A. & E. 781.

(*m*) *R.* v. *Justices of Middlesex*, 2 Dowl. N. S. 719; *Ex parte Simpkin*, 2 E. & E. 392; 29 L. J., M. C. 23.

(*n*) *R.* v. *Justices of Huntingdonshire*, 5 D. & R. 588; 2 D. & R. Mag. Cas. 594.

(*o*) *Re Blues*, 5 E. & B. 291; 24 L. J., M. C. 138.

(*p*) *Reg.* v. *Justices of Derbyshire*, 7 Q. B. 193; 14 L. J., M. C. 84.

(*q*) *Ex parte Johnson*, 3 B. & S. 947; 32 L. J., M. C. 193; see *ante*, p. 662.

(*r*) 18 & 19 Vict. c. 121, s. 40.

(*s*) *Ex parte Simpkin*, 2 E. & E. 392, per *Crompton*, J.; see *ante*, p. 662.

(*t*) *R.* v. *Justices of Sussex*, 7 T. R. 107; *R.* v. *Surrey*, 1 M. & S. 479; *R.* v. *Suffolk*, 4 D. & L. 628; *R.* v. *Justices of Lancashire*, 8 E. & B. 563; 27 L. J., M. C. 161.

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must be calculated with reference to the first day of the sessions (*u*); but when for practical convenience the county is divided into distinct divisions, and in each division a distinct court is held, so that all questions locally arising within each division, by practice belong to that division, and all the process for that division is returnable at the court for that division, and the panels of the jurors are made out for that division, and the rules of practice made by the court for each division for the conduct of business in it, assume the day when the court for that division begins its sittings is the first day of the sessions of that division, the time in giving notice of appeal, and sending grounds of appeal against an order of removal, is to be regulated with reference to the rules of practice for that division (*v*).

Notice, how to be intituled.

The notice may well be intituled in the same manner as the order or conviction intended to be appealed against, and which may be recited in it, for it is in the nature of the declaration in an action, and is notice of what one court has decided, which

How directed.

authorizes another court to proceed (*w*). It should be directed to the parties described by the particular statute, or, in the absence of any such express direction, to such other persons as have been already shown to be respondents (*x*) by their names and additions. If directed to magistrates, their names and office of justices for the county, borough, &c. should be stated. If by or to parish officers, describing them as churchwardens and overseers will, it appears, suffice without naming them. Upon a joint grievance the parties may give a joint notice of appeal (*y*); and where three defendants were convicted on a joint hearing and gave a joint notice of appeal, it was held sufficient, though three separate convictions were returned to the sessions (*z*).

By whom to be given.

By trustees of a turnpike trust.

A notice of appeal on behalf of trustees of a turnpike trust may be given under the words "party aggrieved" by one trustee in the name of, and on behalf of, the rest, though he be not himself personally aggrieved, under a local act which gave the trustees power to sue and be sued in the name of one of them (*a*).

May be given by attorney.

The general rule, *qui facit per alium facit per se*, applies to the giving of notice of appeal, unless the statute expresses or implies that it is to be a personal act; and therefore ordinarily a man may give a notice by means of his agent or attorney (*b*).

(*u*) *Reg.* v. *Justices of Lancashire*, 8 E. & B. 563; 27 L. J., M. C. 161.
(*v*) *Reg.* v. *Justices of Sussex*, 4 B. & S. 966; 36 L. J., M. C. 69.
(*w*) *R.* v. *Justices of Suffolk*, 1 B. & A. 640, per *Holroyd*, J. See per *Erle*, J., in *Reg.* v. *Justices of Middlesex*, 5 D. & L. 580.
(*x*) See *ante*, "Parties to appeal"—"Respondents," *ante*, p. 652.
(*y*) See *R.* v. *White*, 4 T. R. 771; *R.* v. *Justices of Sussex*, 15 East, 206.
(*z*) *Reg.* v. *Justices of Oxfordshire*, 4 Q. B. 177; 12 L. J., M. C. 40.
(*a*) *R.* v. *Justices of Surrey*, 5 A. & E. 701, n.
(*b*) *Reg.* v. *Justices of Middlesex*, 20 L. J., M. C. 42; *Reg.* v. *Carew*, *id.* 44; *R.* v. *Justices of Huntingdonshire*, 4 New Sess. Cas. 101; 19 L. J., M. C. 127.

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How to be signed.

And by 12 & 13 Vict. c. 45, in the cases to which it applies, "the notice of appeal shall be in writing, signed by the person or persons giving the same, or by his, her or their attorney on his, her or their behalf;" and under this section a notice was held good which was signed in the name of the appellant, but in the handwriting of the clerk to the appellant's attorney, who wrote the name by the direction of the appellant, who also acknowledged the signature (*c*). And a notice signed by the clerk to a board of guardians by "A. B., clerk to the aforesaid guardians," was held good, the clerk being an attorney in fact (*d*).

But if an appeal is given to the holder of a particular office, the notice must state the appellant to be such holder. If the condition of bringing the appeal is, that the appellant is aggrieved, that must appear on the face of the notice, either expressly or as necessarily resulting and self-evident from so much of the order, conviction, &c. appealed against as is set out in the notice (*e*).

The sessions are the judges of the reasonableness of the notice given, and are to construe its meaning, and the court will not interfere with the exercise of their discretion on such a matter, so long as the construction put upon it by the sessions is one which the document can reasonably bear (*f*); but if the court can see that they have decided against the validity of the notice, by reason of what they deemed a fatal objection in point of law, the court will interfere if they have wrongly decided (*g*), as in the above case, on the ground that a mistake in the notice not calculated to mislead was fatal, or on the ground that a misdescription of the order appealed against invalidated the notice where there was no variance, or it was not material or not calculated to mislead (*h*).

Defects of notice—misdescription of matter appealed against.

The object of the notice of appeal being to make the other side aware of the intention to appeal against a particular order, conviction, rate or the like, if in describing it reasonable information is given by which they cannot be misled, the court will not construe such notice with the accuracy of a pleading. Thus, where a notice of appeal described an order accurately, except that it was stated to have been made by R. H. C. instead of B. C., there being two justices of the county whose christian

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(*c*) *Reg.* v. *Justices of Kent*, 42 L. J., M. C. 112; L. R., 8 Q. B. 305.

(*d*) *Reg.* v. *Guardians of Newport Union*, 33 L. J., M. C. 155.

(*e*) As where the order recited in the notice was for stopping up a highway from the appellant place, *R.* v. *Justices of Yorkshire* (*West Riding*), 7 B. & C. 678. See also *R.* v. *Blackawton*, 10 B. & C. 792; *R.* v. *Justices of Yorkshire* (*West Riding*), 4 B. & A. 685; *R.* v. *Justices of Essex*, 5 B. & C. 431; *R.* v. *Justices of Somersetshire*, 7 B. & C. 681, n.

(*f*) *Reg.* v. *Justices of Cambridgeshire*, 1 L. M. & P. 47; *Reg.* v. *Justices of Kesteven*, 3 Q. B. 810; 13 L. J., M. C. 78; and see now 12 & 13 Vict. c. 45, s. 9, *post*, p. 673.

(*g*) *Reg.* v. *Justices of Bucks*, 4 E. & B. 259, n.

(*h*) *R.* v. *Justices of Oxfordshire*, 4 Q. B. 177.

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names had those initials respectively, and the sessions refused to hear the appeal on the ground of the variance, *Williams*, J., granted a mandamus, saying, "the object of the notice of appeal is to give the opposite party notice that the appellants have been aggrieved by an order of removal, perfectly agreeing in description and other respects with the one actually made. But the sessions have got into *apices juris* and nice questions of variance, instead of doing what would be more consonant with the justice of the case" (*i*). So, where an order of removal was directed to the parish officers of a parish which had no such officers, but was composed of three hamlets, each maintaining its own poor, and was served by the removing parish on the officers of one of the hamlets, who appealed to the sessions, and in their notice of appeal described the order as made on the officers of the hamlet, it was held that the removing officers were estopped from taking advantage of the misdescription as they were not misled (*j*).

Where a notice of appeal describing the order appealed against by its date and contents, and as an order of two of her Majesty's justices of the peace, &c., omitted to give the names of the justices, an objection taken to it on that ground was held to be without foundation (*k*).

So if, from a difficulty in deciphering the names of one of the justices who made an order of removal, the notice of appeal wrongly described the order, if the sessions were of opinion that the appellants intended to appeal against the order really made, and misdescribed the order in consequence of such difficulty, the sessions have jurisdiction to hear the appeal against the real order (*l*).

Mistake as to name or place of quarter sessions.

A mistake in the notice,—as, for instance, either the name of the place of the quarter sessions to which the appeal was intended to be, *e. g.*, if a borough within the county is named instead of the county, or *vice versâ*,—may or may not be fatal, according to whether it could be treated as erroneous surplusage not calculated to mislead or not. Thus, if the appellants discover the mistake and correct it a reasonable time before the proper sessions, it could not have misled them, and the notice would be sufficient; but if both parties (*m*), or the appellants only, have acted upon the mistaken notice, and gone to the sessions named therein, and then only learned their error, it cannot be treated as surplusage, and the notice is invalid (*n*), and the respondents are entitled to treat a notice

(*i*) *R.* v. *Justices of Denbighshire*, 9 Dowl. P. C. 509. See *R.* v. *Justices of Oxfordshire*, 4 Q. B. 177.

(*j*) *R.* v. *Justices of Carmarthenshire*, 4 B. & Ad. 563.

(*k*) *R.* v. *West Houghton*, 5 Q. B. 300.

(*l*) *Reg.* v. *Justices of Middlesex*, 15 L. J., M. C. 101; 2 New Sess. Cas. 341.

(*m*) *Reg.* v. *Justices of Bucks*, 4 E. & B. 259; *Reg.* v. *Recorder of Liverpool*, 15 Q. B. 1070.

(*n*) *Reg.* v. *Justices of Salop*, 4 E. & B. 257.

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of appeal for a sessions being without jurisdiction as made under a mistake, and as a notice for the sessions having jurisdiction, and to prepare for trial at the proper sessions (*o*).

Abandonment of notice of appeal.

A notice of appeal may be abandoned, and a fresh one given, provided it is in proper time, supposing it to be the first notice (*p*).

Where the grounds of appeal must, by statute, be stated in the notice, none beside those fairly included in its terms can be entered into at the sessions. And for the decisions with respect to such points arising on the notice, see *post*, p. 673, as to grounds of appeal.

This subject is further treated of when the particular appeals against poor rates, orders of removal, &c., are considered.

Service of notice of appeal.

The notice of appeal should in general be left at the place of abode of each respondent, unless personal service is made necessary by statute.

Service on persons underrated.

On appeal against a poor rate, on the ground that another person is underrated or overrated, the appellant must give notice to the person interested under the 41 Geo. 3, c. 23, s. 4, and when the appellant gave a notice of appeal containing several grounds of appeal, amongst which was one as above, but he had given no such notice to the persons interested, the sessions were held to be right in treating the parties named as if they were respondents in the appeal, and in refusing to hear the appeal on the ground that no notice had been given to them, or to go into other grounds of appeal which did not require such notice to be given, notwithstanding the appellants offered to abandon the grounds of appeal which require notice (*q*); but under 17 Geo. 2, c. 38, s. 4, the sessions in such case must not dismiss the appeal, but adjourn it till the following sessions (*r*); but where notice of appeal was required to be given "to the person who is intended to be or who may be affected by such appeal" under the Mersey Dock Consolidation Act, 1858 (*s*), against a conviction for negligently damaging a vessel upon the complaint of the owners of the vessel: it was held, that service of notice of appeal upon one of the registered owners of the vessel was service upon all, and entitled the appellant to be heard (*t*).

Service of notice by post.

Under some statutes notice of appeal may be served by being sent through the post, *e. g.* on an appeal against an order of removal (*u*).

The service of such notice when made by post is deemed to

(*o*) *Reg.* v. *Recorder of Leeds*, 3 E. & E. 561.
(*p*) *Reg.* v. *Justices of Middlesex*, 9 Dowl. 163; Paley on Conv., 5th ed. Macnamara, 356.
(*q*) *Reg.* v. *Justices of Cambridgeshire*, 1 L. M. & P. 47.
(*r*) *Reg.* v. *Eyre*, 6 E. & B. 992.
(*s*) 21 & 22 Vict. c. 92, s. 335.
(*t*) *Reg.* v. *The Recorder of Liverpool*, 31 L. J., M. C. 127.
(*u*) 14 & 15 Vict. c. 105, s. 10.

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be made when according to the regular and usual course of post it would reach the hands of the parish officers (*x*).

Service of notice of appeal would probably be deemed "process" within the operation of "The Lord's Day Act" (*y*), and be void to all intents and purposes if made on Sunday (*z*); but transmission by the post is not such service as would be deemed process within the Lord's Day Act (*a*).

Service by and upon attorney for party.

Though a service by an attorney for the party may be good service, it does not follow that service upon the attorney of the respondent would have the same effect unless the statute expressly so enacts (*b*).

Service of notice of appeal under a statute which required notice in writing to be given to the justices of the peace, from whose judgment such appeal should be made, was rightly served on the clerk to the justices in court at the time, the convicting justices and the clerk then being in court (*c*); but where a service of notice of appeal against a conviction under the excise acts was required to be given to the adverse party or left at his place of abode, a service of such notice, by leaving it with a clerk at the excise office in the place where the conviction was, is not a good service (*d*).

If more than one magistrate acts in making an order, &c., they proceed on joint authority, and it seems sufficient to serve a joint notice of appeal on one of them (*e*). So a notice of appeal served on one overseer is good (*f*).

An admission of due service of notice of appeal is evidence for the justices that the notice was served in due time; but the respondent is not precluded from disputing the fact of due notice, and the justices may find the fact or not as the evidence leads them (*g*).

As to grounds of appeal.

Baines' Act (*h*) recites, that a statement of the grounds of appeal, when required by this or any other statute, is for the purpose of enabling the party receiving it to inquire into the subject of such statement, and, if need be, to prepare for trial; and enacts, "that upon the hearing of any appeal to any court of general or quarter sessions of the peace, no objection on account of any defect in the form of setting forth any ground of appeal shall be allowed, and no objection to the reception of

Defects in form of grounds.

(*x*) *Reg.* v. *Slawstone*, 18 Q. B. 388; 21 L. J., M. C. 145.
(*y*) 29 Car. 2, c. 7, s. 6.
(*z*) *Reg.* v. *Justices of Middlesex*, 5 D. & L. 583; 17 L. J., M. C. 111; *R.* v. *Justices of Huntingdonshire*, Cald. 283; *Reg.* v. *Justices of Lancashire*, 16 Jur. 1067.
(*a*) *Reg.* v. *Justices of Leominster*, 2 B. & S. 391; 31 L. J., M. C. 95.
(*b*) *R.* v. *Kimbolton* (*Inh.*), 6 A. & E. 603; *Reg.* v. *Justices of Middlesex*, 20 L. J., M. C. 44.
(*c*) *Reg.* v. *Eaves*, 39 L. J., M. C. 70.
(*d*) *Ibid.*
(*e*) See per *Coleridge*, J., in *R.* v. *Justices of Staffordshire*, 4 A. & E. 842.
(*f*) *Reg.* v. *Recorder of Liverpool*, 31 L. J., M. C. 127, per *Crompton*, J.
(*g*) *Reg.* v. *Justices of Gloucester*, 16 L. J., M. C. 57.
(*h*) 12 & 13 Vict. c. 45, s. 3.

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legal evidence offered in support of any ground of appeal shall prevail, unless the court shall be of opinion that such ground of appeal is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial: provided always, that in all cases where the court shall be of opinion that any objection to any ground of appeal, or to the reception of evidence in support thereof, ought to prevail, it shall be lawful for such court, if it shall think fit, to cause any such ground of appeal to be forthwith amended by some officer of the court, or otherwise on such terms as to payment of costs to the other party, or postponing the trial to another day in the same sessions, or to the next subsequent sessions, or both payment of costs and postponement as to such court shall appear just and reasonable."

Where a ground or grounds of appeal are frivolous, see the provision as to costs, *post*, p. 697.

Decisions of sessions final as to sufficiency of statement of grounds of appeal.

The decisions of the court of general or quarter sessions of the peace upon the hearing of any appeal as to the sufficiency of the statement of any ground or grounds of appeal, and as to the amending or refusing to amend any order or judgment of a justice or justices appealed against, or the statement of any ground or grounds of appeal, and as to the substitution of any new recognizance or recognizances as aforesaid shall be final, and shall not be liable to be reviewed in any court by means of a writ of certiorari, or mandamus, or otherwise (*h*).

Where grounds of appeal unnecessary, how served.

Where grounds of appeal are not required to be given under Baines' Act (*i*), or the statute under which the appeal lies, but the appellant has served them on the respondent, and at the hearing they disclose no valid ground of appeal, and the appellant tenders evidence in support of a good ground different from those stated, the proper course for the court to take is, to consider whether the respondents have been misled, and if they have been, not to dismiss the appeal but to adjourn the hearing till the next sessions, or a subsequent day of the same sessions, as the justice of the case demands (*k*).

Sufficiency of statement of grounds of appeal.

Upon appeal against a conviction, under 5 Geo. 4, c. 83, s. 4, of a party as a rogue and vagabond for obscenely exposing his person in a place of public resort with intent to insult a female, the ground of appeal was stated to be, that the appellant was not guilty of the said offence, and was held sufficient, the appeal being against a conviction on the merits, and not on a matter of form (*l*); but where a statute requires the particular causes or grounds of appeal to be stated, and on an appeal against overseers' accounts, the notice merely specified that a certain number of items to which objection was made, but not

(*h*) 12 & 13 Vict. c. 45, s. 9.
(*i*) See *ante*, p. 665.
(*k*) *R.* v. *Westmoreland*, 10 B. & C. 226.
(*l*) *R.* v. *Justices of Newcastle-on-Tyne*, 1 B. & Ad. 933.

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giving the particulars of objection, the notice was held to be bad on the ground that there might be several possible objections, and it did not specify which particular objection was to be brought forward (*m*). So, an appeal against a rate, for a defect appearing on the face of it, cannot be heard, unless the notice specify the defect (*n*).

Where a ground of appeal objected that the grounds of removal were bad for want of sufficient certainty in setting out a derivative settlement, and in alleging a marriage of the parents of the pauper, by stating only the fact of the marriage and the time of its celebration, but not stating the place, the objection was held to be untenable (*o*).

In cases of removal of paupers, by virtue of the words of 4 & 5 Will. 4, c. 76, s. 81, the grounds of appeal may be changed at any time before the fourteen days before the first day of sessions at which the appeal is intended to be tried (*p*).

Changing grounds of appeal.

Where an appeal has been simply entered and respited, a fresh statement of the grounds of appeal may, it seems, be served after the adjournment (*q*), so that the character and identity of the appeal be not changed thereby; but where, on the hearing of an appeal against an order of removal, the bench, being equally divided, adjourned the case to the next sessions; the court held, that the appellants could not, after such adjournment, serve a fresh statement of their grounds of appeal (*r*). So, after a refusal by sessions to respite an appeal against a poor rate on the ground, amongst other, that certain persons were improperly rated, in order that such persons might be served with notice of such grounds, and a mandamus issued to compel the sessions to respite and hear the appeal; and the appellant then gave a second notice, omitting the above ground; it was held, that he had thereby changed the nature of the appeal, and the sessions were not bound to hear the appeal upon such last-mentioned notice and ground (*s*). And where an appeal was given to the borough sessions, with the further appeal if the party were dissatisfied to the county quarter sessions, the party is confined to the same grounds which were taken at the borough sessions, and cannot be allowed to add fresh grounds (*t*).

The 12 & 13 Vict. c. 45, s. 1, provides that it shall not be lawful for the appellant, on the trial of any appeal within that act, to go into or give evidence of any other grounds of appeal

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(*m*) *R.* v. *Sheard*, 2 B. & C. 856; *R.* v. *Justices of Oxfordshire*, 1 B. & C. 279.

(*n*) *R.* v. *Bromyard* (*Inh.*), 8 B. & C. 240.

(*o*) *Reg.* v. *Thacton-cum-Grafton*, 1 Q. B. 971.

(*p*) *Reg.* v. *Kendal* (*Inh.*), 1 E. & E. 492; 28 L. J., M. C. 110.

(*q*) *R.* v. *Justices of Derbyshire*, in note to *R.* v. *Kimbolton*, 6 A. & E. 612.

(*r*) *R.* v. *Arlecdon*, 11 A. & E. 87.

(*s*) *Reg.* v. *Eyre*, 7 E. & B. 619; 26 L. J., M. C. 121.

(*t*) *R.* v. *Justices of Suffolk*, 1 B. & A. 640.

besides those set forth in the notice of appeal; and it has been decided that, where a statute prevents a party from going into or giving evidence on the hearing of the appeal of any other grounds of appeal than those set forth in his notice, it extends to objections apparent upon the face of the order so appealed against (*u*). *Entering into Recognizance.*

Of entering into recognizances as a preliminary step to the appeal.

It is often required, as a preliminary step to the appeal, that a recognizance should be entered into by the appellant with sureties conditioned to try the appeal and pay the costs, and when this is so, it is a condition precedent to the right of the sessions to hear the appeal (*v*).

Appeals in bastardy cases, *post*, p. 739, and under the licensing acts are instances.

The terms in which this recognizance has to be given must depend upon the statute requiring it.

It is sufficient if the recognizance be verbally acknowledged within the time fixed by the statute for entering into it, and it may be perfected afterwards (*w*) by entry on the roll (*x*).

When the recognizance is required to be entered into "forthwith," it means within a reasonable time under all the circumstances (*y*); and when the recognizance was required to be entered into "immediately," it was held to mean within a reasonable time; and where the conviction took place on a Saturday and the recognizances were entered into on the following Thursday, the statute was held to be complied with (*z*). Where the appellant had to enter into a recognizance within two days of giving notice of appeal, Sunday must be included in calculating the time, so that where notice was given on Friday, the recognizance had to be entered into on Saturday, and Monday was too late (*a*). And where a notice of appeal had to be given within twenty-four hours after the order was made, and a recognizance entered into within seven days, the justice before whom the recognizance is taken has nothing to do with the validity of the notice of appeal; but must take the recognizance irrespective of the validity or invalidity of the notice (*b*).

A recognizance required to be entered into by a parish may be entered into by an inhabitant on behalf of himself and other inhabitants prosecuting the appeal (*c*).

There seems to be some doubt whether a corporation can, strictly speaking, enter into a recognizance, though this diffi-

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(*u*) *R.* v. *Withernwick* (*Inh.*), 6 A. & E. 273; *R.* v. *Bromyard* (*Inh.*), 8 B. & C. 240.
(*v*) *R.* v. *Justices of Lincolnshire*, 3 B. & C. 548.
(*w*) *R.* v. *Justices of St. Albans*, 8 A. & E. 932.
(*x*) *Hall* v. *Wingfield*, Hob. 195.
(*y*) *R.* v. *Justices of Worcester*, 7 Dowl. 789.
(*z*) *Re Blues*, 5 E. & B. 291; 24 L. J., M. C. 138.
(*a*) *Ex parte Simpkin*, 2 E. & E. 392; 29 L. J., M. C. 23.
(*b*) *Re Carter*, 24 L. J., M. C. 72, per *Crompton*, J.
(*c*) See *R.* v. *Abergele*, 5 A. & E. 795.

Notice of Recognizance.

culty is, in practice, evaded by one or more members of the body entering into one for it (*d*).

Substitution of new recognizances for insufficient ones.

Where a recognizance or recognizances are required as a condition of any appeal against any order or conviction, in order to obviate the liability of appellants to be prevented from trying their appeals upon the merits in consequence of imperfections in the taking of such recognizances, it is enacted by 12 & 13 Vict. c. 45, s. 8, "that where any recognizance or recognizances which shall have been entered into within the time by law required before any justice or justices, for the purpose of complying with any such condition of appeal, shall appear to the court before which such appeal is brought to have been insufficiently entered into, or to be otherwise defective or invalid, it shall be lawful for such court, if it shall so think fit, to permit the substitution of a new and sufficient recognizance, or new and sufficient recognizances, to be entered into before such court in the place of such insufficient, defective, or invalid recognizance or recognizances, and for that purpose to allow such time and make such examination, and impose such terms as to payment of costs to the respondent or respondents, as to such court shall appear just and reasonable; and such substituted recognizance or recognizances shall be as valid and effectual, to all intents and purposes, as if the same had been duly entered into at an earlier time or times as required by any statute or statutes for that purpose."

And the decisions of any court of general quarter sessions of the peace, upon the hearing of any appeal as to the substitution of any new recognizance or recognizances as aforesaid, shall be final, and shall not be liable to be reviewed by means of a writ of certiorari, or mandamus, or otherwise (*e*).

As to notice of recognizance.

An additional preliminary to the appeal sometimes required is, that notice of the recognizance having been entered into should be given to the other party, and this, when imposed, is a condition precedent.

If the party upon whom notice of recognizance is served undertakes to admit due service of the notice, such admission is evidence against him that the service was made in due time; and if the sessions act upon such evidence and thereupon overrule an objection to the time of service, the court will not interfere (*f*).

(*d*) *Cortis* v. *Kent Waterworks Co.*, 7 B. & C. 330; *Reg.* v. *Mayor, &c. of Manchester*, 7 E. & B. 453.

(*e*) 12 & 13 Vict. c. 45, s. 9.

(*f*) *Reg.* v. *Justices of Gloucestershire*, 16 L. J., M. C. 57.

Section 4.

Of the Entry, Adjournment, Hearing, and Determination of Appeals at the Quarter Sessions.

Entry of Appeals.

The names of the parties to each appeal should be furnished by the appellants to the clerk of the peace, who should enter on a separate paper the names of each appeal in the order in which he receives them (*g*).

Rules of sessions as to entry.

The sessions will not be compelled to hear an appeal where there is a reasonable rule and a settled practice with reference to the time for the entry of appeals, and which they have refused to hear on the ground that it was not entered in due time. Thus the sessions may make a rule of practice that all appeals shall be entered on the first day of sessions, and may refuse to enter after that time (*h*), or before twelve o'clock on the first day of sessions (*i*); but if the rule is unreasonable, or the practice indistinct and unsettled, a mandamus will issue to them to hear (*j*). Thus, where the sessions, by a rule of their own practice, required an appeal to be entered and the grounds of appeal deposited with the clerk of the peace three clear days before the first day of sessions, and refused to hear an appeal because such rule had not been observed, the Court of Queen's Bench held that they had no power to make such a rule (*k*).

The justices at adjourned quarter sessions were held right in refusing to receive an appeal, the entry of which had been refused at the original session, for want of the notice of appeal, and recognizance required by an act which gave an appeal to the "next general quarter sessions:" but directed that no such appeal should be "brought, received, or heard," unless such notice or recognizance should be given, &c. (*l*).

As to respited appeals.

But it has been held that when a particular sessions is fixed to which the appeal is to be brought, and notice of appeal is required, and it is provided that the appeal shall not be "heard" unless such notice has been given, the appeal where such notice has not been given before the specified session may and should nevertheless be entered and respited at the specified session,

(*g*) A mistake of a clerk of the peace in stating three appeals as one, which from particular circumstances was overlooked at the sessions, but became afterwards material, was amended by the King's Bench; *R.* v. *Justices of Yorkshire* (*West Riding*), 4 B. & Ad. 685; but if an appeal has been entered by the clerk of the peace in a wrong name, by which the appellants are made to appear to be the guardians of a union instead of the churchwardens and overseers of a parish, if the sessions refuse to alter the entry it cannot be treated as an appeal of the parish officers, and if the sessions refuse to hear the appeal at the instance of the parish officers the Court of Queen's Bench will not compel them to do so; *Reg.* v. *Justices of Leicester*, 3 New Sess. Cas. 1.

(*h*) *Reg.* v. *Justices of Warwickshire*, 6 Q. B. 750.

(*i*) *Reg.* v. *Justices of Derbyshire*, 22 L. J., M. C. 50.

(*j*) *Reg.* v. *Justices of Derbyshire*, 22 L. J., M. C. 31, per *Crompton*, J.

(*k*) *Reg.* v. *Pawlett*, 42 L. J., M. C. 157; L. R., 8 Q. B. 491.

(*l*) *R.* v. *Justices of Lincolnshire*, 3 B. & C. 548.

Entry and Respite of Appeals.

and the notice given before the following session, and this was so held on the Poor Law Amendment Act in *R.* v. *Kimbolton* (*m*); but upon the Highway Act (*n*), which allows an appeal "upon giving" ten days' notice together with the statement of grounds of appeal, and afterwards provide that the appellant shall not be "heard" in support of his appeal unless such notice and statement has been so given: it was held, that the court could not enter and respite the appeal where such notice had not been given (*o*); and the same point was mooted again in the Poor Rate Act, and the Union Assessment Act (*p*), s. 1, in *The Liverpool United Gas Co.* v. *Overseers of Everton* (*q*), but no decision was given on it.

A case must not be stated on a preliminary objection unless the appeal is, in other respects, disposed of.

The Court of Queen's Bench will not take notice of a case stated on a motion to enter and respite an appeal when the court made the order for the entry, subject to a case to raise a question whether a preliminary notice to another tribunal was necessary, the court saying that a point not finally disposing of the appeal ought not in any form to be brought before the court on a case (*r*); but the opinion of the court might have been obtained in that case by a different procedure as by a rule for a prohibition to the recorder (*s*); or, indeed, upon a rule to quash the order of entry and respite upon affidavits raising the question of jurisdiction as in *Reg.* v. *Lancashire, JJ.* (*t*), which would seem to be the most proper course.

Appeal irregularly entered and respited may be dismissed.

If an appeal is irregularly entered and respited, it may be dismissed on that ground on its coming on for hearing (*u*); and the Court of Queen's Bench has gone so far as to interfere by mandamus to compel the sessions to erase an erroneous entry on their records of appeals which had been procured by fraud (*x*). Where, on notice of an order removing a pauper from A. to B., the overseers of B. gave notice of appeal, which they afterwards countermanded, reserving the right to appeal when the pauper should be actually removed, whereupon at the following sessions the overseers of A., according to the practice of the court, entered an appeal against the order, as by the overseers of B., but without their knowledge, and the order was confirmed with costs. More than six months after the confirmation the pauper was removed to B., whereupon the overseers of B. applied at the next sessions to erase the entry of the previous appeal and order, and to enter their appeal against the removal; the sessions refused, and the court issued a mandamus

(*m*) 6 A. & E. 603.
(*n*) 5 & 6 Will. 4, c. 50.
(*o*) *Reg.* v. *Justices of Lancashire*, 8 E. & B. 563; 27 L. J., M. C. 161.
(*p*) 27 & 28 Vict. c. 39.
(*q*) 40 L. J., M. C. 104; L. R., 6 C. P. 414.
(*r*) *Reg.* v. *London and North Western Rail. Co.*, 43 L. J., M. C. 57.
(*s*) *Liverpool United Gaslight Co.* v. *Overseers of Everton*, 40 L. J., M. C. 104; L. R., 6 C. P. 414.
(*t*) 8 E. & B. 563.
(*u*) *Reg.* v. *Oundle* (*Inh.*), 3 Q. B. 350; *Reg.* v. *Justices of Oxfordshire*, 1 M. & S. 446.
(*x*) *Reg.* v. *Justices of West Riding*, 5 Q. B. 1.

Calling on of Appeals.

to erase the prior entry, and to enter and hear the subsequent appeal; but if it be entered in time, a motion to respite it may be made at a later period of the sessions.

Order of calling on appeals.

The appeals are usually called on for hearing in the order in which they stand in the paper of the clerk of the peace. This is, however, subject to any other arrangement which may be made by the court (*y*); who may exercise their discretion in taking them in any order which public convenience or particular circumstances, as in the case of many persons attending from a great distance, or of the necessary attendance of jurors, in appeals under some statutes, may appear to them to make convenient for the more effectual attainment of justice; and in general a preference should be given to foreign appeal (*z*).

Proceeding after appeal called on.

The first proper step, after calling on the appeal, is for the clerk of the peace to read the order or conviction, &c. appealed against; and which should always be returned to the sessions (*a*). The notice of appeal, as well as of the entry into recognizance, if required by statute as conditions precedent to the right of appeal, must then be proved; whether it is intended to try, or only to move to respite the hearing; for till it is made to appear to the court that the appeal is duly lodged at the proper sessions, as well as that due notice has been given, and recognizance entered into, where so required by the act applicable to the appeal, their jurisdiction to hear or adjourn it will not attach. The neglect of any one of the above, or of other matters so required by any statute, will have the effect of preventing the sessions from entering or receiving, or dealing with the appeal in any manner; for, till it is regularly brought before them by compliance with the provisions of the act, it cannot be entertained, even for the purpose of adjourning it only, as the sessions cannot thus acquire a jurisdiction by an act of their own (*b*); and all they can do is to dismiss it. But if the performance of the condition, such as the giving notice to the respondent, is made impossible by the act of God, in that the respondent has died before the time for giving notice has expired, the appellant is excused, and the appeal must be heard notwithstanding the non-performance of such condition precedent (*c*). But in cases in which no specific notice of appeal or recognizance is prescribed by statute, and in such cases as well as those in which one or both are required, but either no particular time is fixed for giving them, or "reasonable" notice

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(*y*) *Reg.* v. *Stamper*, 1 Q. B. 119, 127.

(*z*) Burn's J., vol. 1, 30th ed., *tit.* "Appeal."

(*a*) When so returned, it is the only one of which the sessions will take notice, and a mere formal mistake in a copy of it given to the appellant will not afford ground for quashing the original so returned; *R.* v. *Allen*, 15 East, 336, 346; Paley on Conv., 5th ed. 289, 290. See *In re Rix*, 4 D. & R. 352; *R.* v. *Barker*, 1 East, 186.

(*b*) *R.* v. *Justices of Oxfordshire*, 1 M. & S. 448; *R.* v. *King's Langley*, Salk. 605; *R.* v. *Justices of Lincolnshire*, 3 B. & C. 548.

(*c*) *Reg.* v. *Justices of Leicestershire*, 15 Q. B. 88; 29 L. J., M. C. 209.

Proof of Notice of Appeal.

Condition that notice of appeal should be given, when implied.

is required, the sessions must decide whether reasonable notice of appeal has been given; while even in cases where no notice need be given by statute, and no condition such as the entering into recognizances to take the place of notice has been imposed, there is an implied condition that notice should be given to the other party, and they must decide whether the respondent has been so far surprised by the want of it, or misled by any notice which has in fact been given, as to be unable to meet the case without further time (*d*). If they find that he has, or that reasonable notice has not been given, they may respite the hearing at the instance of the respondent (*e*) on payment of costs, or without it, as they think reasonable; and if they do so, may respite it without any notice of appeal which may have been actually given, being proved or expressly admitted (*f*); and if the sessions decide upon following a rule of practice of theirs as to notice, and wrongly refuse to hear an appeal on the ground that it was not complied with and injustice was done, the court issues a mandamus to enter continuances and hear the appeal (*g*). If the act which gives the appeal requires notice, and a statement therein of the grounds of appeal, the appellant cannot travel out of the notice; but if the grounds are not so required to be alleged, he may; unless the respondent is misled by it, in which case it is clear the sessions should adjourn the appeal (*h*). A respondent may so waive proof of notice of appeal, or admit it, as to make proof of it unnecessary (*i*).

Adjournment of appeals.

The practice of entering and respiting appeals to the next sessions, in cases where that step is not authorized by statute, as in appeals against orders of removal and poor's rates where it is (*k*), seems very questionable (*l*). Assuming, however, the appeal to be properly entered so as to give the sessions jurisdiction, that is, if all the preliminary conditions imposed by the statute, as notice of appeal, &c. are proved or admitted (*m*),

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(*d*) *Re Blues*, 5 E. & B. 291; commenting upon *R.* v. *Justices of Essex*, 4 B. & A. 276.

(*e*) *R.* v. *Justices of Herts*, 4 B. & Ad. 561. This power of respiting for want of reasonable notice is expressly conferred by 9 Geo. 1, c. 7, s. 8, in appeals against orders of removal; and by 17 Geo. 2, c. 38, s. 4, in appeals against rates.

(*f*) *Re Blues*, 5 E. & B. 291; 24 L. J., M. C. 138.

(*g*) *Ibid.*

(*h*) *R.* v. *Justices of Westmoreland*, 10 B. & C. 226.

(*i*) *R.* v. *Justices of Herts*, 4 B. & Ad. 561.

(*k*) See *ante*, p. 658.

(*l*) *Liverpool United Gas Co.* v. *Overseers, &c. of Everton*, 40 L. J., M. C. 104; L. R., 6 C. P. 414.

(*m*) *R.* v. *Oxfordshire* (*Inh.*), 1 M. & S. 442, 448. See *ante*, p. 678. If a regular notice of appeal has been given for one sessions, and the appeal is adjourned at the instance of the appellants, after hearing counsel on both sides, the next sessions should hear it, or entertain a further application to adjourn it, if still necessary, without requiring proof of a strictly regular notice of trial for that sessions; *R.* v. *Justices of Gloucestershire*, 3 Dowl. P. C. 398, per *Littledale*, J.

Adjournment of Appeals.

either party may move to adjourn the hearing. One such adjournment used to be made a matter of course under 9 Geo. 1, c. 7, s. 8, in appeals against orders of removal; and by 17 Geo. 2, c. 38, s. 4, appeals against poor rates and overseers' accounts, duly entered, but without reasonable notice previously given, shall be adjourned to the next quarter sessions, and there finally determined (*n*); and by 41 Geo. 3, c. 23, s. 6, where upon an appeal against a poor's rate, on the ground that other persons are improperly rated, notice is required to be given to the persons whose rating is objected; if notice has only been given to some of such persons, and not to all, the next sessions are bound, on the application of the respondent, to enter and respite the appeal to the following sessions, and have no discretion intrusted to them (*o*); but in the case of other appeals, it is also in the discretion of the sessions to adjourn the hearing in the exercise of the power inherent in all courts for the advancement of justice. Even where a statute gives an appeal to a particular sessions directing the justices of the *said* sessions to hear and *determine* it, they have an incidental power to adjourn the hearing after it has been duly entered, when their immediate proceeding with it, *e. g.* in the case of absence of a material witness, appears to them inconvenient for the advancement of justice (*p*); but the authority to adjourn the appeal to a subsequent sessions may be limited by statute. Thus, the now partially repealed Licensing Act (*q*), by which an appeal was given to the "next" sessions, or, in a certain event, to the "next subsequent" sessions, and the court at such sessions is to hear and determine and make its order, with or without costs, takes away the power of adjournment to a subsequent sessions (*r*), but it does not prevent the adjournment of the same sessions to a future day (*s*). The power of adjournment to a subsequent sessions was also taken away by 26 Geo. 2, c. 74 (*t*), where it was enacted, that the table of fees to be taken by clerks of the peace was to be made at one sessions and approved by the justices at the next succeeding sessions, and it was held to take away the power of adjournment to a sessions after the next subsequent sessions, or they have power to

Adjournment compulsory, when.

(*n*) *Reg.* v. *Eyre*, 6 E. & B. 992; *R.* v. *Justices of Bucks*, 3 East, 342; *R.* v. *Justices of Wilts*, 8 B. & C. 380; *R.* v. *Justices of Salop*, 7 East, 949.

(*o*) *Reg.* v. *Eyre*, 6 E. & B. 992.

(*p*) *R.* v. *Wilts*, 13 East, 352; *R.* v. *Justices of Westmoreland*, 10 B. & C. 226; *R.* v. *Justices of Leicestershire*, 1 M. & S. 442; *R.* v. *Kimbolton* (*Inh.*), 6 A. & E. 603. The entering and adjourning appeals against orders of removal is governed by 9 Geo. 1, c. 7, s. 8. See *R.* v. *Justices of Kent*, 8 B. & C. 639; and *post*, Chap. V.; *R.* v. *Justices of Norfolk*, 5 B. & Ad. 990, *post*.

(*q*) 9 Geo. 4, c. 61.

(*r*) *Reg.* v. *Belton*, 11 Q. B. 379; 17 L. J., M. C. 70; and see *Reg.* v. *Mainwaring*, E. B. & E. 474; 27 L. J., M. C. 278.

(*s*) *Rawnsley* v. *Hutchinson*, 40 L. J., M. C. 97; L. R., 6 Q. B. 305.

(*t*) *Bowman* v. *Blyth*, 8 E. & B. 7; 26 L. J., M. C. 57.

Adjournment of Appeals discretionary.

adjourn even in the middle of the hearing of the case (*u*): but such power ought to be exercised with great care and caution. It is a bad practice to adjourn a case for the purpose of enabling a party to strengthen their evidence, as to give time for search to be made for an original document, so as to let in secondary evidence of it; and, in general, an appeal, once begun, ought not to be adjourned, but the power of adjournment may be from one sessions to another sessions, and is not confined to an adjournment from one sitting to another sitting of the same sessions (*x*). But under the modern statutes, even in cases under the acts relating to the removal of the poor, the best practice is to try the appeal at the first sessions when it can be done, and entering and respiting should not be a matter of course, but in each case the court should exercise its judgment whether justice requires that the appeal should be adjourned (*y*); therefore, if an appellant, as he is entitled to do, by taking all the time allowed him for applying for a copy of the depositions taken on the making of an order of removal, and giving his notice of appeal, disables himself from giving notice and serving grounds of appeal in time for the next sessions, he is not entitled to pass over those sessions if they were at the time of the serving of the order practicable, but he ought at least to enter and respite his appeal (*z*). Then, on the application to respite, the court should inquire whether he has made the sessions impracticable by dilatory or negligent conduct, and if they are of opinion that the appellant had time to bring on the trial, and no good ground for delay, they ought not to respite the appeal (*a*); but on appeals against orders of removal, the Poor Law Amendment Act (*b*), and the 11 & 12 Vict. c. 31, s. 9, do not refer to or define any limit of time which, after service of the order of removal, the parish authorities may require or take for deciding whether they will appeal or submit to the order, or for fixing the maximum of delay, after which the sessions next in fact may be passed over as not the next practicable, or after which the appellant may demand an adjournment, but leave that matter as it was before under 13 & 14 Car. 2, c. 12; and, therefore, now, if the appellants enter their appeal at a sessions which the appellants have made impracticable to try at in consequence of taking the full time allowed them by those statutes for giving notice of trial and sending grounds, those sessions, upon the application to respite the appeal, have a right to consider whether they have been guilty of unreasonable delay, and in their discretion may refuse an adjourn-

(*u*) *Reg.* v. *Guardians of Cambridge Union*, 1 B. & S. 61; 30 L. J., M. C. 137.
(*x*) *Ibid.*
(*y*) *Reg.* v. *Skircoat*, 28 L. J., M. C. 224.
(*z*) *Reg.* v. *Justices of West Riding*, 27 L. J., M. C. 269; E. B. & E. 713; *Reg.* v. *Peterborough*, 7 E. & B. 643; 26 L. J., M. C. 153.
(*a*) *Reg.* v. *Skircoat*, *supra*.
(*b*) 4 & 5 Will. 4, c. 76, ss. 79, 81.

ment (*c*). So the judgment only upon an appeal may be postponed, for there cannot be a better reason for an adjournment than that the justices have not made up their minds as to the judgment to be given (*d*). *Adjournment of Appeals.*

The sessions are to judge of the sufficiency of the ground assigned for adjournment (*e*). Where full notice of appeal was given without countermand, and both parties attended at sessions, but late in the first day the appellants moved to enter and adjourn the appeal to the next sessions on an affidavit stating the absence of a material witness, the sessions refused the application, except on the terms of paying the respondents their actual costs of the day, as was their practice where due notice had been given but not countermanded in time. These costs not being paid the appeal was not entered. The Court of King's Bench held the refusal to *enter* immaterial; that the respite of the hearing was to be granted or not, as the sessions might think reasonable (*f*), and that their discretion had not been improperly exercised (*g*). Nor will the court compel by mandamus the hearing an appeal, where the sessions, after arguments for and against an adjournment of the hearing, on account of the absence of a material witness, decided against the postponement (*h*). Adjournment of an appeal, at the instance of the appellant, dispenses with a strictly regular notice of trial for the next sessions (*i*). It should not be adjourned later than to the next original sessions, or to an adjourned session held in the interval (*k*); but if convenience requires it, and the statute does not prohibit it, they have the power to adjourn to any future sessions (*l*). Adjournment upon terms. Adjournment to, when.

Though an appeal has been entered and respited, it cannot be heard if the conditions annexed to the appeal have not been complied with, *e. g.*, the giving of notice of appeal in due time or form, because it never was duly entered (*m*).

Whether after an appeal against an order of removal had been entered and respited at one session, and a copy of the order of respite was duly served on the respondents, the general rules of law made it also requisite to give them notice of trying it at the session to which the respite was granted, was debated in Notice of trial after respite.

(*c*) *Reg.* v. *Justices of Sussex*, 4 B. & S. 966; 34 L. J., M. C. 69; overruling *R.* v. *Justices of Suffolk*, 4 A. & E. 319, and *R.* v. *Justices of Herefordshire*, 8 Dowl. 638.

(*d*) *Keen* v. *The Queen*, 10 Q. B. 928; 16 L. J., M. C. 180.

(*e*) *R.* v. *Justices of Wilts*, 13 East, 352; *R.* v. *Justices of Staffordshire*, 2 Dowl. N. S. 353.

(*f*) 9 Geo. 1, c. 7, s. 8.

(*g*) *R.* v. *Justices of Monmouthshire*, 1 B. & Ad. 895.

(*h*) *Ex parte Becke*, 3 B. & Ad. 704. Case of appeal against order of filiation under the old law.

(*i*) *R.* v. *Justices of Gloucestershire*, 3 Dowl. P. C. 298.

(*k*) See *ante*, p. 55. *R.* v. *Grince*, 19 Vin. 358.

(*l*) *Reg.* v. *Justices of Westmoreland*, 37 L. J., M. C. 115; L. R., 3 Q. B. 457.

(*m*) *Reg.* v. *Justices of Oxfordshire*, 1 M. & S. 446, *ante*, p. 678.

Notice of Trial after Respite.

R. v. *Lambeth* (*n*); and held in the negative, the service of the order of respite being considered a substantial notice of trying the appeal at the next session, without more (*o*). So, if a statute gives a party a right of appeal on entering into a recognizance without requiring a notice of appeal, he may enter his appeal and get it respited at the next sessions, having previously entered into such recognizance, without notice to the other side (*p*).

But if the practice of the particular session requires the giving to respondents a particular notice of trying a respited appeal, it must be complied with, or the session may dismiss it altogether (*q*); for after it was once entered, the appellant was bound to conform to the practice, though the notice not being required by the statute giving the appeal, would have been unnecessary if he had tried his appeal at the first sessions instead of having it respited (*r*). A local act required ten days' notice of appeal without providing anything as to notice of trying respited appeals; a notice of appeal was duly served for a particular session; the appeal was there respited at the instance of the appellants; and the question at the second sessions was, whether the appellant, after such respite, was obliged to prove service of a notice to try at that session. *Patteson*, J., said, "if that is necessary, it must be so either by the practice of the sessions or by general rules of law. Now *R.* v. *Lambeth* (*ubi sup.*), shows that the latter do not require such a notice; nor is any rule of practice at the sessions produced requiring it. If any had been shown, it might perhaps have been too much to say that such a practice was illegal, and ought not to be abided by" (*s*). Indeed, in a former case not then cited, *Abbott*, C. J., had declared the rule of practice at the Bucks sessions, that in case of an appeal respited at the instance of either of the parties, fresh notice of trial should be given, was very reasonable, though in that case, which was very peculiar, as the postponement of the appeal took place in consequence of an equal division of the magistrates, that rule was disregarded, it being considered that an adjournment rather than a respite had taken place (*t*).

(*n*) 3 D. & R. 340. See 3 D. P. C. 298; for it could not have been served by the appellants for any other purpose, or understood by respondents in any other light.

(*o*) Making a town cause a *remanet*, has a like effect; *Shepherd* v. *Butler*, 1 D. & R. 15.

(*p*) 1 Burn's J., *tit.* "Appeal," p. 256, 30th ed.

(*q*) Anon. Stra. 315. See 3 East, 342; 1 D. & R. 341; 5 B. & Ad. 673; and *post*, pp. 724 *et seq.*, as to control of Queen's Bench over sessions practice.

(*r*) *R.* v. *Justices of Salop*, 2 B. & A. 694, appeal against conviction on a game act.

(*s*) *R.* v. *Justices of Yorkshire* (*West Riding*), 5 B. & Ad. 673, 674. See 6 M. & S. 59; and this case further illustrated in a converse case; *R.* v. *Justices of Monmouthshire*, 3 D. P. C. 306, *post*.

(*t*) *R.* v. *Justices of Bucks*, 6 D. & R. 142.

Notice of Trial after Respite.

Where a notice of appeal (against a rate) containing the grounds of appeal, was served in due time for trial at the first sessions, and was ready for proof there, but was not proved or admitted, the respondents obtaining an order of respite on payment of costs, whereupon the notice was handed to the clerk of the peace, who made out the order of respite, inserting in it the grounds of appeal; the King's Bench held that, as the respondent had acted on the notice, the appellant was entitled to be heard at the following sessions without proving any notice of appeal (*u*). No practice of the sessions appeared in the case last cited. However, in a previous instance, where the hearing of an appeal had been respited to the next sessions on the respondents' motion, and for their accommodation in the absence of a witness, it was held that a rule of the quarter sessions' practice, that in cases of respited appeals ten days' notice in writing shall be given by appellants to respondents, did not apply to the case before them, in which the respondents by desiring to respite the appeal agreed in effect to be ready to try at the next sessions without notice (*x*). The legislature having only required reasonable notice of appeal against an order of removal, the sessions have no power to require any other notice, *e. g.*, by resolving, that whenever an appeal, against an order of removal, shall be entered and respited, notice thereof shall within one month after such entry and respite be given to the officers of the removing parish (*y*).

Proof of notice of appeal upon hearing after respite.

Where an appeal against an order of removal was entered and respited by the *appellants* at a particular sessions, in pursuance of previous notice to that purpose, as also that the appeal would be tried with effect at the *following* sessions, the court is reported to have held in one case that a negotiation for arrangement, which went off in the interval, did not exonerate the appellants from giving, according to the practice of the sessions, the usual, *viz.*, a fresh notice to try at the second sessions, before they could be heard there (*z*). An adjournment of an appeal to the following sessions, on account of an equal division of opinion on the bench, will not oblige an appellant to give fresh notice of trying it, though that be the usual practice on adjourned appeals (*a*). But where an appellant gave

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(*u*) *R.* v. *Justices of Herts*, 4 B. & Ad. 561.

(*x*) *R.* v. *Justices of Lindsey*, 6 M. & S. 379. *Bayley*, J., added that the sessions' rule of practice applied only to the common case of entry and respiting an appeal, which is done in many cases as a matter of course, the appellants not having then fully satisfied themselves of all the facts of the case; and see *R.* v. *Justices of Hertfordshire*, 4 B. & Ad. 561; *R.* v. *Justices of Yorkshire* (*West Riding*), 1 A. & E. 606.

(*y*) *R.* v. *Justices of Norfolk*, 5 B. & Ad. 990; *mandamus* issued to compel a hearing of the appeal; *Reg.* v. *Justices of Surrey*, 3 New Sess. Cas. 531; and see *Reg.* v. *Pawlett*, 42 L. J., M. C. 157, *ante*, p. 677.

(*z*) *R.* v. *Justices of Essex*, 2 Chit. R. 385; Hil. 1820. The practice of the sessions is not distinctly stated, but appears to have been the foundation of the judgment.

(*a*) *R.* v. *Justices of Bucks*, 6 D. & R. 142; 3 D. & R. M. C. 23.

Notice of Trial of Respited Appeal.

due notice of appeal against commissioners' accounts and that a respite would be moved for, the respite was granted, the respondents not consenting to refer the accounts. At the next sessions a further respite was applied for, the respondents still refusing to refer. The appeal was then called on, and on the respondents requiring proof of notice of trial after the respite, the sessions dismissed the appeal for want of such proof; it was held, that in the absence of any statutory enactment requiring such notice or practice of sessions, that the sessions must hear the appeal (*b*); and it was there further said, that if the respondents had called for proof of the statutory notice of appeal for the original sessions, and not of trial of the respited appeal, that the sessions might have called for it, and on want of proof might have dismissed the appeal (*c*).

Hearing of the appeal.

There seems no general rule requiring the personal attendance of the appellant, and the necessity for this depends in a great measure upon the practice of each sessions respectively (*d*).

After notice of countermand of appeal against an order of removal, though it arrive too late to be of effect according to the practice of the sessions, the sessions have no jurisdiction to hear the appeal at the instance of the respondents in the absence of the appellants, and an order which stated that no one appearing to prosecute the appeal, the order of removal was confirmed, was quashed (*e*); but where an order of justices under the 11 Geo. 2, c. 19, s. 4, adjudging the payment of double the value of goods fraudulently removed, was affirmed on appeal by the sessions without hearing, owing to the absence of the appellant's attorney, and the sessions refused to reopen the appeal except on the terms of payment of full costs, the Court of Queen's Bench refused to interfere by mandamus (*f*).

Appearance of respondents.

If the respondents do not appear to support the matter appealed against, the appellants must prove that the necessary preliminaries to the appeal to be performed by them have been performed, as, for instance, that notice of appeal has been duly given, or recognizances, if required, been duly entered into, and until then they are not in a position to ask for the order or conviction to be quashed unless the respondents consent by motion to the court that the order, &c. be quashed. If the appellants are ready to prove, we have above referred cases where, upon adjournment, the respondents have so acted as to waive the proof of such notice of appeal, &c. by the appellants (*g*). If on an appeal against a conviction the prosecutor

(*b*) *R.* v. *Justices of West Riding*, 5 B. & Ad. 667.
(*c*) *Ibid.*
(*d*) *Reg.* v. *Cracklin*, Mich. 1822; Burn's J., *tit.* "Appeal," 30th ed. 240; Paley on Conv., 5th ed., by Macnamara, 369, n. (*p*).
(*e*) *Reg.* v. *Stoke Bliss*, 13 L. J., M. C. 151; 6 Q. B. 158. See *R.* v. *Justices of West Riding*, 5 Q. B. 1.
(*f*) *R.* v. *Justices of Lancashire*, 2 Jur. 468.
(*g*) *Ante*, p. 666; *R.* v. *Justices of Herts*, 4 B. & Ad. 561.

Hearing of the Appeal.

do not appear at the sessions as a respondent in support of the conviction, as the onus lies upon him, it becomes the duty of the court to give effect to the appeal, and to quash the conviction upon the presumption that the prosecutor is unable to produce evidence sufficient to support it (*h*).

Respondents' case.

When the appeal is brought regularly before the sessions by the proof, or on the admissions above described, and is not adjourned, the leading counsel for the respondents, as the party sustaining the order or other act complained of, opens his case on the merits, and adduces evidence in support of it (*i*), without being confined to that produced before the magistrates below (*j*).

Who to begin.

The reason for the practice of respondents in general beginning, is put by Lord *Kenyon*, who draws the distinction between appeals at sessions and other appeals, thus (*k*): "In writs of error and appeals to the House of Lords, where each party is in possession of all the evidence on both sides, the party who impeaches the decision below always begins; but in a case of this kind (an appeal against a poor rate), where it is an *ex parte* proceeding, and where the appeal comes on to be heard naked and destitute of all evidence before the court, those who have done the act ought to establish the propriety of it by evidence" (*k*). However, where objections of form are raised to convictions for matter apparent on the face of them, the appellant's counsel begins by stating all of them in one address, so that they may be answered by the opposite counsel, and decided on by the bench in like manner (*l*). If no such objections are taken, or if they are overruled, or if such objections prevail, but are met by an amendment under 12 & 13 Vict. c. 45, s. 7, the respondent opens his case in support of the conviction on the merits. By 12 & 13 Vict. c. 45, s. 7, it is enacted, that if upon the trial of any appeal to any court of general or quarter sessions of the peace against any order or judgment made or given by any justice or justices of the peace, any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful

Amendment of order or conviction.

(*h*) *Reg.* v. *Purdey*, 5 B. & S. 909; 34 L. J., M. C. 4.

(*i*) But where, by the practice of the sessions, the appellant was bound to begin, even in an appeal against a poor rate, and the appeal was dismissed, for the appellant's refusal to begin, the court above refused to interfere; *R.* v. *Justices of Suffolk*, 6 M. & S. 57.

(*j*) *R.* v. *Excise Commissioners*, 3 M. & S. 37; *Reg.* v. *Pilgrim*, 40 L. J., M. C. 3; L. R., 6 Q. B. 89. See also *R.* v. *Jefferys*, 1 B. & C. 604. By the acts relating to the collection of inland revenue, no other witnesses besides those examined by the convicting justices, are to be re-examined at the sessions on appeals; and see *Breedon* v. *Gill*, 1 Ld. Raym. 219.

(*k*) *Reg.* v. *Newbury* (*Inh.*), 4 T. R. 476. See *R.* v. *Knill*, 12 East, 50; and *post*, as to rates, Chap. IV.

(*l*) 1 Burn's J., 157, by Chitty, 28th edit.

Hearing of the Appeal.

for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed.

Decision of sessions as to amending order, &c. final.

The decision of the sessions as to the amending or refusing to amend any order or judgment appealed against is final and not liable to be reviewed by the Court of Queen's Bench (*m*). Under the term judgment convictions are concluded (*n*). Similar powers of amendment are conferred as to orders of removal by 11 & 12 Vict. c. 31, s. 6, and as to lunacy orders, by 16 & 17 Vict. c. 97, s. 116.

Witnesses thus called, are of course subject to cross-examination by the appellant's counsel. Where a "further appeal" was given from the decision of an appeal by borough sessions to sessions for the county, the appellant was not suffered to urge any grounds of appeal other than those stated in the notice, though, as it seems, he might bring fresh evidence in support of the latter (*o*). The particular course of trying appeals against poor rates, orders of removal, &c. is treated more at large under those heads, *post*.

Evidence on appeal.

On the rehearing of an appeal on a case sent back to the sessions by the court above to be re-stated, they may receive other and further evidence (*p*). If the sessions quash a conviction on appeal for matter of form, subject to the opinion of the court above on the validity of the objection, and it appears to that court that there is no defect in form, the case will be sent back to the sessions to be heard on its merits (*q*). But if a conviction be quashed at the sessions on a ground independent of the merits, and the conviction is set up again on *certiorari* by a decision of the court above, which quashes the order of sessions, the appellant cannot afterwards go to the sessions to hear the appeal discussed again on the merits by entering continuances from the first appeal (*r*); nor if an appeal is dismissed on a point of practice, subject to a case which the applicants do not bring up, can they have a mandamus for hearing the appeal (*s*).

When the respondent's case is closed, the practice would now seem to be, following the statutory provisions relating to causes at nisi prius as well as criminal trials (*t*), for the respondent's counsel, in the event of the appellant or his counsel not announcing his intention to adduce evidence, to address the

(*m*) 12 & 13 Vict. c. 45, s. 9, *ante*, p. 673.
(*n*) Paley on Conv., 5th ed. 363.
(*o*) *R.* v. *Justices of Suffolk*, 1 B. & A. 640. See, however, *Rex* v. *Pilgrim*, *infra*, p. 689.
(*p*) *R.* v. *Bloxham*, 1 A. & E. 386; 3 N. & M. 385. See *R.* v. *Justices of Suffolk*, 1 B. & A. 645.
(*q*) *R.* v. *Ridgway*, 5 B. & A. 527; 1 D. & R. 132; *R.* v. *Frieston* (*Inh.*), 5 B. & Ad. 597. See 4 B. & Ad. 86.
(*r*) *R.* v. *Allen*, 15 East, 333. See 3 T. R. 519.
(*s*) *R.* v. *Justices of Yorkshire* (*West Riding*), *Warmsworth* v. *Doncaster*, 1 A. & E. 606; 3 N. & M. 86.
(*t*) See C. L. P. Act, 1854, s. 18, and 28 Vict. c. 18.

court a second time for the purpose of summing up the evidence, and then the counsel for the appellant addresses the court, and either relies on the insufficiency of the case proved, or calls witnesses to refute it without being limited to those called on the former hearing (*u*), or sets up a new case in answer to it; if he calls no witnesses, the discussion closes with his address; if he calls witnesses, he sums up the evidence, and the leading counsel for the respondent replies; but at some sessions there is this variation from it, that where there are two counsel engaged for one party, and witnesses are called for that party, the junior has the privilege of summing up the evidence given for his clients at its conclusion. But in no case has he this right unless when his leader calls witnesses, so as to be enabled to make a second speech on the case of his adversary. On all collateral points of law which may arise, the court may hear as many counsel as the parties think fit to employ. But it is not always necessary to do so, or to hear the argument to its end; as the court may call at once on the counsel against whom their opinion inclines, and if that opinion is not shaken by his arguments, may at once decide.

Hearing of the Appeal.

Speeches of counsel.

The rules of evidence and of examination are exactly the same in cases of appeal as in the trial of civil or criminal matters, as the case may be.

The justices are, in all cases of appeal to them, the absolute judges of the facts: no bill of exception lies (*x*), and they may not, even if they desire it, remit any question of *fact* to a superior tribunal (*y*). They are also, whilst acting within their jurisdiction, if they think fit, the absolute judges of the law; for they cannot, under any circumstances, be required to take the opinion of the judges of assize, or of the Court of Queen's Bench (*z*); but where the *certiorari* is not taken away by express words, they may remit a case on proved or admitted facts, to that court (*a*). Where the *certiorari* is taken away, the reservation of a case can be of no avail, as the court above can take no cognizance of the proceedings (*b*).

Sessions exclusive judges of facts.

The principle that judicial power cannot be delegated by those to whom it is intrusted (*c*), applies to the jurisdiction of a court of quarter sessions, which cannot in general delegate its authority to a third party as referee to decide an appeal for it (*d*). However, by consent of the parties or their attornies,

Sessions cannot in general delegate their authority.

(*u*) *Reg.* v. *Pilgrim*, 40 L. J., M. C. 3; L. R., 6 Q. B. 89. See, however, *R.* v. *Justices of Suffolk*, 1 B. & A. 640, *ante*, p. 688.
(*x*) *R.* v. *Preston-on-the-Hill*, Burr. Sett. Cas. 77.
(*y*) *R.* v. *Justices of Carnarvon*, 4 B. & A. 86.
(*z*) *R.* v. *Oulton*, Burr. Sett. Cas. 64.
(*a*) As to the special case, see *post*, p. 703.
(*b*) *R.* v. *Justices of Middlesex*, 8 D. & R. 117. This seems otherwise where a conviction is *quashed* on appeal, subject to a case; *R.* v. *Allen*, 15 East, 333; *R.* v. *Boultbee*, 4 A. & E. 498.
(*c*) See Bac. Abr. *tit.* "Offices" (A).
(*d*) *R.* v. *Townsend*, 16 Vin. Abr. 417; 2 Nolan, 4th ed. 468; *R.* v. *Harding*, Salk. 77. 477

Hearing of the Appeal.

it seems that the sessions may hand over the consideration of the matter in dispute to third persons, or to a committee of their own body in order to report to them; and may adopt the report and make an order accordingly without exercising their own judgment (*e*).

Again, where the subject-matter is a public trust reposed in the justices, *e. g.*, building or repairing a county bridge, so that no individuals are parties, they may of their own motion refer it to a committee of their own body, and afterwards adopt their report; for it may be proper to acquire information out of the sessions (*f*); and for that purpose may adjourn the further consideration of the matter to any future sessions (*g*); but see now as to the power to refer an appeal to an arbitrator under the 12 & 13 Vict. c. 45, ss. 12 *et seq* (*h*).

Special entry of judgment.

When judgment on an appeal against an order of removal is quashed on some formal ground, the justices may direct a special entry by the clerk of the peace, that it is "quashed for form only," in order to prevent the judgment from being conclusive on a subsequent appeal (*i*). But the Court of Queen's Bench will not compel them under any circumstances to state in their order the grounds of their decision, or to give their reasons for it (*k*). In point of form, when an appeal is heard against an order or conviction the judgment is "order confirmed," or "order quashed," as the case may be, but when the appeal is not heard it should be "appeal dismissed" (*l*). Where, after an appeal had been entered, and twice respited at the instance of the appellant, the respondents before the next session gave notice that they would not oppose the appeal; so that it was allowed accordingly, and the rate quashed without opposition, the appeal was held to be by such allowance *heard* and *determined* within 17 Geo. 2, c. 38, s. 4, so as to entitle the appellant to costs (*m*).

Judgment, by whom given.

When the proceedings are closed, the chairman collects the opinions of the justices, and pronounces that of the majority for confirming or quashing the order, conviction, or rate, which is the subject of the appeal. The justices who made the order (*n*), or who are rated inhabitants of either of the parishes litigating a rate, are disqualified from voting (*o*).

Interested justices disqualified from giving judgment.

(*e*) *R.* v. *Justices of Northampton*, Cald. Sett. Cas. 30; *R.* v. *Natland*, Burr. Sett. Cas. 793 (cited 5 Tyr. R. 1056; 2 C. M. & R. 377); *R.* v. *Harding*, 2 Salk. 477.

(*f*) *R.* v. *Justices of Glamorganshire*, 5 T. R. 279.

(*g*) *Reg.* v. *Justices of Westmoreland*, 37 L. J., M. C. 115; L. R., 3 Q. B. 457.

(*h*) *Post*, p. 701.

(*i*) See 4 Burn's J., p. 798, 30th ed., *tit.* "Poor."

(*k*) *South Cadbury* v. *Bradden*, 2 Salk. 60; *R.* v. *Justices of Devon*, 1 Ch. R. 34, 164, 649; *R.* v. *Justices of Worcestershire*, and other cases, 2 Ch. R. 250, 251, 257. See 4 Burr. 2102.

(*l*) Per *Erle*, J., *Reg.* v. *Binney*, 1 E. & B. 815.

(*m*) *R.* v. *Cawston*, 4 D. & R. 445.

(*n*) *Foxham* (*Tithing case*), 2 Salk. 607; *Reg.* v. *Justices of Hertfordshire*, 6 Q. B. 753.

(*o*) *R.* v. *Yarpole*, 4 T. R. 71; and see *R.* v. *Gudderidge*, 4 D. & R.

Disqualification of Justices on account of interest from giving Judgment.

A ratepayer in the appellant parish upon an appeal against an order of removal is interested in the result of the appeal (*p*). So is a deputy recorder who is a rated inhabitant in a parish in a union where the appeal was between two other parishes of the same union respecting the valuation of rateable property when the parishes contributed to a common fund (*q*). And the 16 Geo. 2, c. 18, which gives powers to justices of a county, city, borough, &c. to act in things relating to their office, so far as the same relates to the poor laws, &c., notwithstanding they are rated to or chargeable with the taxes and rates within such parish, &c., affected by such acts, removes the objection as to the justices, but the deputy recorder at sessions is not acting as a justice of the borough (*r*).

A magistrate making the order appealed against, and one who is a creditor of a turnpike trust, having money owing to him which was secured solely upon the tolls of the trust, are interested in the event of an appeal against an order that part of the assessment, levied under 5 & 6 Will. 4, c. 50, should be paid by the surveyor of highways of a parish to the commissioners of the turnpike trust, to be laid out in the repair of such part of the turnpike road as lay in the parish (*s*).

Duty of interested justice to withdraw.

It is the duty of an interested justice voluntarily to withdraw from the court when the appeal is called on (*t*). The decision of the court, of which an interested justice forms a member, is vitiated whether the majority turns upon his vote or not, and whether his interference had any influence or not (*u*). Where some of the magistrates, deciding an appeal against a conviction for an offence against a bye-law of a railway company, were shareholders in the railway company, the information being preferred on behalf of the company, the order of sessions affirming the conviction was quashed on *certiorari*, the court saying that there had been no appeal before a proper tribunal, and that the act of sessions was null (*x*). But whilst any direct pecuniary interest, however small, in the subject-matter of inquiry, disqualifies a justice from acting judicially in the matter, the mere possibility of bias on the ground that the justices were trustees of property which might be improved by anything improving a borough fund, and the result of the justices' decision might be to improve the borough fund and thereby

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M. C. 35; *Great Charte* v. *Kennington*, Stra. 1173; *Reg.* v. *Justices of Hertfordshire*, 6 Q. B. 753; *R.* v. *Cheltenham Commissioners*, 1 Q. B. 467. See generally as to disqualifications, *ante*, pp. 37 *et seq.*

(*p*) *R.* v. *Justices of Suffolk*, 18 Q. B. 416; 21 L. J., M. C. 169.

(*q*) *Reg.* v. *The Recorder of Cambridge*, 8 E. & B. 637; 27 L. J., M. C. 160.

(*r*) *Ibid.*

(*s*) *Reg.* v. *Justices of Hertfordshire*, 6 Q. B. 753.

(*t*) *Reg.* v. *The Justices of Suffolk*, 18 Q. B. 416.

(*u*) *Ibid.*; *Reg.* v. *Justices of Herts*, 6 Q. B. 753; *Reg.* v. *Cheltenham Commissioners*, 1 Q. B. 467.

(*x*) *Re Hopkins*, E. B. & E. 100.

Disqualification of Justices on account of interest cured, when.

beneficially to affect the interest of their cestui que trusts, is not sufficient to disqualify the justice (*y*).

The interest of justices is cured as regards certain matters relating to poor law by 16 Geo. 2, c. 18, s. 1, but this does not apply to appellate matters. The section provides, that every justice of the peace for any county, &c., borough, &c., may do all acts appertaining to their office as far as the same relates to the relief, maintenance and settlement of the poor, to vagrants, repairs of highways, parochial taxes or rates, notwithstanding such justice is rateable to the taxes or rates within any parish affected by his acts; provided that (*z*) nothing shall authorize any of them to act in the determination of any appeal to quarter sessions for any county or riding at large, from any order or matter relating to the parish, &c., where such justice is chargeable. It is observable that the proviso only applies to counties and ridings, while the enactment applies to cities, liberties, franchises and boroughs. So, by 27 & 28 Vict. c. 55, s. 6, "No justice of the peace shall be disqualified for acting in the determination of any appeal against a poor rate at any quarter or special sessions by reason of such justice being rated or being liable to be rated in some other parish in the union than that for which the rate appealed against is made." And by the Justice of the Peace Act, 1867 (*a*), sect. 2, a justice of the peace shall not be incapable of acting as a justice at any petty or special or general or quarter sessions on the trial of an offence arising under an act to be put in execution by a municipal corporation or a local board of health, or improvement commissioners, or trustees, or any other local authority by reason only of— (a), his being as one of several ratepayers, or as one of any other class of persons liable in common with the others to contribute to or to be benefited by any fund, to the account of which the penalty payable in respect of such offence is directed to be carried, or of which it will form part, or to contribute to any rate or expenses in diminution of which such penalty will go.

Being a ratepayer not a disqualification on appeals against poor rates, when.

On appeals against offences against Local Government Acts.

As to the judgment of the court.

Justices are not bound to give any reason for their judgment (*b*), and their order confirming an order of removal on appeal is final, unless there be error in form (*c*).

They may alter their judgments at any time during the continuance of the same session at which they are made, but not after it has been ended by the departure of those magistrates who composed it (*d*).

Chairman has no casting vote.

The chairman has the same right to vote as any other justice present, but has no casting or double vote, in case the numbers

(*y*) *Reg.* v. *Rand*, 35 L. J., M. C. 157; *Reg.* v. *The Dean of Rochester*, 17 Q. B. 1; 20 L. J., Q. B. 467.
(*z*) Sect. 3.
(*a*) 30 & 31 Vict. c. 115.
(*b*) *South Cadbury* v. *Braddon*, Salk. 607. *Ante*, p. 690.
(*c*) *St. Andrew, Holborn and St. Clement Danes*, Salk. 494, 606.
(*d*) *Anon.* 1 Ventris, 210. See 2 M. & S. 321; 1 M. & S. 442; 8 B. & C. 139.

including his own vote should be equal; for *inter pares non est potestas.* *Hearing of the Appeal.*

In cases of equal division, the proper course is to continue the session by adjournment to some day not later than that on which the next original quarter session should be holden, and so on from session to session, if the question in doubt remains so long undecided by a majority (*e*). For otherwise, or if the judgment or order of adjournment has been erroneously pronounced or entered, the justices who were present cannot take up or rectify the matter after the session ended, nor can the court above assist them (*f*). And there cannot be a better reason for an adjournment than that the justices have not made up their minds as to the judgment to be given (*g*). Where the justices were equally divided in opinion, and the chairman gave a casting vote in favour of the order which was then confirmed, and on the following day the appellant's counsel protested against the legality of the decision, and an argument thereupon being heard, the justices then present determined to adhere to the former decision, the court held, on a case stated by the quarter sessions, that although the proceedings on the first day were irregular, they could not assume that the judgment on the second day was not a judgment upon the merits (*h*). If an interested justice has taken part in the decision of the sessions where the division is equal, it is not competent to the Court of Queen's Bench to treat his vote as a nullity, and enter the judgment to quash or affirm the order appealed against according to the numbers, if he had not voted (*i*), as explained by Lord *Denman*, in *Reg.* v. *Cheltenham Commissioners* (*k*), where he says, "As to the order of removal there had been clearly no decision of the sessions against it. The facts there were that two justices had voted for the appellant parish, and two for the respondent parish, one of which latter was a rated inhabitant of the respondent parish." Judgment where justices equally divided.

It has been said to be the bounden duty of the clerk of the peace to enter an adjournment in the above case (*l*); but in *Reg.* v. *Belton* (*m*), Lord *Denman*, in answer to an argument used, that if the court were equally divided in opinion the appeal would not be decided, said, that that amounted legally to a judgment that nothing should be done in the case, and the result would be, that the judgment of the sessions would be the judgment of the justices out of sessions. Effect of equal division of the court without an adjournment.

(*e*) See *ante*, p. 683; 2 Nol. 546, 4th ed.
(*f*) *R.* v. *Stansfield* (*Inh.*), Burr. Sett. Cas. 205.
(*g*) *Keen* v. *The Queen*, 10 Q. B. 928; 16 L. J., M. C. 180.
(*h*) *R.* v. *Fladbury* (*Inh.*), 10 A. & E. 706.
(*i*) *R.* v. *Justices of Monmouthshire*, 8 B. & C. 137.
(*k*) 1 Q. B. 475.
(*l*) *Bodmin* v. *Warligen*, 2 Bott, 6th ed. pl. 982; *R.* v. *Justices of Leicestershire*, 1 M. & S. 442; *R.* v. *Justices of Westmoreland*, 2 Sess. Cas. 193; *R.* v. *King's Langley*, 1 Ld. Raym. 481; Salk. 605, *S. C.*
(*m*) 11 Q. B. 380.

Adjournment of Appeal.

Neglect to adjourn.

If there has been no adjournment and the neglect to adjourn be with criminal intent, or occasions a failure of justice in any respect, an information will lie against the justices who attended the sessions; but where, from its being overlooked that the numbers for quashing were equal with those for confirming the order, judgment was entered to quash it, but the error was not noticed to the court during the session; a *mandamus* to rehear the appeal was refused, on the ground that as the sessions had not doubted so far as to send up a case, but had actually given judgment, the court above could not look *dehors* the record, by scrutinizing the poll on which the judgment proceeded (*n*).

Section 5.

of costs of appeals.

The power to give costs is not incident to the authority of the sessions, nor does it exist at common law: and, therefore, they never can be given, unless by the words of the particular act under which the justices are acting at the time.

Under Baines' Act.

And now, by 12 & 13 Vict. c. 45, s. 5, "Upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by the 11 & 12 Vict. c. 43."

And the sessions must always exercise their judgment on the amount of costs to which the successful party is entitled (*o*).

Order as to costs form part of the judgment.

Whenever the sessions grant costs, they form part of the judgment of the court, and the amount must be ascertained by and in the order itself (*p*); and, therefore, if the order confirming or quashing the order, &c. be made subject to a case, the costs must be adjudged at the time of the making of the order subject to the case, and cannot be made at a subsequent sessions (*q*); and so when, by order of the court, an appeal is referred to arbitration under 12 & 13 Vict. c. 45, s. 13 (*r*), the order must provide for the costs, and neither the arbitrator, nor the sessions at which the award is entered, as the

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(*n*) *R.* v. *Justices of Leicestershire*, 1 M. & S. 442.

(*o*) *Reg.* v. *Justices of Merioneth*, 6 Q. B. 163; *Reg.* v. *Justices of Glamorganshire*, 1 L. M. & P. 336.

(*p*) See p. 699, *post*; *Ex parte Holloway*, 1 D. P. C. 26; *Sellwood* v. *Mount*, 1 Q. B. 126.

(*q*) *Reg.* v. *Justices of Staffordshire*, 7 E. & B. 935.

(*r*) *Post*, p. 702.

Costs of the Appeal.

How ascertained.

udgment of the court, have any power to award them (*s*); and where the order as to costs is made to abide the event of a case to the Court of Queen's Bench, and the court give judgment, but say nothing as to costs, the costs cannot be obtained, inasmuch as the sessions have no longer jurisdiction to ascertain the costs (*t*); for they have no power to grant costs generally, like the courts at Westminster, to be afterwards taxed by the proper officer; though they may direct the clerk of the peace to ascertain and report to them the items of expenditure which may form the grounds of their decision; but they must themselves determine the sum to be paid, for they cannot delegate their authority (*u*).

Where the court made a rule absolute for a mandamus to the sessions to make an order for costs, they may make the rule absolute without costs, on an undertaking that the order shall be made without the mandamus issuing (*x*).

A practice to allow forty shillings costs to the party succeeding on an appeal is a very unreasonable one, and an order of sessions confirming an order of removal and giving costs to the respondents, cannot be divided so as to separate the part relating to costs from the other part, so that if the former part is invalid, as made without jurisdiction, the latter cannot be upheld (*y*). Sometimes, when notice of appeal is given and not countermanded, the practice is to refuse the appellant leave to enter and respite his appeal, unless he agrees to pay the costs of the day (*z*). In the case of an appeal against a poor's rate, unless the appeal is entered, the sessions cannot order the appellant to pay the costs which he may have occasioned in preparing to resist it in consequence of notice; for it is not heard and determined (*a*): but if it was entered and respited, and opposition to it is afterwards abandoned, they may give the costs incurred down to the time of abandonment (*b*); and the like if, after the appeal was entered and respited, a notice of appeal given for the second sessions was countermanded, and the appellant did not appear then to support his appeal (*c*).

After appeal against conviction or order, justice

And by 11 & 12 Vict. c. 43, s. 27, it is enacted, That after an appeal against any such conviction or order as aforesaid, *i. e.* referred to in that act, shall be decided, if the same shall be

(*s*) *Reg.* v. *Justices of West Riding*, 6 B. & S. 531; *Reg.* v. *Justices of Middlesex*, 39 L. J., Q. B. 178; 40 L. J., M. C. 109.
(*t*) *Reg.* v. *Justices of Hampshire*, 32 L. J., M. C. 46.
(*u*) *R.* v. *Skinner*, 1 Bott, by Const. 476, pl. 625.
(*x*) *Reg.* v. *Justices of West Riding*, 31 L. J., M. C. 271; 2 B. & S. 811.
(*y*) *Reg.* v. *Stoke Bliss*, 6 Q. B. 158.
(*z*) *R.* v. *Justices of Monmouthshire*, 1 B. & Ad. 895. See *Porter* v. *Cooper*, 4 Tyr. R. 456; *King* v. *Taylor*, 5 Tyr. 804.
(*a*) *R.* v. *Justices of Essex*, 8 T. R. 583, on 17 Geo. 2, c. 38, s. 4.
(*b*) See *R.* v. *Cawston*, 4 D. & R. 445, *ante*, p. 690; *R.* v. *Justices of Cambridge*, 2 A. & E. 374.
(*c*) *Ex parte Holloway*, 1 D. P. C. 26.

Costs of the Appeal.

may issue warrants of distress for execution of the same.

Costs of appeal, how recovered.

Order for costs.

decided in favour of the respondents, the justice or justices who made such conviction or order, or any other justice of the peace of the same county, riding, division, liberty, city, borough or place, may issue such warrant of distress or commitment as aforesaid for execution of the same, as if no such appeal had been brought; and if upon any such appeal the court of quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay the same shall not be bound by any recognizance conditioned to pay such costs, such clerk of the peace or his deputy, upon application of the party entitled to such costs, or of any person on his behalf, and on payment of a fee of one shilling, shall grant to the party so applying a certificate (No. XXXIX.) that such costs have not been paid; and upon production of such certificate to any justice or justices of the peace for the same county, riding, division, liberty, city, borough or place, it shall be lawful for him or them to enforce the payment of such costs by warrant of distress (No. XL.) in manner aforesaid, and in default of distress, he or they may commit (No. XLI.) the party against whom such warrant shall have issued in manner hereinbefore mentioned, for any time not exceeding three calendar months, unless the amount of such costs, and all costs and charges of the distress, and also the costs of the commitment and conveying of the said party to prison, if such justice or justices shall think fit so to order (the amount thereof being ascertained and stated in such commitment), shall be sooner paid.

What appeals within Baines' Act, s. 5.

The 5th section of 12 & 13 Vict. c. 45, includes an appeal where there has been a decision, though the effect of the decision was that the appeal was dismissed on the ground that the sessions had no jurisdiction to try the appeal (*d*); and it is cumulative and extends to all appeals, whether the appellant has entered into a recognizance conditioned to pay costs or not (*e*).

The above 5th section, however, does not apply where the crown is a party, and therefore on an appeal from the decision of justices on an information by an excise officer, there is no power in the court to order costs to a successful defendant (*f*); and it is the same even if the prosecutor or complainant did not appear to support the conviction (*g*).

"Party or parties," who.

The expression "party or parties" in the above section is not limited to the former parties to the appeal (viz., the appellant

(*d*) *Reg.* v. *Padwick*, 8 E. & B. 704; 27 L. J., M. C. 113.
(*e*) *Freeman* v. *Read*, 9 C. B., N. S. 301; 30 L. J., M. C. 123; *Reg.* v. *Hawkes*, 3 E. & B. 179; 23 L. J., M. C. 106; *Reg.* v. *Justices of Ely*, 5 E. & B. 489; 25 L. J., M. C. 1.
(*f*) *Reg.* v. *Beadle*, 7 E. & B. 492; 26 L. J., M. C. 111.
(*g*) *Reg.* v. *Purdey*, 34 L. J., M. C. 4; 5 B. & S. 909.

and respondent), but applies to the substantial complainant. Thus, upon an appeal against a conviction under the Vagrant Act (*h*), though the convicting justices were made respondents and the convicted person the appellant, and notice of appeal was given to the justices only, yet, as the informant really appeared and defended the appeal, the court of quarter sessions, on quashing the conviction, ordered the informant, and not the justices, to pay the costs to the appellant, and it was held that the court was right in so doing (*i*). And so where the appeal is against a conviction under the Criminal Law Amendment Act (34 & 35 Vict. c. 32, s. 3) (*j*).

Order for Costs.

"Party or parties" to appeal, who.

An order for costs on an appeal made under the 5th section is correct in ordering them to be paid to the clerk of the peace, to be by him paid over to the successful party (*k*); but the 5th section is cumulative, and does not abrogate a prior statute giving the costs direct to the party without the intervention of the clerk of the peace, as, for instance, the 17 Geo. 2, c. 38, giving costs on an appeal against a poor rate (*l*), or the 9 Geo. 4, c. 61, giving costs on an appeal against the refusal of justices to grant a licence (*m*); but where the certiorari was taken away by a local act, and an order made on appeal against a rate made under the local act by the quarter sessions dismissing the appeal, ordering the costs to be paid directly to the party instead of to the clerk of the peace, the court refused to set it aside as made without jurisdiction (*n*); but in the case of an appeal against a summary conviction or order within the 11 & 12 Vict. c. 43, the order giving costs would be bad if it were not made in the form directed by the 27th section of that act, and must therefore direct the payment to be made to the clerk of the peace (*o*).

To whom costs to be ordered to be paid.

By the 12 & 13 Vict. c. 45, s. 4, if in any notice of appeal the appellant or appellants shall have included any ground or grounds of appeal which shall in the opinion of the court determining the appeal be frivolous or vexatious, such appellant or appellants shall be liable, if the court shall so think fit, to pay the whole or any part of the costs incurred by the respondent or respondents in disputing any such ground or grounds of appeal, such costs to be recoverable in the manner hereinafter directed as to the other costs incurred by reason of such appeal.

Costs occasioned by frivolous grounds of appeal.

By the 12 & 13 Vict. c. 45, s. 6, for the more effectual prevention of frivolous appeals, it is enacted, that any court of general or quarter sessions of the peace, upon proof of notice

Costs occasioned by frivolous peals.

(*h*) 5 Geo. 4, c. 83.
(*i*) *Reg.* v. *Smith*, 29 L. J., M. C. 216; *Reg.* v. *Justices of Hants*, 1 B. & Ad. 654; *Reg.* v. *Purdey*, 5 B. & S. 909; 34 L. J., M. C. 4.
(*j*) *Reg.* v. *Goodall*, 43 L. J., M. C. 119.
(*k*) *Gay* v. *Matthews*, 4 B. & S. 425; 33 L. J., M. C. 14.
(*l*) *Reg.* v. *Huntley*, 3 E. & B. 172; 23 L. J., M. C. 106.
(*m*) *Reg.* v. *Justices of Ely*, 5 E. & B. 489; 25 L. J., M. C. 1.
(*n*) *Reg.* v. *Binney*, 1 E. & B. 810; 22 L. J., M. C. 127.
(*o*) *Reg.* v. *Hellier*, 17 Q. B. 220; 21 L. J., M. C. 3.

Costs of the Appeal.

of any appeal to the same court having been given to the party or parties entitled to receive the same, though such appeal was not afterwards prosecuted or entered, may, if it so think fit, at the same sessions for which such notice was given, order to the party or parties receiving the same such costs and charges as by the said court shall be thought reasonable and just to be paid by the party or parties giving such notice, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by 11 & 12 Vict. c. 43.

Jurisdiction to give costs where notice of appeal was to wrong sessions.

Where notice of appeal is given which might have been acted upon, the court to which the appeal lay has jurisdiction to give costs under this section. Thus, where notice of appeal against an order of removal made by justices acting in and for a borough was given as to the next quarter sessions for the county, and the day before the quarter sessions for the borough to which the appeal really lay were held, the appellants gave the respondents notice, that having discovered that the appeal ought to have been to the borough, they abandoned the appeal to the county sessions. The respondents appeared at the borough sessions and obtained an order for their costs on the abandonment of the appeal, and the order was held to be rightly made (*n*).

Upon whom order to be made.

An order made on an appeal against a poor's rate, that the respondents, being the churchwardens and overseers of the respondent parish, pay the costs of the appellants, is rightly made on the overseers in office at the time when the order is made, notwithstanding that the appeal was begun and defended by their predecessors (*o*).

Application for costs, when it may be made.

An appellant has the whole day of the sessions to make an application for an order for costs on an appeal where the respondent does not appear, and he is not too late if he makes his application on the same day, after the appeal has been called on and struck out because neither party was present (*p*). And where the statute required the sessions to give costs, though the appeal were not tried, if the sessions refuse to make the order when applied for, on the ground that the appeal has been struck out in the absence of the parties, the court will issue a mandamus to compel them to make the order (*q*).

Of the taxation of costs.

The taxation of costs by the clerk of the peace, as the officer of the court, is a judicial act, and must therefore be adopted by the court which makes the order for costs. The amount must therefore be ascertained during the sitting of the court (*r*), unless the parties consent to the taxation being made after the

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(*n*) *Reg.* v. *Recorder of Leeds*, 3 E. & E. 561; *Reg.* v. *Recorder of Liverpool*, 15 Q. B. 1070; *Reg.* v. *Justices of Bucks*, 4 E. & B. 259, n.

(*o*) *Ex parte Overseers, &c. of Fletton*, 2 E. & E. 712; 29 L. J., M. C. 205.

(*p*) *Reg.* v. *Justices of West Riding*, 31 L. J., M. C. 271; 2 B. & S. 811.

(*q*) *Ibid.*

(*r*) *Freeman* v. *Read*, 9 C. B., N. S. 301; 30 L. J., M. C. 123.

close of the sessions (*s*), or if the court adjourns before the final close of the sessions, or if the original sessions be adjourned at an adjournment of the same sessions (*t*). But where the appeal has been heard at an original sessions, and there was no application for costs, it is doubtful whether an application for costs at an adjournment could be granted, at all events unless the same justices were sitting at both the original sessions and the adjourned (*u*). *Taxation of Costs.*

An order of sessions awarding such costs as should be adjudged reasonable by the clerk of the peace or other persons named, *e. g.*, by two attornies, is bad (*x*).

If upon appeal to the quarter sessions a case is stated for the opinion of a superior court, under the 11th section of 12 & 13 Vict. c. 45, the practice is to give costs as between party and party (*y*). Order as to costs where case stated.

In all cases where any order shall be made by any court of general or quarter sessions of the peace, it shall be lawful for the Court of Queen's Bench, or for any judge of that court at chambers either in term or vacation, upon the application of any person entitled to enforce such order, and upon the production of a copy of such order under the hand of the clerk of the peace, or his deputy, and upon proof of refusal or neglect to obey such order, to order and direct such order of the court of general or quarter sessions to be removed into the said Court of Queen's Bench, and thereupon such order shall be of the same force and effect, and may be enforced in the same manner as a rule made by the said Court of Queen's Bench, and all the reasonable costs and charges attendant upon such application and removal shall be recoverable in like manner as if the same were part of such order (*z*). No certiorari is required to remove such order of sessions (*a*). Enforcing orders of sessions.

This 18th section does not apply to an order of quarter sessions to abate a nuisance (*b*); in which case the court make the order, sitting as it were as a court of oyer and terminer, and which judgment can be enforced by the sheriff, while the above statute applies only to cases of appeal and to such orders as the remedy for disobedience was by indictment (*c*). So, where the *certiorari* has been taken away so that the party affected by the

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(*s*) *Freeman* v. *Read, ubi sup.; Reg.* v. *Shrewsbury and Hereford Railway Co.*, 25 L. T. 65.

(*t*) *Reg.* v. *Justices of Hampshire*, 33 L. J., M. C. 104; *Reg.* v. *Mortlock*, 7 Q. B. 459; *Reg.* v. *Justices of Ely*, 5 E. & B. 489, *ante*, p. 697; *Rawnsley* v. *Hutchinson*, 40 L. J., M. C. 971; L. R., 6 Q. B. 305.

(*u*) See *Reg.* v. *Clark*, 5 Q. B. 887, 893.

(*x*) *R.* v. *St. Mary's, Nottingham*, 15 East, 57, note; *R.* v. *Shinn*, 1 Bott, 421; pl. 527, 6th ed., cited in *R.* v. *Sweet*, 9 East, 27.

(*y*) *Earl of Clarendon* v. *St. James, Westminster*, 10 C. B. 806; 20 L. J., M. C. 213.

(*z*) 12 & 13 Vict. c. 45, s. 18.

(*a*) *Hawker* v. *Field*, 1 L. M. & P. 606; 20 L. J., M. C. 41.

(*b*) *Reg.* v. *Bateman*, 27 L. J., M. C. 95.

(*c*) *Ibid.*

Costs of the Appeal.

order could not remove it, yet, if the other party has removed it and seeks to enforce it, the party affected is at liberty to object to the order as bad on the face of it and apply to have the proceedings set aside (*d*). If the order be for the payment of a certain sum a *fi. fa.* or a *ca. sa.* may issue at once, unless it be payable out of a specific fund not under the control of the party sought to be charged, as out of the highway rate under 4 & 5 Will. 4, c. 50, s. 95 (*e*).

Order for costs may be enforced by commitment.

An order giving costs under the 12 & 13 Vict. c. 45, s. 5, being recoverable under sect. 27 of 11 & 12 Vict. c. 43, are within the second exception in sect. 4 of the Debtors Act, 1869, and may therefore be enforced by commitment and imprisonment where the party against whom it is given is not bound by recognizance to pay the costs (*f*).

Disobedience of order indictable.

Before the above statute, such order, when made, would be enforced against the party who disobeys it after it has been personally served on him by indictment for the misdemeanour, and punished for his contempt by imprisonment and fine (*g*); and, it would seem, that the above section is cumulative, and would not, therefore, take away this remedy. Such order was never enforceable by attachment at common law.

Section 6.

Of the Termination of Sessions.

By the departure of the justices without adjournment.

All sessions are terminated as of course by the departure of the justices, the constituted authorities by which they are holden; unless they are previously prolonged by adjournment, proclaimed in the presence of at least two justices (*h*); and the court cannot be adjourned by the crier without the presence of the justices (*i*). But we have seen that such adjournment ought not to be made to a day beyond that fixed for the meeting of the next original session, for if it is, a judgment at such adjourned session will be reversed (*k*).

The whole session is considered in law as one day, and accordingly, all the proceedings have reference to the first day, and the justices may, during its continuance (*l*), as we have

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(*d*) *Reg.* v. *Hellier*, 21 L. J., M. C. 3; 17 Q. B. 229; *Reg.* v. *Hyde*, 21 L. J., Q. B. 94; *Reg.* v. *Huntley*, 3 E. & B. 172; 23 L. J., M. C. 106.

(*e*) *Reg.* v. *Tryddyn*, per *Erle*, J., Dec. 14, 1852, 4 Chitt. Stat. 3rd ed., *tit.* "Sessions," note (*b*), p. 165.

(*f*) *Reg.* v. *Pratt*, 39 L. J. 73; L. R., 5 Q. B. 176.

(*g*) *Reg.* v. *Mortlock*, 7 Q. B. 459; 14 L. J., M. C. 153.

(*h*) *R.* v. *Mullaney*, 6 C. & P. 90; *R.* v. *Westrington*, 1 Bott, 631; 2 Bott, 733.

(*i*) *R.* v. *Middlesex*, 3 R. & M. 110; 6 C. & P. 90.

(*k*) *R.* v. *Grince*, 19 Vin. Abr. 358. As to the caption of indictments, orders, &c. made at adjourned session, see *ante*, pp. 25, 26.

(*l*) See *ante*, pp. 27, 28.

seen (*m*), annul their former order made in the same session; but this is a power to be exercised with delicacy and discretion, for if enforced by a fresh accession of justices, in the spirit of party or other unbecoming manner, an information would be granted against those of them who were concerned in the transaction (*n*). It necessarily follows from what has been advanced, that as the power of the court expires at the conclusion of its sitting, no order there made can be reviewed, or placed in any new situation, at any subsequent session, unless kept open by adjournment of the session itself (*o*).

Annulling Decision before Termination of Sessions.

But besides these means by which the justices may, purely of their own authority, procrastinate their decisions on all subjects, there are other modes by which any question of legal difficulty *may* be referred by the justices, of their own authority, to the opinion of a superior tribunal; as by reference of the whole case or a particular point in it (*p*), to the next judges of assize, or by stating the special circumstances of the case, for the consideration of the Court of Queen's Bench, as to its legal effect.

Referring questions to superior tribunal.

Besides these modes, originating with the sessions themselves, for taking the opinion of a higher tribunal, the paramount writ of *certiorari* will, at the instance of either party, in various stages of proceedings in which it is not taken away by statute, withdraw the cognizance of them to the Court of Queen's Bench.

Section 7.

of references to arbitration.

By 12 & 13 Vict. c. 45, s. 12, at any time after notice given of appeal to any court of general or quarter sessions of the peace against any order, rate or other matter (except a summary conviction or an order in bastardy or any proceeding under or by virtue of any of the statutes relating to her Majesty's revenue of excise or customs, stamps, taxes, or post office) for which the remedy is by such appeal, it shall be lawful for the parties by themselves or their attornies, and by order of a judge of her Majesty's Court of Queen's Bench, to submit the matter or matters of such appeal to the award or umpirage of any person or persons, and to agree that such submission should be made a rule of the said Court of Queen's Bench, and to insert such agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of such person or persons; and

Reference of appeal after notice and before entry.

(*m*) *Ante*, p. 28.
(*n*) 2 Nolan, 536, 546, 4th ed.
(*o*) *Ante*, p. 28.
(*p*) *R.* v. *Tedford*, 2 Burr. S. C. 57.

Effect of Awards or Umpirages.

thereupon such and the like proceedings in all respects shall and may be taken with regard to submissions under this act, and to enforcing awards or umpirages thereupon, and to setting aside the same as are authorized by 9 & 10 Will. 3, with regard to cases therein provided for; and every award or umpirage duly made under this act shall be as binding and effectual to all intents as if the same had been a regular judgment of the said court of general or quarter sessions, and shall and may on the application of either party be enrolled among the records of the said court of sessions.

The court of quarter sessions on appeal may order a reference by consent.

But by 12 & 13 Vict. c. 45, s. 13, "it shall be lawful for any court of general or quarter sessions of the peace, before which any appeal (except against a summary conviction or an order in bastardy, or any proceedings under or by virtue of any of the statutes relating to her Majesty's revenue of excise or customs, stamps, taxes, or post office) shall be brought, to order with consent of the parties or their attornies, that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner and on such terms as the said court shall think reasonable and proper; and such order may be made a rule of the Court of Queen's Bench on the application of either party, and the award of the arbitrator or arbitrators, or umpirage of the umpire, may on motion by either party at the sessions next or next but one after such award or umpirage shall have been finally made and published, or after the decision of the Court of Queen's Bench, on any motion for setting aside the same, be entered as the judgment of the court of general or quarter sessions in the appeal, and shall be as binding and effectual to all intents as if given by the said court: provided always, that the Court of Queen's Bench may, if it think fit on application within the term next after the making or publication of such award or umpirage, either refer the same back again to the same arbitrator, arbitrators or umpire, or wholly set aside the award or umpirage already made, and may in the latter event order the court of general or quarter sessions to enter continuances and hear the appeal."

Order of reference should provide for the costs.

The order of reference under the above section ought to provide for the costs of the reference and award, otherwise the sessions at which the award is entered has no power to order either party to pay such costs. The sessions at which the award is entered have merely a ministerial duty to perform, that is, to receive and enter the award (*q*). The sessions ordering the reference should therefore be asked to make the costs abide the event, or be in the discretion of the arbitrator, or they may be perhaps left in the discretion of the sessions receiving the award; without some reservation of a power over the costs a subsequent sessions to the one ordering the reference certainly are functi officio, and have parted with the appeal, therefore they have no power to deal with the costs in such a case.

(*q*) *Reg.* v. *Justices of West Riding*, 6 B. & S. 531; 34 L. J., M. C. 142.

Costs on Reference of Appeal.

Therefore, where an appeal was referred to an arbitrator without making any provision for the costs, and the arbitrator made his award and nothing was said about costs, the sessions entering the award had no power to give costs to either party (*r*).

The Court of Queen's Bench will review an award which has dealt with the costs without having power reserved in the order of reference so to do, and order such an award to be referred back to the arbitrator to be amended by omitting such part of it (*s*).

It is probably unnecessary for the sessions to make adjournments of the appeal till the making of the award under the above statute, because at any future quarter sessions the justices would be bound to enter the award as their judgment (*t*).

Continuance of appeal on death of arbitrator.

If upon any reference to arbitration under 12 & 13 Vict. c. 45, it shall be made to appear to the Court of Queen's Bench that, either from the death of the arbitrator or arbitrators or umpire, or from any other cause, it has become impossible that an award or umpirage can be made, it shall be lawful for the said court to order the court of general or quarter sessions of the peace to enter continuances and hear the appeal (*u*).

3 & 4 Will. 4, c. 42, applicable to such references and powers of amendment.

The several provisions relating to arbitrations contained in 3 & 4 Will. 4, c. 42, shall be deemed and taken to be applicable to arbitrations under this act; and in every such arbitration the arbitrator or arbitrators or umpire shall have the same powers of amendment which the court of general or quarter sessions of the peace would have had on the trial of the appeal (*x*).

No recognizance entered into pursuant to any statute or statutes for the prosecution and trial of any appeal shall be deemed to be forfeited by such agreement as aforesaid, for the statement of a special case without previously going to the court of general or quarter sessions, or by any submission to arbitration under the provisions of this act (*y*).

Section 8.

Of reference to the Court of Queen's Bench, on a special case.

Power and duty of sessions in respect of granting special cases.

Though, as we have seen, the quarter sessions cannot delegate their judicial authority, they may give *judgment* on any appeal, *e. g.*, for confirming or quashing the rate, order, conviction, &c., subject to a special statement of the facts for the

(*r*) *Reg.* v. *Justices of Middlesex*, 40 L. J., M. C. 109; L. R., 6 Q. B. 220.

(*s*) *West London Extension Railway Company* v. *Assessment Committee of Fulham*, 39 L. J., Q. B. 178; L. R., 5 Q. B. 361.

(*t*) Per *Blackburn*, J., *Reg.* v. *Justices of Middlesex*, 40 L. J., M. C. 111; L. R., 6 Q. B. 220.

(*u*) 12 & 13 Vict. c. 45, s. 14.

(*x*) *Ibid.* s. 15.

(*y*) *Ibid.* s. 16.

As to Statement of Special Case.

opinion of the judge of assize, or of the Court of Queen's Bench, as to the law resulting *from* them; thus leaving the ultimate event to depend on the judgment of that court (*z*). The former practice has fallen into disuse, and the latter is now supplemented by 12 & 13 Vict. c. 45, s. 11. By which statute it is provided, that at any time after notice given of appeal to any court of general or quarter sessions of the peace against any judgment, order, rate, or other matter (except an order in bastardy, or a proceeding under or by virtue of any of the statutes relating to her Majesty's revenue of excise or customs, stamps, taxes, or post office) for which the remedy is by such appeal, it shall be lawful for the parties by consent, and by order of any judge of one of the superior courts of common law at Westminster, to state the facts of the case in the form of a special case for the opinion of such superior court, and to agree that a judgment in conformity with the decision of such court, and for such costs as such court shall adjudge, may be entered on motion by either party at the sessions next or next but one after such decision shall have been given; and such judgment shall and may be entered accordingly, and shall be of the same effect in all respects as if the same had been given by the court of general or quarter sessions upon an appeal duly entered and continued (*a*).

Baines' Act, s. 11.

Parties may by consent state a special case, when.

Under this section the practice is to give costs as between party and party (*b*).

Subject to the question whether the *certiorari* necessary to remove the order, &c. is taken away in the particular instance by statute (*c*), the same sessions which adjudge on the appeal (*d*), may grant a special case at the request or without consent of the parties (*e*), whenever a reasonable doubt exists in the minds of a majority of the justices on the subject disputed (*e. g.*, the admissibility of a matter of evidence), but should refuse it where they are so satisfied that they think they ought to *decide*

(*z*) *Reg.* v. *Stoke-on-Trent* (*Inh.*), 13 L. J., M. C. 41.

(*a*) For a case stated under this section, see *Overseers of Snaith* v. *Overseers of Wigton*, 20 L. J., M. C. 110; 16 Q. B. 496.

(*b*) *Earl of Clarendon* v. *St. James, Westminster*, 10 C. B. 806; 20 L. J., M. C. 213.

(*c*) *R.* v. *Allen*, 15 East, 333. See 10 B. & C. 163; 1 B. & Ad. 113. As to convictions see per *Le Blanc*, J., *R.* v. *Allen*, 15 East, 346, and other cases, Paley, 3rd ed. 301.

Whether the *certiorari* is lost, must depend on the wording of each act, which, as we have seen, must be express to have this effect. In *R.* v. *Justices of Middlesex*, 8 D. & R. 117, a local act prevented the removal by *certiorari* of any "rate, proceeding, conviction, matter, or *thing*." *Tindal* moved for a *certiorari* to remove into K. B. a *special case* which the sessions had granted, but the court said the language of the section was too strong to be got over, being clearly comprehensive enough to embrace a special case as a "*thing*," and refused the motion.

(*d*) No subsequent (original) session can grant a special case, *R.* v. *Michaelstone Vedoes*, 2 Nol. 4th ed. 500.

(*e*) *R.* v. *Justices of Sussex*, 2 Nol. 558, 4th ed..

against either party (*f*), or believe the application for the case to be founded on obstinacy or a spirit of litigation (*g*); or where it would be useless to draw up the case, the *certiorari* being taken away (*h*). *When Case should be stated.*

The summary jurisdiction of the justices over the civil business of the sessions, places them in the situation of jurors as well as judges, calling on them as jurors to elicit the facts from the evidence, and as judges to apply and declare the law resulting from the facts. On this account, sessions are not compellable to *grant* a special case (*i*); for such a case must always depend on particular facts which it is the exclusive province of sessions to find; so that if they refuse it, the particular state of facts which would be said to prove their determination to be against law, cannot appear to the court above to be so (*k*).

As to the propriety of granting or refusing a special case, Lord *Hardwicke* has said (*l*), "It has been much wished that a bill of exceptions would lie to the justices at their sessions, because otherwise it may sometimes happen that they may determine in an arbitrary manner, contrary to the resolutions of the courts of law. For if, *when the matter is doubtful*, they will not state the facts specially, though requested to do so, this is very blameable conduct in them, and it is to be wished that it might be avoided." He also added, "It is a thing very much to be censured and discommended, when an inferior jurisdiction endeavours to preclude parties from an opportunity of applying to a superior." As to propriety of granting a special case.

The Court of Queen's Bench has not general jurisdiction as a court of error to review the judgments or orders of sessions in subject-matters over which they have jurisdiction (*m*), unless a defect appears on the face of them when removed by *certiorari* (*n*), or unless the sessions was improperly constituted from a majority of the justices who voted on the successful side being interested (*o*); nor will the court above interfere by Jurisdiction of Queen's Bench where no case stated.

(*f*) See *Reg.* v. *Justices of Kesteven*, 3 Q. B. 820, per *Patteson*, J., and *R.* v. *Justices of Middlesex*, 8 D. & R. 117.

(*g*) See *R.* v. *Burbach*, 1 M. & S. 376, per *Bayley*, J., and *R.* v. *Darley Abbey*, 14 East, 285.

(*h*) See *R.* v. *Justices of Middlesex*, 8 D. & R. 117.

(*i*) *R.* v. *Jarvin* (*Ex parte Inh.*), 9 D. P. C. 120, *Patteson*, J.

(*k*) *R.* v. *Oulton*, Burr. S. C. 64; 2 Nol. 55, 4th ed.; and see cases, *ante*, p. 689, *notis*.

(*l*) *R.* v. *Preston-on-the-Hill*, Burr. S. C. 77; and see *ante*, p. 689 *et seq.*

(*m*) *R.* v. *Justices of Monmouthshire*, 8 B. & C. 137; nom. *R.* v. *Uske*, 2 M. & Ry. 172, cited and acted on in *Reg.* v. *Justices of Cheshire*, 8 A. & E. 398; 1 P. & D. 89. See 1 Ventris, 210. As to *mandamus* to erase an entry in a court of quarter sessions, see *Reg.* v. *Justices of West Riding*, 5 Q. B. 1, *ante*, p. 678.

(*n*) See *Reg.* v. *Cottingham* (*Inh.*), 2 A. & E. 250; *Reg.* v. *Read*, 9 A. & E. 619; *R.* v. *Justices of Leicestershire*, 1 M. & S. 446; *R.* v. *James*, 2 M. & S. 321; *R.* v. *Oulton*, Burr. S. C. 64, *ante*, p. 689.

(*o*) *Reg.* v. *Cheltenham Paving Commissioners*, 1 Q. B. 476; and see *ante*, pp. 37, 690.

As to Statement of Special Case.

way of granting a new trial for improper rejection or reception of evidence, upon objection made on the hearing of the appeal, no case being reserved (*p*). And where the sessions have decided that sufficient search had not been made for an agreement in writing to let in secondary evidence of its contents, the court will not, even on a case stated for their opinion, interfere with their decision, unless it sees clearly that the sessions were wrong (*q*). But it will act in aid of the sessions by taking cognizance of a special case sent up from thence for their opinion, and accompanying the order, conviction, &c. appealed against, when these last are removable and removed by *certiorari*. It is in this way only that it will overrule a *judgment* of the sessions in an appeal, where it appears requisite to do so (*r*).

The sessions can only state a case on matter of law.

The only matter which the sessions can send to the Court of Queen's Bench is their authority to judge of the law (*s*); from whence it follows that conclusions drawn from the assertions of the witnesses at the hearing must be specifically stated in a case as *facts* found by the sessions (*t*), for *merely* stating the testimony or documents from which those facts were or might have been deduced, would leave the court above to draw the inference which the justices below ought to have done (*u*).

This rule is most important to be observed, as the neglect of it will often occasion a case to be sent back to the sessions to be re-stated. It will therefore receive a few examples by way of illustration.

Where on an appeal respecting a pauper's settlement, the

(*p*) See *ante*, p. 704; *R.* v. *Frieston* (*Inh.*), 5 B & Ad. 597; *Reg.* v. *Kesteven* (*Inh.*), 3 Q. B. 810, overruling *Reg.* v. *Justices of Carnarvon*, 2 Q. B. 325, 331; and *Reg.* v. *Justices of West Riding*, 2 Q. B. 331.

(*q*) *Reg.* v. *Liberty of Saffron Hill*, 1 E. & B. 93; 22 L. J., M. C. 22; *Reg.* v. *Justices of Hinckley*, 3 B. & S. 885; 32 L. J., M. C. 158; *Reg.* v. *Blanshard*, 13 Q. B. 318; *Reg.* v. *Rawden*, 2 A. & E. 156.

(*r*) *Reg.* v. *London & N. W. Rail. Co.*, 43 L. J., M. C. 57; *R.* v. *Allen*, 15 East, 233; *R.* v. *Justices of Carnarvonshire*, 4 B. & A. 86; *Ex parte Pratt*, 7 A. & E. 423; *R.* v. *Justices of Cumberland*, 4 A. & E. 695; 5 N. & M. 578.

(*s*) The court above will hold itself concluded by a fact found by the sessions; as, *e. g.*, that the appellant was occupier of the property in question, *R.* v. *Hurdis*, 3 T. R. 497; that the landlord and not the tenant was the party intended to be rated, *R.* v. *Rainham*, 5 T. R. 240; *R.* v. *Folkstone*, 3 T. R. 505; that the governor of the workhouse was an annual office, *R.* v. *Ilminster*, 1 East, 83, &c. &c.

(*t*) *R.* v. *St. Cuthbert, Wells*, 5 B. & Ad. 939; 3 N. & M. 100; *R.* v. *Martley*, Burr. S. C. 120; *R.* v. *Luffington*, 1 Wils. 74. Special orders of sessions are considered in the nature of special verdicts *quoad hoc*, *R.* v. *Martley*, *ubi sup.* See Comberbach, 285, 286.

(*u*) *R.* v. *Lyth*, 5 T. R. 327; *R.* v. *Bottesford*, 4 B. & C. 84; 6 Dowl. & Ry. 99. See *R.* v. *Ardington*, *post*, p. 712.

It is sufficient if the sessions state, that *it appears to them* that the pauper was bound, *R.* v. *East Knoyle*, 2 Bott, 644. If the ordinary meaning of a term is displaced by a local acceptation, the sessions must explain the latter, or effect will be given to the first, even to the quashing their order, *R.* v. *Thornham*, 6 B. & C. 733, on the meaning of "ewes *going;*" *R.* v. *North Bedburn*, Cald. Ca. 452, on that of "Landsell Colliery."

When Case should be stated.

question depends on an equivocal hiring, or a doubtful service for a year, the fact of hiring or service is to be found by the sessions one way or other, from the evidence, such as it may be; and stating the evidence only without drawing the conclusion will not suffice (*x*). So, whether a master gave a particular consent to his apprentice to serve a third person, is a matter of fact, which, let it rest on ever so ambiguous testimony, must be found one way or other, and not left doubtful on the face of the case (*y*). For the same reason, in a question of service under a hiring, the sessions must find whether the service was dispensed with, or the contract dissolved (*z*). Again, on a claim of settlement by residence on an estate, the sessions must state the interest which the pauper took, whether he came in by descent or purchase, and if the latter, the price of such purchase (*a*); that so it may appear on the face of the case, whether it was such a purchase as would confer a settlement. Frauds, whether affecting the parties merely, or the gaining a settlement in the parish sought to be burdened, are facts which must be considered and adjudicated on by the sessions (*b*); and being facts, must be specifically found and stated accordingly (*c*). For it is not enough to state *evidence*, though clearly leading to the most palpable conclusion of fraud, if the court above is left to draw that conclusion (*d*).

Sessions must find the facts and not state the evidence.

In some cases the evidence itself, *as well as* the fact or conclusion drawn from it, have both been stated, which course appears erroneous, as it tends to the obvious inconvenience in point of practice, that if the court above should differ from the sessions as to their conclusion, they could not regularly interfere, and thus in appearance an opinion is asked from them which they cannot judicially give (*e*). Further, sessions are not merely to refer to the court a mere question of fact, and ask

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(*x*) *R.* v. *Bray*, Burr. S. C. 686, per Lord *Mansfield;* and see *R.* v. *Great Wishford*, 4 A. & E. 216; 5 N. & M. 540. See *post*, p. 712.

(*y*) *R.* v. *Shebbeare*, 1 East, 73.

(*z*) *R.* v. *St. Peter, Norwich*, 8 T. R. 477.

(*a*) *R.* v. *Warblington*, 1 T. R. 241.

(*b*) *Reg.* v. *Barmston (Inh.)*, 7 A. & E. 858; 3 N. & P. 167; *R.* v. *Gravesend*, 3 B. & Ad. 243. The old rule was confined to frauds on the parish, *R.* v. *Tedford*, Burr. S. C. 57. See 4 A. & E. 211, 219.

(*c*) *R.* v. *St. Cuthbert, Wells*, 5 B. & Ad. 939; 3 N. & M. 100; *R.* v. *Tellingham*, 1 B. & Ad. 180. Whether the fraud so found prevents the settlement from being gained may be a question for the Queen's Bench, *ibid.*; *R.* v. *Birmingham*, 14 East, 251; *R.* v. *Kibworth*, 7 B. & C. 790; 2 M. & Ry. 28.

(*d*) *R.* v. *Llanfihangel Abercowin*, 4 N. &. M. 355; per *Buller*, J., in *R.* v. *Fillongley*, 1 T. R. 461. Fraud, when found generally by the sessions, has been held to bind the court above, *R.* v. *Llanwinio*, 4 T. R. 373;—unless the sessions quash an order for fraud, and state the facts particularly on which they find it, in which case the question of fraud or not being still open upon the facts, the court above may decide it in the negative, *R.* v. *Tedford*, Burr. S. C. 57; *R.* v. *St. Nicholas in Harwich*, *id.* 171.

(*e*) *R.* v. *Tedford*, Burr. S. C. 57; *R.* v. *Bowling*, *id.* 171. See as to Appeals from Orders of Removal, *post*, Chap. V.

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their opinion as a jury on it, but are to draw conclusions and form an opinion from the evidence before them, *e. g.*, whether or not there was a contract of hiring or apprenticeship. Having so done, they may ask the opinion of the court above, whether the facts stated, and which led them to the judgment they have formed, were sufficient to warrant the conclusion arrived at (*f*). However, where they do both, *viz.*, state facts and draw conclusions from them, the court will not in general disturb the finding, unless the case shows it to have been without, or contrary to, evidence (*g*).

The court above will not consider any question, besides that reserved by the sessions (*h*), or infer anything which should have been stated on the case but is omitted; nor will they send it back on that account to be re-stated. Unless the facts disclosed by a *special case* show the decision of sessions to be necessarily wrong, their order will not be disturbed (*i*). So, if they have discretion in the matter adjudged by them and have exercised it (*k*), they ought not to ask a question, and in case of the answer being one way, to order the appeal to go back to the sessions for rehearing (*l*); but must state the case in such a form that the opinion of the court on it would be final. And the court will not notice the facts stated in a case reserved, on the making of an order respiting an appeal intended to raise the point whether the sessions ought to have entered and respited or not (*m*).

The case must state the decision of the justices.

It seems to be the duty of counsel to take care, as far as lies

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(*f*) *Reg.* v. *Pilkington* (*Inh.*), 13 L. J., M. C. 61, and *Reg.* v. *Kingsclere* (*Inh.*), *ante*.

(*g*) Per *Coleridge*, J., in *R.* v. *Great Wishford*, 4 A. & E. 224, and *ante*, p. 696. See, however, instances where the Court of King's Bench has disregarded this doctrine, and reversed the finding of sessions on the evidence as stated by them; see *R.* v. *Ardington*, *ante*, p. 706, *post*, Chap. V.; *R.* v. *Threkingham*, 7 A. & E. 868. Also *R.* v. *Rickinghall Superior*, 1 N. & M. 47; *R.* v. *Claxby*, *id.* 118; *R.* v. *Nether Knutsford*, 1 B. & Ad. 726.

(*h*) *Reg.* v. *Hartpury*, 8 Q. B. 566; 16 L. J., M. C. 105; *Reg.* v. *Thomas*, 7 E. & B. 399; *Reg.* v. *Dickenson*, 7 E. & B. 831; 26 L. J., M. C. 204; *R.* v. *Guildford*, 2 Chit. R. 284; *R.* v. *Aire Navigation*, 2 T. R. 666.

(*i*) *R.* v. *Snape*, 6 A. & E. 278; 1 Nev. & P. 429; *Reg.* v. *Pilkington* (*Inh.*), 13 L. J., M. C. 61; see *ante*, p. 706.

(*k*) *Reg.* v. *Fouch*, *ante*; *Reg.* v. *White*, 12 L. J., M. C. 35; *Reg.* v. *Kingsclere*, and *Reg.* v. *Pilkington*, *ubi sup.*; *Reg.* v. *London & N. W. Rail. Co.*, 43 L. J., M. C. 57; *Reg.* v. *Kesteven*, 3 Q. B. 819; 13 L. J., M. C. 78; *Reg.* v. *Martin-cum-Grafton*, 10 Q. B. 971; 16 L. J., M. C. 159; *Anon.* Salk. 486.

(*l*) *Reg.* v. *Ickham*, 3 Q. B. 815, n.; *Reg.* v. *Wistow*, *ib.*; *Reg.* v. *Worth*, *ib.*; and 4 Q. B. 132; *Reg.* v. *West Boughton* (*Inh.*), 13 L. J., M. C. 41. See *Reg.* v. *Justices of Flintshire*, 2 D. & L. 143; 1 New Sess. C. 288, *acc.* In *Reg.* v. *St. John's, Margate* (*Inh.*), 1 Q. B. 252, they quashed the order of sessions according to one term in the case, but would not send it back to be reheard as there prayed.

(*m*) *Reg.* v. *London & N. W. Rail. Co.*, 43 L. J., M. C. 57, *ante*, p. 678.

in their power, that as well all material facts proved, as all inferences of fact to be drawn from the evidence, should be found by the justices, and duly noted down by the chairman, for the signatures of counsel to a special case are taken as guaranteeing this to have been done (*n*).

Sessions must form their own Conclusions as to Facts.

The procuring the statement of a special case after it has been granted, is thus carried into effect. In contemplation of law, it is taken to be stated by the justices at sessions (*o*); but as the accuracy requisite makes it desirable that it should be framed by counsel (*p*), it is usually drawn by the junior counsel for the party on whose application it is granted, being afterwards sent to the junior counsel on the other side for his perusal and approbation. Differences between them as to its contents are eventually settled by reference to the chairman's notes. The case is then signed by the junior counsel on each side. If no counsel are employed, or if they cannot agree on the facts to be stated, even with the chairman's assistance, he should, with the concurrence of a majority of justices on the bench, state and sign the case himself (*q*), for under special circumstances they are compellable to state a case before granting it (*r*), though a *mandamus* for that purpose was refused where it was clear that the proceeding could lead to no result, *e. g.*, where the chairman, in consequence of his own opinion and that of the other justices on the facts, refused to sign any statement but one which would have excluded the point of law relied on by the party demanding the case (*s*).

Mode of stating special case.

In general, when a case is specially stated, it is taken to contain the full reasons of the order of sessions; on which account, if the court hold those reasons to be ill, they will quash the order (*t*).

There is no specific form or precedent according to which a special case must be drawn (*u*); but, nevertheless, there are certain rules to be collected from a long succession of determinations which have been alluded to. Stating the facts, &c.

(*n*) Reporter's note, *R.* v. *Great Wishford*, 5 N. & M. 540.

(*o*) Per *J. Parke*, J., MSS., cited in 1 D. P. C. 167.

(*p*) Per *Cur.* in *R.* v. *Woolpit*, 4 A. & E. 216; 5 N. & M. 526, 538. In one case an order of removal, and an order of sessions confirming it, were quashed for the imperfect statement of facts in a special case. See *R.* v. *Luffington*, Burr. S. C. 232; *R.* v. *Dursley*, 6 T. R. 53.

(*q*) *R.* v. *Great Wishford*, 5 N. & M. 540; 4 A. & E. 224.

(*r*) *R.* v. *Effingham* (*Earl*) *and others*, 2 B. & Ad. 393, note; *Jarvin* (*Ex parte Inh.*), 9 D. P. C. 120; *R.* v. *Justices of Pembrokeshire*, 2 B. & Ad. 391. *J. Parke*, J., is reported as having said that justices were *not* compellable to settle a case, but *qu.*, 1 D. P. C. 168, *R.* v. *Justices of Suffolk*.

(*s*) *R.* v. *Justices of Pembrokeshire*, 2 B. & Ad. 391.

(*t*) Per *Lee* and *Page*, JJ., in *R.* v. *Tedford*, Burr. S. C. 57.

(*u*) A form is, however, given in 4 Burn's J. by Chitty, 29th ed. 1401; and the form in *R.* v. *St. Paul's, Exeter*, 10 B. & C. 12, is approved. See also as to stating the question for the court, *R.* v. *Ightham*, 4 A. & E. 937.

Form of Special Case.

merely, without distinctly setting forth the points intended for consideration, is very inconvenient (*x*).

The justices should not only state all the facts which they consider necessary to enable the court to form an opinion on the point of law respecting which they want information, but those also which are material, and were proved before them, that it may be a true state of the case (*y*); for the court will not permit a general or speculative question of law to be raised, by omitting any particular circumstances belonging to the case before them, which are material to its decision (*z*).

When justices decide that a special case shall be made, they virtually say, that the cause shall be adjourned till that is done (*a*); and, therefore, the want of the necessary adjournment or respite is merely the omission of the clerk, and may be supplied at any time (*b*).

Proceedings to remove the order and the case.

Within six calendar months (*c*) after the making of the order of sessions on which the case is granted, the unsuccessful party sues out a *certiorari* to remove (in the terms of that writ) "all and singular the *orders* made by the sessions with all things touching the same (or, thereto belonging)" (*d*), into the Queen's Bench on the crown side. Notice of this motion must be given to two of the justices "by and before whom" (*e*) the order of sessions was made, and on recognizance entered into (as to which see *post*, p. 724), the *certiorari* will issue on a motion paper signed by counsel and handed in to the officers of the crown office (*f*). A rule is then granted on counsel's signature for filing the order and case, after which a rule is granted on counsel's motion, calling on the successful parties to show cause

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(*x*) *R.* v. *Harbury*, 1 B. & Ad. 360.

(*y*) *R.* v. *Dursley*, 6 T. R. 53. See per Lord *Hardwicke*, C. J., *R.* v. *Tedford*, Burr. S. C. 57; 2 Nol. 4th ed. 563.

(*z*) *R.* v. *Francis Hill*, Cowp. 613; 2 Nol. 654; 5 Burn, J., 30th ed. 380.

(*a*) Admitted in *Reg.* v. *Oundle* (*Inh.*), 3 Q. B. 353. See *R.* v. *Justices of Suffolk*, 1 Dowl. 163; and *R.* v. *Justices of Staffordshire*, *infra*. Also 2 B. & Ad. 391, but if it comes again before quarter sessions, no special case having been stated, they may dispose of it according to their first opinion.

(*b*) Per *cur.* in *R.* v. *Sussex*, 2 Bott, 6th ed. pl. 1002. See *R.* v. *Hedingham Sible*, Burr. S. C. 112; 2 Nol. 566, 605, *semb. contra*, 4th ed.

(*c*) *R.* v. *Justices of Staffordshire*, 1 D. P. C. 484, *post*, p. 721.

(*d*) These words include the special case; and the original order of removal, *Reg.* v. *Justices of Cornwall*, 1 New Sess. C. 414. See *id.* 350; also *post*, as to *Certiorari*, p. 716 *et seq.* It is said that where a special case has been granted, the course of the crown office is for the successful party to give a consent, and that the *certiorari* issues thereon, 14 L. J., M. C. 42.

(*e*) See *Reg.* v. *Darton* (*Inh.*), 14 L. J., M. C. 41. See *post*, p. 721.

(*f*) See *post*, p. 720. There was formerly a motion made in court. Thus, in *R.* v. *Sawbridgworth*, 1 Barnard. 297, a rule to show cause was refused; and see per *Buller*, J., 2 T. R. 80. In Mich. 1840, *Coleridge*, J., in the Q. B. Practice Court, refused to hear a motion for a rule *nisi* for a *certiorari* to remove a special case *only* from sessions, saying, it must be issued at the party's peril, Tyr. MS., but see *R.* v. *Justices of Middlesex*, 8 D. & R. 117, and *R.* v. *Terrett*, 2 T. R. 734.

Hearing of Appeal by Queen's Bench.

on a day fixed why the order of sessions should not be quashed for the insufficiency thereof. Notice of the rule must be given to the two justices and to the parties successful below.

Whether or not the case is settled at that time is immaterial (*g*). When settled in the case of an *order*, the order may, by leave of the court only (*h*), be put in the crown paper for argument, upon a rule to show cause why it should not be quashed (*i*). In *all other* cases the conviction or other proceedings intended to be argued shall be put into the crown paper on a rule for a *concilium* specifying the day on which the case shall be put in the paper for argument, and shall be drawn up and served six days at least before such day, within forty miles of London, and eight days in all other cases (*k*), the case is then argued in the Queen's Bench on one of the crown paper days in term, *viz.*, on a Wednesday or Saturday.

Proceedings where attempts to settle a case are abortive.

Where, however, the original order of removal was *confirmed* by the sessions subject to a case, but the counsel disagreed as to its terms, and the chairman and justice did not settle it when referred to for that purpose, a *mandamus* issued commanding them to enter continuances and hear the appeal; for they had not decided the appeal, their order of confirmation being conditional, and no order at all if no case was returned (*l*). In the last case, though nearly two years elapsed between the granting the case and the application for a *mandamus*, the *certiorari* had been sued out within six calendar months, as required by law. But where an order of removal was confirmed at sessions, subject to a special case, which remained unsettled for more than six calendar months after it was granted, and *no certiorari had been sued out in time*, the *mandamus* to enter continuances and hear the appeal was refused; for the order had become absolute at the end of those months, no *certiorari* having been sued out (*m*). Where an appeal was *dismissed* below for a mere breach of the practice of the particular sessions, in not giving the required notice of trying a respited appeal, and a case was reserved on application of the appellants, but they abandoned the remedy thus sought, and did not bring up the case, the court refused to grant them a *mandamus* to enter continuances and hear it (*n*).

(*g*) See 1 Chitt. Stat. *tit.* "Certiorari," 133, note; *R.* v. *Bloxam*, 1 Ad. & E. 386.

(*h*) *Kennet and Avon Navigation Company* v. *Great Western Railway Company*, 2 D. & L. 115; 13 L. J., K. B. 304.

(*i*) Reg. Gen. Hil. 1844, No. 21, printed in Archb. Practice of Crown Office, Introd. p. 1.

(*k*) *Ibid.* See No. 22, as to delivery of paper books with points for argument in margin, *ibid.*

(*l*) *R.* v. *Justices of Suffolk*, 1 D. P. C. 163, and MS. case there cited and relied on. See 1 D. P. C. 484.

(*m*) *R.* v *Justices of Staffordshire*, 7 E. & B. 939, per Lord *Campbell*; 1 Dowl. P. C. 484 (approving *R.* v. *Justices of Suffolk*, 1 D. P. C. 163, and cited by Lord *Denman*, 5 A. & E. 112). See *R.* v. *Justices of Sussex*, 1 M. & S. 734; *Id.* 631; *R.* v. *Kaye*, 1 D. & R. 436; 4 T. R. 281.

(*n*) *R.* v. *Justices of West Riding*, 1 A. & E. 606. However, where the

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Proceedings where special case abandoned.

Again, where, on appeal against an order of removal, the sessions, without going into the appeal, *quashed* the order, on the ground that the examination sent to the appellants did not state the pauper to be chargeable at the time of making the order, but afterwards granted a case to the respondents on the point of construction of the act respecting it, but the case was not brought up, the court refused to hear the point discussed on a rule obtained by the respondents for a *mandamus* to enter continuances and hear the appeal (*o*), and discharged the rule. For though the respondents might have forborne to take a case, and might then have applied for a *mandamus*, they could not have both remedies at once (*p*). So a rule for a like *mandamus* was refused where the sessions had *dismissed* an appeal unheard, confirming the order of removal, because the notice of appeal had been served on one only of several parish officers, but had granted a case, at the instance of the appellants, which was not brought up (*q*). Where an appeal has been dismissed for insufficiency of its grounds as stated, without hearing evidence, a motion for a *mandamus* to enter continuances and hear an appeal, is cheaper than a case, but if the rule for the *mandamus* is discharged, it is with costs (*r*).

The facts are for the judgment of the sessions (*s*). Where it was made a question of fact at a sessions whether there was a hiring and service for a year in the appellant parish, and the sessions confirmed the order of removal, thus virtually holding the affirmative, but granted a case for the opinion of the court whether a settlement was thus gained, which case stated the evidence as to that fact ; the court said that the sessions being bound to hear the evidence, the case amounted to a finding by them of a fact, the decision of which belonged to them, *viz.* that there was a hiring and service for a year in the parish to which the removal had taken place, and held that such finding ought not to be disturbed, if there were any premises to warrant it (*t*). But where an order of removal was confirmed, and the

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sessions dismissed an appeal against an order of justices for executing a suspended order of removal and payment of intermediate expenses, on a preliminary point, *viz.* that notice of apprenticeship was given too late, but offered to grant a case, it was held that appellants were not *bound* to accept the case thus volunteered by the sessions, and might apply for a *mandamus*. *Reg.* v *Justices of Yorkshire* (*West Riding*), *In re Chorlton Township*, 11 L. J., M. C. 34.

(*o*) *R.* v. *Justices of Suffolk*, 6 A. & E. 109; 1 N. & P. 306.

(*p*) Per Lord *Denman*, *ibid.*

(*q*) *R.* v. *Justices of Northamptonshire*, in *Morborn* v. *Warmington*, 6 A. & E. 111, n. Rule for *mandamus* to enter, &c. and to hear the appeal obtained by appellants, was discharged.

(*r*) *Reg.* v. *Recorder of Leeds*, 2 Q. B. 547.

(*s*) 2 A. & E. 393.

(*t*) *R.* v. *St. Andrew the Great, Cambridge*, 8 B. & C. 664; *S. P.* in *R.* v. *Rosliston*, *id.* 668; *R.* v. *Edwinstowe*, *id.* 671; *R.* v. *St. Martin's in Leicester*, *id.* 674; *R.* v. *Great Wishford*, 4 A. & E. 216; *R.* v. *Snape*, 1 N. & P. 429. See *ante*, p. 707. However, in *R.* v. *Ardington*, 1 A. & E. 260, (observed on *arguendo*, 3 A. & E. 162, and per *Cur.*, 2 Q. B. 311,) the court disregarded and reversed the decision of the sessions on the evidence,

case set out the evidence upon which a yearly hiring in the respondent parish was sought to be supported, without any finding on the fact of the yearly hiring, the case was sent back to be re-stated (*u*). *Mode of Statement of Case.*

It seems that the court above will not be concluded by the finding of sessions as stated in a special case, where they see that that finding is perfectly contradictory to the facts proved and set out in the case as constituting the ground of the decision; *e. g.* where sessions find the fact of a coming to settle, and mistakenly refer it to the court with the facts on which their finding was grounded as a matter of law (*x*). In the last case, many instances are collected where the court above has interfered by examining and adjudging on matters of fact, if brought before it for their opinion by special cases (*y*), though the sessions had themselves decided on the facts subject to such opinion. So where the sessions have decided on the fact against or without evidence (*z*).

Where the special case is manifestly insufficient as stated, *e. g.* if it contains evidence only, without finding facts (*a*), or omits circumstances material to the decision of the particular case, in order to raise a general question which would not otherwise arise (*b*), or without finding fraud, states facts which nearly demonstrate that the decision of the sessions proceeded on the ground of fraud (*c*), the court may, either by consent (*d*), or of their own authority, send it back to the sessions to be re-stated (*e*). Upon this taking place, it is the duty of those who contested the original order to give notice to those who support it, not merely of the order of Queen's Bench sending the case back for re-statement, but also of any proceeding to have the case re-heard at sessions. For where an order had been so quashed, and the case stated and sent back, and the respondents, *without giving notice* of trial, attended the sessions, and in ap- Where case sent back to be re-stated.

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both being set out in the case; and held that they were wrong in implying a hiring in a third parish. See *ante*, p. 706.

(*u*) *R.* v. *Road (Inh.)*, 1 B. & Ad. 362

(*x*) *R.* v. *Woolpit*, 4 A. & E. 205; *Coleridge*, J., *dissentiente;* but see by same learned judge, 4 A. & E. 224, and *id.* 929.

(*y*) Per *Coleridge*, J., 4 A. & E. 213; 3 A. & E. 162; 1 A. & E. 260; *R.* v. *Field*, 5 T. R. 587; as stated, 8 Ad. & E. 383, *Reg.* v. *Lynn;* and *R.* v. *Snape*, 6 A. & E. 278.

(*z*) Per *Coleridge*, J., *R.* v. *Great Wishford*, 4 A. & E. 224. See *ante*, p. 712.

(*a*) See *form of rule* for sending case to be re-stated, *id.* 687, and 1 B. & A. 645, *R.* v. *Justices of Suffolk; R.* v. *Road (Inh.)*, 1 B. & Ad. 362. Except where the conclusion ought to be the same as that arrived at by the sessions, *R.* v. *Shebbeare*, 1 East, 73.

(*b*) *R.* v. *Francis Hill*, Cowp. 613

(*c*) *R.* v. *Llanfihangel Abercowin*, 4 N. & M. 355.

(*d*) *R.* v. *Nether Heyford*, Burr. S. C. 479.

(*e*) *R.* v. *Winwick*, 8 T. R. 455; *R.* v. *Road*, 1 B. & Ad. 362. So even where no case was reserved, but a fact appeared doubtful on the original order of removal, *R.* v. *Margam*, 1 T. R. 775; but not so if they admit improper evidence, *R.* v. *Rawden*, 2 A. & E. 256; 4 N. & M. 97, *ante.*

Of Statement of Special Case.

The sessions must re-hear on case being sent back.

pellant's absence obtained a confirmation of the order, the order so confirmed was quashed in Queen's Bench on *certiorari* (*d*). The sessions must proceed *de novo*, as on a new trial, to *re-hear* the whole case (*e*); and, except by consent, can take no cognizance of any evidence previously given (*f*), unless the case is sent back only to ascertain some particular fact to which the proof may then be confined (*g*), or to explain some ambiguity of expression or omission of an inference, which can be supplied by the justices without hearing witnesses (*h*). But fresh evidence may in every case be given (*i*), and a new order made.

However, no case will be sent back to be re-stated on a mere formal objection, or for containing an immaterial or irrelevant fact, if enough appears upon it to enable the court above to give judgment on the merits of the question submitted to them; particularly when the only possible result of sending back the case would be to produce delay and expense (*k*);—or if the facts stated warrant the judgment, though the court below has drawn an inference which they do not warrant (*l*), or has rejected evidence improperly, which, if admitted, ought not to vary their conclusion (*m*); nor on an affidavit of a witness that the clerk of the peace did not state his evidence truly (*n*), or on affidavit that the case does not agree with the facts proved, if it purports to be signed by the chairman, though he does not recollect signing it (*o*); or that it does not state what the conversations were which took place between parties to a written agreement at the time of signing it, and which it alleges that the respondents proposed to give in evidence, if it distinctly states, as a question for the opinion of the court, whether the agreement was a contract of hiring (*p*).

Where a case respects a poor rate, the order of sessions will not be remitted there, except for a defect on the face of the case (*q*); and where "iron" as well as coal mines were rated, before iron mines were rateable, yet the rate was confirmed generally at sessions, their order was quashed as wrong at all events, the court refusing to send it back (*r*), though the ses-

(*d*) *Reg.* v. *Barnes*, 3 Q. B. 437.
(*e*) *R.* v. *Bromley*, 6 T. R. 330; *R.* v. *Bloxham*, 1 A. & E. 386; 3 Nev. & M. 385; 2 Nolan, 610.
(*f*) *R.* v. *Page*, 2 Bott, by Const. 5th ed. 743.
(*g*) *R.* v. *Hitcham*, Burr. S. C. 489.
(*h*) *R.* v. *Bray*, Burr. S. C. 684. See next note.
(*i*) *R.* v. *Hitcham*, Burr. S. C. 489; and *R.* v. *Bloxham*, 1 A. & E. 386; 3 N. & M. 385. See *R.* v. *Justices of Suffolk*, 1 B. & A. 645.
(*k*) *R.* v. *Minchinhampton*, 3 Burr. 1310, on a rate; *R.* v. *Middlezoy*, 2 T. R. 41. See 2 Nolan, 4th ed. 607.
(*l*) *R.* v. *Rickinghall Superior*, 1 N. & M. 47.
(*m*) *R.* v. *Nutley*, Burr. S. C. 701.
(*n*) *R.* v. *Burgh-in-the-Marsh*, Burr. S. C. 145; 2 Bott, by Const. 5th ed. 747; *Thackham* v. *Trindon*, 2 Salk. 489.
(*o*) *R.* v. *Matlock*, 5 B. & Ad. 883.
(*p*) *R.* v. *Billinghay* (*Inh.*), 1 N. & P. 149.
(*q*) *R.* v. *Coode*, 2 Nolan, 608, 4th ed.
(*r*) *R.* v. *Cunningham*, 5 East, 478.

sions only had that power to amend the rate (*s*). So where a rate was quashed at sessions, and it appeared in the King's Bench that a large tract of land was not assessed therein, the order of sessions was confirmed (*t*); but where the sessions confirmed a rate, and the court above held certain burgesses to be improperly omitted, the order of sessions was sent back to have the rate amended by inserting them (*u*). Where necessary, special directions are inserted in the rule by which the order is sent down, commanding the sessions to inquire into and state particular facts (*x*). A new case may, if defective, be again remitted to sessions for further inquiry (*y*). Other modes of dealing with an imperfectly-stated case are, quashing either or both orders by consent of counsel on terms (*z*); inserting a fact in the case under a rule obtained by consent to amend the order (*a*); and admitting the fact by counsel during argument (*b*).

Costs on a Special Case.

A re-hearing on the merits was allowed where the respondents had stood on a point of form at the sessions, and got the order of removal quashed there, the opinion of the court being afterwards adverse to them on the point of form (*c*).

Mr. Nolan observes, that no case seems ever to have been remitted to sessions to find the fact of fraud, however pregnant such a conclusion might be on the evidence stated (*d*).

By the practice of the crown office, if a rate singly appealed against, or one of several rates appealed against is *confirmed*, the costs fall on the appellants; but if *quashed* or *reduced*, no costs are allowed on either side.

Rule as to costs on special case.

The quarter sessions confirmed an order of removal subject to a special case. That case was sent up to the Court of Queen's Bench, on a rule obtained for quashing the order of sessions. That rule was discharged, and the order of sessions confirmed. The party who brought up the order paid the costs; for the court will not discharge the rule without giving judgment on the confirmation of the order (*e*).

When a conviction has been quashed on appeal for *want of form*, subject to the opinion of the court above on the validity

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(*s*) The Q. B. could not amend it, *R.* v. *Milton*, 3 B. & A. 120.

(*t*) *R.* v. *Aberavon*, 5 East, 453.

(*u*) *R.* v. *Watson*, 5 East, 480. See *R.* v. *Topham*, 12 East, 546.

(*x*) *R.* v. *Clifton-on-Dunsmore*, Burr. S. C. 697; *R.* v. *Margam*, 1 T. R. 775 (orders of removal); *R.* v. *Hogg*, Cald. 266 (poor's rate).

(*y*) *R.* v. *Bray*, Burr. S. C. 682; *R.* v. *Clifton-on-Dunsmore*, *supra*.

(*z*) 2 Nol. 4th ed. 606; *R.* v. *Himley*, Burr. S. C. 115.

(*a*) *R.* v. *Great Chart*, Burr. S. C. 194.

(*b*) See *R.* v. *Llandverras*, Burr. S. C. 573; *R.* v. *Warblington*, 1 T. R. 241. The rule for quashing or confirming the orders must state the facts admitted, and that they were admitted by counsel. See form of rule, *R.* v. *Llandverras*.

(*c*) *Reg.* v. *Arlecdon*, 11 A. & E. 87; 3 P. & D. 95, *semb.* overruling *R.* v. *Honiton*, Burr. S. C. 680; 2 Nolan, 617, 4th ed.

(*d*) 2 Nol. 4th. ed. 561, 564.

(*e*) *Reg.* v. *Latchford* (*Inh.*), 14 L. J., M. C. 20.

Of Certiorari to remove Orders of Sessions.

of the objection, and it appears to that court that there is no defect in form, the case will sometimes be sent back to sessions to be re-heard on the merits (*f*). But if a conviction is quashed at the sessions on a ground independent of the merits, and is set up again by the court above on *certiorari*, the appellant cannot afterwards go to sessions to have the appeal again discussed on the merits, by entering continuances from the first appeal (*g*).

Section 9.

of certiorari to remove orders of sessions.

We have before referred to the mode of removing indictments from quarter sessions into the Queen's Bench by writ of *certiorari* (*h*). We will now treat of the *certiorari* as it relates to matters before sessions, such as their orders, &c.

The writ goes to bring before the court orders of quarter sessions or of justices out of sessions, either to rectify them or quash them; and although such orders may be avoided as nullities in collateral proceedings, yet that is not sufficient, and the court will not permit them to exist if their existence be a grievance to the party convicted (*i*). Since the 12 & 13 Vict. c. 45, however, the frequency of the writ is much diminished.

What orders, &c. may be removed.

Articles of the peace may be brought up from quarter sessions and the order to find sureties therewith, and the court will examine into the sufficiency of the articles to warrant the order (*k*). A poor rate cannot be removed by *certiorari* on account of the inconvenience that would ensue to the poor by the delay, but all the orders of justices relating to it may (*l*). An order of quarter sessions that no officer of the court should take any fee from defendants in a judicial order (*m*); and so, also, an order allowing or disallowing items in the treasurer's accounts (*n*); or an order that barristers should have pre-audience in court (*o*).

Any order made by a court of quarter sessions deciding an appeal, composed in part of persons interested in the matter

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(*f*) *R.* v. *Ridgway* (*Inh.*), 5 B. & A. 527; 1 D. & R. 132; *R.* v. *Frieston* (*Inh.*), 5 B. & Ad. 597; see 4 B. & A. 86.

(*g*) *R.* v. *Allen*, 15 East, 333. See 3 T. R. 519, and 1 A. & E. 606.

(*h*) *Ante*, p. 357 *et seq.*

(*i*) *R.* v. *Berkley*, 1 Ken. 81, 103; 1 Burn's J., *tit.* "Certiorari," 38th ed. 616; *Reg.* v. *Justices of Yorkshire*, 7 A. & E. 533; *R.* v. *Hopkins*, E. B. & E. 100; *Reg.* v. *Allen*, 4 B. & S. 915; 33 L. J., M. C. 98.

(*k*) *Re Dunn*, 4 P. & D. 415.

(*l*) *R.* v. *Uttoxeter*, 1 Bott, 292; *R.* v. *King*, 2 T. R. 235; *vide* 2 Str. 932, 975.

(*m*) *Reg.* v. *Coles*, 8 Q. B. 75; 15 L. J., M. C. 10.

(*n*) See *Reg.* v. *Saunders*, 3 E. & B. 763; 14 L. J., M. C. 45.

(*o*) *Reg.* v. *Justices of Denbighshire*, 2 New Sess. C. 422, nom. *Ex parte Evans*, 5 Q. B. 279.

When Writ lies.

sub judice, is removable by *certiorari* (*p*). A *certiorari* to remove an order of entry and respite, founded upon affidavits of the facts, is the best mode of obtaining the decision of the court on the question as to the right of the quarter sessions to enter and respite an appeal; as, for instance, where notice of appeal had not been given when required by statute, and the sessions have nevertheless entered and respited the appeal (*q*). And the court will take no notice of the facts, if stated in the form of a special case reserved at the time of making such order of entry and respite, to raise the question whether the order was properly made or not (*r*).

Where order not of judicial nature.

The objection that the instrument removed is not of a judicial nature may be taken on showing cause against the rule to quash it (*s*).

Though the attorney-general cannot himself issue a *certiorari*, yet the court is bound to grant it on his application *ex officio*. For he represents the crown, which has an absolute right to it in all cases, unless where the statute taking away the *certiorari* names the crown.

The like rule prevails as to private prosecutors in all cases of proceedings *merely penal*, and appeals on them, even where he has become nominally a defendant (*t*). Thus, where a conviction is quashed at sessions with costs to be paid by the prosecutor, and he seeks to remove and quash the order of sessions in the court above, he is entitled to a *certiorari*, though the crown has no actual interest (*u*). Again, if the crown thinks fit to take up the defence of a party, the attorney-general's signature will command a *certiorari* without special ground laid (*x*), or being restricted by any statute as to the *time* of making the application (*y*).

This writ being beneficial for the subject, cannot be taken away, except by express words; nor will expressions of minor stringency, or indirect application avail; (*e. g.*, that the sessions, only on appeal, shall "hear and *finally* determine" (*z*),) if they

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(*p*) *Reg.* v. *Cheltenham Commissioners*, 1 Q. B. 467; 10 L. J., M. C. 99; *Reg.* v. *Recorder of Cambridge*, 8 E. & B. 637; 27 L. J., M. C. 160; *Re Hopkins*, E. B. & E. 100; *Reg.* v. *Allen*, 4 B. & S. 915; 33 L. J., M. C. 98. See, as to this objection, *ante*, pp. 37, 690 *et seq.*

(*q*) *Reg.* v. *Justices of Lancashire*, 8 E. & B. 563; 27 L. J., M. C. 161.

(*r*) *Reg.* v. *London and North Western Rail. Co.*, 43 L. J., M. C. 57.

(*s*) *Reg.* v. *Hatfield Peverel* (*Inh.*), 18 L. J., M. C. 225; *Reg.* v. *Overseers of Salford*, 21 L. J., M. C. 223.

(*t*) *R.* v. *Thomas*, 4 M. & S. 442. See 2 Chit. R. 136; *R.* v. *Eaton*, 2 T. R. 89; *R.* v. *Clace*, 4 Burr. 2458; *R.* v. *Bodenham* (*Inh.*), 1 Cowp. 78; *R.* v. *Stannard*, 4 T. R. 161; *R.* v. *Cumberland*, 6 T. R. 194; *R.* v. *Davies*, 5 *id.* 626; *R.* v. *Allen*, 15 East, 341; *R.* v. *Boultbee*, 4 A. & E. 498; 6 Nev. & Man. 26.

(*u*) *R.* v. *Boultbee*, 4 A. & E. 498; 6 N. & M. 2.

(*x*) 1 East, 303, n.; 4 Burr. 2458; *R.* v. *Stannard*, 4 T. R. 161; cases collected 1 Burn's J., *tit.* "Certiorari," S. IV.

(*y*) *R.* v. *James*, 1 East, 303.

(*z*) *R.* v. *Jukes*, 8 T. R. 542; *R.* v. *Leighton*, Fortesc. 173; *R.* v. *Lomas*, Comberb. 297; 2 Hawk. c. 27, s. 23; Dalton, chap. 195; *R.* v. *Morley*, 2 Burr. 1040. The act must expressly direct that no *certiorari* shall issue.

Of Certiorari to remove Orders of Sessions.

only lead to an inference, however plain, that the *certiorari* was designed to be taken away (*c*).

We have seen that the writ of *certiorari* cannot be taken away by implication (*d*); nor is a general reference to offences created by a former act, in which the *certiorari* is taken away, sufficient to take it away in a later act, in which the prohibitory clause is either repeated specially, or is to be understood by necessary intendment (*e*). But where the later of several acts, in order to the carrying its powers into execution, incorporated "all the *provisions*" of two previous acts, except certain portions of them which its own enactments expressly altered; a clause in one of them by which the *certiorari* was taken away, was held to be a "*provision*" of the former act, embodied in the new with reference to proceedings under it (*f*); and the *certiorari* was lost.

So where an act provided that an order of justices should not be removed by *certiorari* "unless recognizance were given by the party removing, a *prosecutor* might remove an order of sessions without entering into such recognizance (*g*).

Where *certiorari* is taken away, order removable when.

Though the *certiorari* be taken away by statute, an order bad on the ground that it is made without jurisdiction is still removable, the want of jurisdiction being shown by affidavit (*h*).

Again, if a justice or justices, in or out of quarter sessions, assume to act under a statute, but have no jurisdiction, their order, &c. may be removed by *certiorari*, in order to be quashed,

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(*c*) The practice of taking away *certiorari* by statute did not seem to prevail till the beginning of the reign of William III. after appeals to to the sessions had come into general use, which begun about the end of Charles the Second's reign; Paley on Conv., 4th ed. 351. Lord *Kenyon* used to lament the frequency of acts taking away the *certiorari*. See 8 T. R. 542.

(*d*) *R.* v. *Jukes*, 8 T. R. 542; *R.* v. *Hale*, 5 T. R. 542; 2 Burr. 1040; Cowp. 523; 15 East, 376; 1 B. & C. 666; 3 Dowl. & R. 84; cases collected in *R.* v. *Justices of Ripon*, 7 A. & E. 418; 2 Nev. & Per. 411. Where counts on an act creating a misdemeanour were joined with counts at common law for conspiracy to obtain goods by false pretences, it was held that the *certiorari* remained, notwithstanding a clause in the act which took it away as to proceedings under it, *R.* v. *Saunders*, 5 D. & R. 611 (on 30 Geo. 2, c. 42, now repealed); and see *R.* v. *Fowler*, 1 A. & E. 836; 3 Nev. & M. 826.

(*e*) *R.* v. *Terrett*, 2 T. R. 734 (on old Vagrant Act, 17 Geo. 2, c. 5, s, 5). Note, the present Vagrant Act, 5 Geo. 4, c. 83, has no clause taking away the *certiorari; R.* v. *Kaye*, 1 D. & R. 436. See Paley, 4th ed. 353 *et seq.*

(*f*) *R.* v. *Fell*, 1 B. & Ad. 340 (on the acts respecting employ of children in factories); *R.* v. *Hester*, 4 D. P. C. 589 (on the game acts); *R.* v. *Liverpool* (*Mayor*), 3 D. & R. 275; 2 *id.* Mag. Ca. 4; *R.* v. *Kaye*, 1 D. & R. 436; 1 *id.* Mag. Ca. 114.

(*g*) *Reg.* v. *Spencer*, 9 A. & E. 484; nom. *Ex parte Spencer*, 1 P. & D. 358 (on 5 Geo. 2, c. 20, s. 2). A conviction by two justices on information of Spencer had been quashed by the quarter sessions, with costs to be paid by the convicting justices. Spencer got a *certiorari* without entering into recognizances.

(*h*) *Reg.* v. *Bolton*, 1 Q. B. 66; *Reg.* v. *Justices of Warwickshire*, 6 E. & B. 837; 25 L. J., M. C. 119; *Reg.* v. *Justices of St. Albans*, 22 L. J., M. C. 142; *Reg.* v. *Wood*, 5 E. & B. 49; 21 L. J., M. C. 130; *Ex parte Henn*, 6 Ir. C. L. R. 243; *Reg.* v. *Hyde*, 21 L. J., M. C. 94; *Reg.* v. *Justices of Gloucestershire*, 15 L. J., M. C. 48.

notwithstanding a clause taking away the *certiorari* as to proceedings "had or taken *in pursuance* of the act;" for that expression is confined to cases where the inferior tribunal had jurisdiction to make the order complained of (*i*).

When Writ will be granted.

The writ is a discretionary writ, but the court, in exercising its discretion as to granting or not a *certiorari*, will grant it to a person aggrieved like a writ of error *ex debito justitiæ;* but to a stranger, who merely comes to inform the court, according to its pure discretion (*k*). But even when the party aggrieved applies, he may have acted so as to preclude himself from taking the objection (*l*). Sometimes it will require an affidavit of merits, as in *Reg.* v. *Davis* (*m*), where it required one before granting a *certiorari* to quash an order in bastardy. The application for the writ should be made with reasonable promptitude, though the court will not necessarily require it to be made within the term following the sessions (*n*).

How discretion of court exercised.

A rule of court exists in the Queen's Bench against granting a *certiorari* to remove orders of justices from which appeals lie by either party to the sessions before the matter be determined on such appeals, whether pending or not (*o*), for it would hinder that privilege, but if the time for appealing be expired, and no appeal is pending, the objection no longer exists (*p*). And this rule only abridges the authority of the court in cases where the right of appeal is limited to a particular time, as, *e. g.*, to the next quarter session; so that where there is no restriction as to time, the rule does not apply, for otherwise the order might never be removed (*q*). And further, this rule does not apply where the party against whom the order is made seeks to remove it, for it was made in his favour, in order that he might not lose his privilege of appeal, which he is competent to waive (*r*). However, were there no objection to the *certiorari* issuing before the time of appealing is expired, the court will, in *its* discretion, refuse to grant it, if, on the affidavits in support of the application, the ground alleged for it appears more properly the subject of appeal (*s*).

Where appeal to the sessions lies.

It has also been determined that where, by the words of any statute, the *certiorari* is taken away, but by its general tenor that was only done to give the option of appeal to the sessions,

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(*i*) *Reg.* v. *Justices of Somersetshire*, 5 B. & S. 816; 6 D. & R. 469.
(*k*) *Reg.* v. *Justices of Surrey*, 39 L. J., M. C. 145; L. R., 5 Q. B. 466; *Arthur* v. *The Commissioners of Sewers*, 8 Mod. 331.
(*l*) *R.* v. *South Holland Drainage Commissioners*, 8 A. & E. 429; *Reg.* v. *Justices of Surrey*, 39 L. J., M. C. 145; *R.* v. *Justices of Yorkshire* (*E. R.*), 3 N. & M. 93; and *Reg.* v. *Newborough*, 38 L. J., M. C. 129.
(*m*) 22 L. J., M. C. 143.
(*n*) *Reg.* v. *Justices of Brecknock*, 42 L. J., M. C. 135.
(*o*) *R.* v. *Sparrow*, 2 T. R. 196, n.
(*p*) Reg. Gen. Pasch., 1 An. 1; Salk. 147.
(*q*) Cald. 172; Andr. 343; Stra. 991.
(*r*) *Reg.* v. *Willatts*, 7 Q. B. 516; 14 L. J., M. C. 157; and see *Reg.* v. *Allen*, 4 B. & S. 915; 33 L. J., M. C. 987.
(*s*) *R.* v. *Whitbread*, Doug. 550, per Lord *Mansfield*.

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the right of proceeding by *certiorari* is only barred by the party adopting the method of appeal (*t*).

And if one party has the exclusive right of appealing, he may waive his privilege, and at once remove the proceedings (*u*).

A *certiorari* does not lie where an appeal is given, and the objection is not to the jurisdiction, but to the merits (*x*); or to remove any but judicial acts (*y*); for even though the justices should exceed their authority, and be punishable for so doing, the remedy is not by means of this writ (*z*). And if such a writ issue incautiously or improvidently, the Court of Queen's Bench will supersede it (*a*).

Writ, how obtained in term time;

During term time no writ of *certiorari* will be issued, unless applied for by the attorney-general, or granted at the discretion (*b*) of the Court of Queen's Bench, or a judge of that court, on motion by counsel in open court. The grounds of the application must be stated in an affidavit. In instances where the sessions have made an order, subject to a special case, the rule is absolute in the first instance (*c*) for removing the indictment, &c. or order of sessions, and any previous order of justices appealed against (*e. g.*, of removal (*d*)), on counsel's signature only.

in vacation.

In vacation, this writ may be obtained, as well for removing indictments as orders, &c. by applying at chambers for the order or fiat of a judge of the Queen's Bench (*e*). If the judge grants a rule for issuing the fiat, it will be *nisi* only that cause may be shown on affidavit, and if drawn up as absolute in the first instance, it will be discharged by the court (*f*). The *certiorari* is ultimately made out by the clerk in court, on parchment, and delivered to the person applying for it, together with the recognizance necessary to be given. (See *post*, pp. 726, 727.)

(*t*) *R.* v. *Eaton*, 2 T. R. 89. This result is expressly provided against by the Gaming Act, 12 Geo. 2, c. 28, s. 6.

(*u*) *R.* v. *Harman*, Andr. 343.

(*x*) *Reg.* v. *Justices of Middlesex*, 9 A. & E. 540.

(*y*) *E. g.*, order of removal as well as of sessions.

(*z*) *R.* v. *Lediard*, Say. 6; *R.* v. *Lloyd*, Cald. 329.

(*a*) *R.* v. *Wakefield*, 1 Burr. R. 488.

(*b*) *Anon.*, 7 Mod. 118; *Arthur* v. *Yorkshire Commissioners of Sewers*, 8 Mod. 131; *R.* v. *Eaton*, 2 T. R. 89; *R.* v. *Steers*, 1 Barnard. K. B. Rep. 96. See 5 T. R. 279.

(*c*) *Reg.* v. *Spencer*, 8 D. P. C. 127.

(*d*) *R.* v. *Newton*, Burr. S. C. 157; 2 Nol. 583, *post*, Chap. V.; *R.* v. *Madley*, Stra. 1198; *R.* v. *Great Chart*, Burr. S. C. 194; *R.* v. *Moor Critchell*, 2 East, 222; *R.* v. *West Cranmore*, 2 Nol. 623, n. The sessions may return the order of removal; for justices are supposed to return all the orders they make to the sessions, there to be recorded; *R.* v. *Warminster*, Stra. 470; Fortescue, 326.

(*e*) *R.* v. *Newton*, *supra*.

(*f*) *R.* v. *Chipping Sodbury*, 3 Nev. & M. 104; 2 *id.* Mag. Cas. 99. As the order of sessions which it was sought to quash stated specially that it quashed an order of removal for informality on the face of it, this resembled a special case.

Limitation of Time for moving for Certiorari.

"For the better preventing vexatious delays and expense occasioned by the suing forth of writs of *certiorari* for the removal of *convictions*, *judgments*, *orders* and *other proceedings* (*g*) before justices of the peace, it is enacted (*h*), that "no writ of *certiorari* shall be granted, issued forth, or allowed, to remove any conviction, judgment, order, or other proceedings had or made by any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the general or quarter sessions thereof, unless such *certiorari* be moved or applied for *within six calendar months* next after such conviction, judgment, order, or other proceeding shall be so had or made; and unless it be duly proved, upon oath, that the said party or parties suing forth the same hath or have *given* (*i*) six days' notice thereof in writing to the justice or justices, or to two of them (if so many there be), by and *before whom* (*k*) such proceedings have been, to the end that such justices, or the parties therein concerned, may show cause, if he or they shall so think fit, against the issuing or granting such *certiorari*."

Removal of summary convictions, orders, &c. of justices by certiorari.

Limitation of time.

As to this limitation of the time for moving for a *certiorari*, —where an act directed justices to make an order for stopping a highway, and that it should be subsequently confirmed by an order of sessions, the period of six calendar months required by this act was calculated from the date of the *latter* order (*l*), but the six calendar months run from the date of the conviction or order, unless there has been an appeal, when the time runs from the making of the order on the appeal (*m*). The writ cannot be granted on an application made later than six calendar months from the making the order, &c. which is sought to be removed, whatever has been the cause of the delay (*n*), *e. g.*, time exhausted in settling a case reserved, &c. (*o*). If an application made within the six months be dismissed as being made on insufficient materials, a fresh motion cannot be made after the six months and attached to the former proceedings so as to make it within time (*p*). And if a summons be taken out

(*g*) Excluding indictments, *R.* v. *Battams*, 1 East, 298.

(*h*) 13 Geo. 2, c. 18, s. 5.

(*i*) *Semble* "given" is satisfied by a service effected by a person who *described* himself as clerk to the attorney who had signed as attorney the notice served, *Reg.* v. *Justices of Yorkshire* (*West Riding*), in *Darton* v. *Bretton West*, 1 New Sess. C. 406; *Reg.* v. *Darton* (*Inh.*), 14 L. J., M. C. 41; *Reg.* v. *Justices of Lancashire*, 11 A. & E. 144.

(*k*) See *post*, p, 724.

(*l*) *R.* v. *Justices of Middlesex*, 5 A. & E. 626.

A sessions began on 5th April, and made an order on an appeal against an order of removal on the 7th. On 3rd October an application was made at a judge's chambers for a *certiorari* to remove the order of removal, and the writ was granted on or before 7th October. Held in time, *R.* v. *Abergele* (*Inh.*), 5 A. & E. 796, n.

(*m*) *Reg.* v. *Morice*, 1 New Sess. C. 585.

(*n*) *R.* v. *Bloxham*, 1 A. & E. 386.

(*o*) *R.* v. *Justices of Sussex*, 1 M. & S. 631, 734.

(*p*) *Reg.* v. *Cartworth* (*Inh.*), 1 D. & L. 837.

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at chambers in due time, and the judge make no order, and dismiss the summons, an application to the court after the six months has expired cannot be referred back to the summons at chambers (*q*); but if a substantial and real application is made on the last day of the six months, the applicant is not to suffer because the only judge before whom the matter could be heard does not happen to be in attendance on the particular day; thus, in the vacation, it is enough if he comes and makes known to the clerk in attendance at chambers the nature and object of his application, and places the materials in his hands (*r*).

The exceptions to this rule of limitation are, where the crown is a party, and requires the issuing of the writ (as in case of indictments) (*s*); or where an order of justices being defective, it becomes necessary to remove it, to give them an opportunity of reviewing the case, in order to make a valid one; and lastly, where an order having been made in favour of a party, he is obliged to resort to this remedy in order to enforce the execution of it. The restrictions of six months for the application, as well as the notice to the justices, are dispensed with. A *certiorari* obtained within the six calendar months, but not used for a long time afterwards, does not therefore become invalid (*t*).

Notice to justices of motion for certiorari.

The object of requiring notice to the justices was to enable them to show cause in the first instance against a motion for issuing a *certiorari* (*u*). Such notice must be served six days before the day on which the rule for a *certiorari* is applied for (*x*); computing those days, one day exclusive and the other inclusive of the day of moving (*y*).

It is equally necessary to serve the notice as above, whether the case which the *certiorari* is intended to bring up, has been granted by the sessions for the opinion of the Court of Queen's Bench (*z*), or whether their order has been merely irregular and void (*a*).

(*q*) *Ex parte Llanheblig* (*Inh.*), 2 New Sess. C. 315; 15 L. J., M. C. 92; *Reg.* v. *Justices of Anglesea*, 10 Jur. 816.

(*r*) *Reg.* v. *Allen*, 4 B. & S. 915; 33 L. J., M. C. 98; *Reg.* v. *St. Mary, Whitechapel*, 2 Dowl. N. S. 964; *R.* v. *Abergele* (*Inh.*), 5 A. & E. 795.

(*s*) *R.* v. *Battams*, 1 East, 298.

(*t*) Per *Patteson*, J., *R.* v. *Abergele* (*Inh.*), 5 A. & E. 799. See *Reg.* v. *Cartworth* (*Inh.*), 13 L. J., M. C. 26.

(*u*) *Reg.* v. *How*, 11 A. & E. 159; 9 D. P. C. 501.

(*x*) Where the notice stated an intention to move for a *certiorari* "on the first day of next term, or so soon after as I can be heard," and was served on the first day of the term, the rule for the *certiorari* was discharged, though the motion was not made till after the expiring of six days from the day of service, *Flounders, In re*, 4 B. & Ad. 865, Lord *Denman, dubitante*. See *Reg.* v. *Bailey*, 2 New Sess. C. 166; 15 L. J., M. C. 6.

(*y*) *R.* v. *Justices of Cumberland*, 4 N. & M. 378; *R.* v. *Goodenough*, 2 A. & E. 463.

(*z*) *R.* v. *Justices of Sussex*, 1 M. & S. 631, 734; *Reg.* v. *Justices of Yorkshire* (*West Riding*), in *Darton* v. *Bretton West*, 1 New Sess. C. 406; *S. C.* 14 L. J., M. C. 113.

(*a*) *Reg.* v. *Spackman*, 9 D. P. C. 1060.

Service of Notices of Motion.

The notice should state that it is given by the party intending to sue for the *certiorari*, and should specify who he is (*b*), naming him (*c*). The *certiorari* can only be issued at the instance of the party giving the notice; for if he avowedly drops the proceeding, it cannot issue at the instance of any other, though it may be too late to give any fresh notice to the justices (*d*). If the application for the *certiorari* is intended to be made on behalf of parish officers, the notice must be signed by all or at least a majority of them, and if signed by one only, and shown to the court to be unauthorized by the rest, nor signed on their behalf, it is insufficient (*e*). It seems it may be signed by a party who describes himself as solicitor or attorney for the parties applying for the *certiorari* (*f*).

If the notice only alleges that the justices served were "two of the justices *present at* the *sessions* at which the appeal mentioned in the notice came on for hearing," the *certiorari* obtained on it will be quashed (*g*), even though the special case has been brought up and set down for argument (*h*); for they may not have been in the commission of the peace when the sessions made the order (*i*).

Nor can this omission be supplied by issuing a fresh writ on sufficient affidavits, or by exhibiting them on showing cause, if more than six calendar months have elapsed since making the order (*k*).

(*b*) *Reg.* v. *How*, 11 A. & E. 159.

(*c*) *R.* v. *Justices of Lancashire*, 4 B. & A. 289. See also *R.* v. *Justices of Cambridgeshire*, 3 B. & Ad. 887.

(*d*) *R.* v. *Justices of Kent*, 3 B. & Ad. 250. The six months after the making the order had elapsed.

(*e*) *R.* v. *Justices of Cambridgeshire*, 3 B. & Ad. 887 (as explained in *Reg.* v. *Justices of Lancashire*, 11 A. & E. 144; 3 P. & D. 88). See 5 A. & E. 796.

(*f*) *R.* v. *Justices of Lancashire*, 4 B. & A. 289; *R.* v. *Abergele*, 5 A. & E. 795.

A notice more full in this particular, *viz.*, notice of application for a *certiorari* to remove an order of justices relating to the gaols of M. signed by "A. and B. *solicitors for* W. G., a ratepayer of M." was held good; for the signature of W. G. was not required by the act, nor did the justices show that the notice so given was not authorized by W. G., *Reg.* v. *Justices of Lancashire, In re Manchester* (*Borough*), 11 A. & E. 144; 3 P. & D. 86. A notice signed by A. B., "attorney for the present churchwardens and overseers of M. O.," was held sufficient, *Reg.* v. *Solly*, 9 D. P. C. 115. See 14 L. J., M. C. 94. Again, in *R.* v. *Abergele* (*Inh.*), 5 A. & E. 795, the notice was signed by the "attorney for the respondents," and no other account of it was given in the affidavit, but it was held sufficient, and the *certiorari* was granted. This signature, "J. B. attorney for respondents," will suffice, if appellants' and respondents' names are stated, and notice is given to every justice present at the hearing, *Reg.* v. *Justices of Wilts*, 9 D. P. C. 524; *Reg.* v. *Justices of Suffolk*, 18 Q. B. 146; 21 L. J., M. C. 169.

(*g*) *Reg.* v. *Justices of Yorkshire* (*West Riding*), 1 New Sess. C. 406; 14 L. J., M. C. 41.

(*h*) *Reg.* v. *Cartworth* (*Inh.*), 5 Q. B. 205.

(*i*) See 2 Q. B. 1037, n.; and see *post*, p. 724.

(*k*) *Reg.* v. *Gilberdike* (*Inh.*), 5 Q. B. 207; nom. *Gilbersome*, 13 L. J., M. C. 46; *Anon. id.* 28.

Of Certiorari to remove Orders.

The *affidavit of service* of the notice should state, that the two justices named and served were two of the justices *by and before* whom the appeal was heard and the proceedings had, and who made the order of sessions (*l*); and though an interested justice ought not to take part in the proceedings on the making of the order, yet if he do interfere, a notice of the application may be rightly served upon him (*m*); but it should not be served upon a magistrate who took no part in the proceedings, and avowedly abstained (*n*). If it appears on the motion that such notice has not been given, a rule even to show cause why a *certiorari* should not issue will be refused (*o*); and it is not too late to object to the notice, after a rule for *certiorari* granted and enlarged by consent (*p*).

If a magistrate present on the bench at the trial of an appeal against an order of removal was a ratepayer in the respondent parish, but stated that he should not vote or take part in the proceeding, it seems that service on him of notice of intending to apply for a *certiorari* is sufficient (*q*).

Entering into recognizances.

By 5 Geo. 2, c. 19, s. 2, no *certiorari* shall be allowed to remove any *judgment* or *order*, unless the *party prosecuting* such *certiorari* before the allowance thereof, shall enter into a *recognizance*, with sufficient sureties, before a justice of the county or place, or before the justices at sessions, where such judgment or order shall have been made or granted, or before a justice of the King's Bench, in 50*l. with condition* to prosecute the same, at his own costs and charges with effect, without wilful delay, and to pay the party in whose favour such order was made, within one month after the said order shall be confirmed, their full costs and charges according to the course of the court. And if he shall not enter into such recognizance, or shall not perform the conditions, the justices may proceed and make such further order, in such manner as if no *certiorari* had been granted.

As to filing this recognizance in crown office, see 5 Geo. 2, c. 19, s. 3, *post*, p. 730.

(*l*) *Reg.* v. *St. James, Colchester*, 2 L. M. & P. 314; 20 L. J., M. C. 203; *Reg.* v. *Justices of Cornwall*, 1 New Sess. C. 414; *Reg.* v. *Cartworth* (*Inh.*), 5 Q. B. 201; 13 L. J., M. C. 26; *Reg.* v. *Bloxham* (*Inh.*), 1 New Sess. C. 370. It has been held that an affidavit of service of notice of *certiorari* under 13 Geo. 2, c. 18, s. 5, on A. and B. "two of the justices present at the sessions at which the order was made, and who are two of the same justices *whose names are mentioned in the heading or caption of the said order*," was, *under the circumstances*, sufficient as against the appellant parish; *Reg.* v. *Sevenoaks* (*Inh.*), 7 Q. B. 136; 14 L. J., M. C. 92.

(*m*) *Reg.* v. *Justices of Suffolk*, 18 Q. B. 416; 21 L. J., M. C. 169.

(*n*) *Reg.* v. *Justices of Herefordshire*, 14 L. J., M. C. 44; 1 New Sess. C. 413.

(*o*) *R.* v. *Justices of Sussex*, 1 M. & S. 631, 734; *Flounders, In re*, 4 B. & A. 865; *R.* v. *Justices of Glamorganshire*, 5 T. R. 279.

(*p*) *Reg.* v. *How*, 11 A. & E. 159.

(*q*) *Reg.* v. *Justices of Herefordshire*, 1 New Sess. C. 413, n.

Of entering into Recognizances.

This enactment does not apply to *prosecutors* under penal acts, but to *defendants* only (*r*). The allowance is by the persons to whom the writ is directed (*s*), and the party issuing out the writ has no right to call upon the justices to allow and return it until he has entered into a proper recognizance as the statute requires (*t*); and if he does not enter into proper recognizances, and no allowance is therefore made, the court will grant a *procedendo* unless he engage to enter into the recognizances (*u*). If an allowance is made before proper recognizances are entered into, the court will quash the allowance and not the writ (*x*). If a *certiorari* has been applied for in time, but the allowance of it is quashed for a defect in the recognizance, and the time has passed for applying for the writ, the court may enlarge the time for the return, and send the writ down again to be properly allowed by the sessions (*y*). The recognizance entered into must be a single one for an entire sum of 50*l.*, and if a defendant and his sureties enter into recognizance for two sums of 25*l.* each, it is bad (*z*). But where a parish prosecutes a *certiorari* in order to remove an order of sessions, it is sufficient if the recognizance required by 5 Geo. 2, c. 19, s. 2, is entered into by *any* inhabitant on behalf of the rest of the parish, with two inhabitants sureties in a joint sum of 50*l.* (*a*). The discharge of the rule for quashing the order of sessions does in effect confirm the order within the meaning of the stat. 5 Geo. 2, c. 19, s. 2, and the consequences of that section thereupon attach (*b*).

Allowance of the writ.

If there be any variance between the description in the *certiorari* of the matters sought to be removed, and the record, the justices are not obliged to remove such record (*c*): *e. g.*, if it be directed to the justices of a county, where in fact they are only the justices of a division, or liberty, or other portion of a county, or of a city or borough within that county; or if any other materially erroneous description of person, or place, or

The return.

(*r*) *Reg.* v. *Spencer*, 9 A. & E. 482; nom. *Spencer, Ex parte*, 1 P. & D. 358; conviction quashed by order of quarter sessions, which order was removed by original prosecutor into Queen's Bench.

(*s*) *R.* v. *Abergele* (*Inh.*), per *Patteson*, J., 5 A. & E. 795.

(*t*) *R.* v. *Dunn*, 8 T. R. 219.

(*u*) *Reg.* v. *Baker*, 28 L. J., Q. B. 377.

(*x*) *R.* v. *Dunn*, 8 T. R. 217; *R.* v. *Jones*, 9 Dowl. P. C. 504.

(*y*) *R.* v. *Abergele* (*Inh.*), 5 A. & E. 795.

(*z*) *R.* v. *Dunn*, 8 T. R. 217; and see 5 A. & E. 798.

(*a*) *R.* v. *Abergele* (*Inh.*), 5 A. & E. 795. But though the *certiorari* had issued on a recognizance insufficient on this account, the court would not quash the *writ*, but only the *allowance*, and enlarged the return to the writ, sending it back to sessions that it might be duly allowed after the parties prosecuting it had entered into recognizance.

(*b*) *Reg.* v. *Latchford* (*Inh.*), 6 Q. B. 567; 14 L. J., M. C. 20.

(*c*) Dalton, Chap. 159; Burr. S. C. 112. But when a case comes on to be argued in Q. B. it is too late to object that the order or document brought up in return to the *certiorari* differs from that required by that writ, the proper course being, to have moved before argument to quash the return, *Reg.* v. *Fordham* (*Inh.*), 11 A. & E. 73; 3 P. & D. 95, 100.

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previous proceeding occur in it (*e*). Some things, however, are considered immaterial, and, in these, trifling errors will not vitiate, *e. g.*, in the mis-spelling of a surname, or in giving the name of a person without *any* addition (*f*). But a wrong christian name, or a gross error in the number of the defendants, or in the addition of rank or title will be fatal (*g*). If, however, the justices obey the writ and return the conviction they cannot afterwards object to the variance in the description in the writ (*h*).

The record itself, or the tenor of it, according to the directions of the writ on the circumstances of the case, must be returned; and *that* without any extraneous matter, or explanation (*i*).

On non-compliance, a rule issues for the return, and, on disobedience, an attachment (*k*); but the writ is of no effect unless delivered before the time for its return has expired (*l*).

And the return must always be on parchment, for a return on paper has been held to be irregular (*m*).

Return, who by.

The writ, if directed to the session, is usually returned by the chairman of the day; if to individual magistrates, by those to whom it is directed. The return should be under the seal of an inferior court, if to any such directed; but if to any court not having a common seal, under the seal of the person making the return (*n*).

Certifying a recognizance.

A recognizance taken by a justice of peace ought to be certified by such justice *only*, till it be made a record of sessions; after which it shall be certified in the same manner as the other records of sessions (*o*).

And upon a *certiorari* to remove a conviction by a justice of the peace, a return that the record is returned to sessions, and that a copy is annexed to the writ, is sufficient; because justices ought, in all cases, to return convictions to sessions (*p*). Justices are not bound by the conviction, as first drawn up, but may return a more formal and amended conviction, according to the truth of the facts (*q*).

The writ of *certiorari*, as has been observed, issues from the crown office, and enough has been introduced respecting its form, so far at least as is necessary to be inserted here. The

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(*e*) *Reg.* v. *Turk*, 10 Q. B. 540.
(*f*) Hawk. b. 2, c. 27, s. 86, *et seq.*; Cro. El. 172.
(*g*) *Ibid.*
(*h*) *Reg.* v. *Turk*, *ubi sup.*
(*i*) See as to the distinction in this respect between *certiorari* and *habeas corpus*, *Hetherington* v. *Reynolds*, Fortesc. R. 269.
(*k*) *R.* v. *Battams*, 1 East, 298.
(*l*) *R.* v. *Rhodes*, Keb. 944; Hawk. b. 2, c. 27, s. 59.
(*m*) *R.* v. *Stow Bardon*, Cas. t. Hardw. 173. See *R.* v *Gunston*, Stra. 583.
(*n*) Hawk. b. 2, c. 27, s. 65; Cald. 297.
(*o*) Cro. Jac. 669.
(*p*) *R.* v. *Eaton*, 2 T. R. 285; *Reg.* v. *Turk*, 10 Q. B. 540.
(*q*) *Chaney* v. *Payne*, 1 Q. B. 712.

attorney for the party applying for it, or receiving it, if it be directed to a session respecting *an order*, carries it, together with the recognizance to prosecute, to the clerk of the peace, who draws up on parchment a record of the order, in conformity to the entries made in the sessions book. If the subject-matter be a poor rate, then, as the rate itself cannot be removed, the entry of appeal must include the title of the rate, and the allowance by the justices. *Return to the Writ.*

Whatever form the return assumes, the clerk of the peace, if the return is from the session, or the single justice, annexes the orders to the writ, and remits them to the agent of the party applying, to be delivered by him into the crown office.

Where a *case has been granted* by the sessions, we have seen that it forms part of the matters to be returned by them to a *certiorari* (*r*). When the sessions have decided a point and granted a case, the writ of *certiorari* issues merely as machinery for the sole purpose of bringing the case up, that the court may decide upon the points raised in the case, so that no objection can be taken to the order on its face by reason of its being brought up with the case, which is not reserved by the case (*s*); but where, on an appeal against an order of removal, they overrule an objection to the examination for insufficiency, but *grant no case* on the point, a rule for a *certiorari* praying the removal not only of the orders of sessions and removal, but also of the examination on which the latter order was made, with the notice and grounds of appeal will be refused (*t*), for these last form a part of the *evidence* submitted to the sessions on the hearing of the appeal (*u*). Writ where case has been granted by sessions.

A *certiorari* had been duly allowed for bringing up "all orders of sessions made" in the case of an appeal against an order of removal, "*with all things touching the same.*" The clerk of the peace returned not only the order of sessions and original order of removal (*x*), but the notices of appeal, and statement of grounds of appeal, from which last it appeared

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(*r*) *Ante*, p. 710.

(*s*) *Reg.* v. *Hartpury*, 8 Q. B. 566; 16 L. J., M. C. 105; *Reg.* v. *Thomas*, 7 E. & B. 399; *Reg.* v. *Dickenson*, 7 E. & B. 831; 26 L. J., M. C. 204.

(*t*) *Reg.* v. *Justices of Yorkshire* (*West Riding*), 12 L. J., M. C. 15 (in *Tollerton* v. *Idle*), relied on and cited *per Cur.* in *Reg.* v. *Justices of Buckinghamshire*, *S. P.*; 3 Q. B. 800, 807. There the sessions on hearing an appeal against an order of removal confirmed it without granting a case. The court refused to direct the order of removal *with the examinations on which it was grounded* and the order of sessions, to be brought up by *certiorari*, on the ground that the examinations contained no legal evidence in support of the order of removal. The writ of *certiorari* ought not to require anything more to be returned than the original order of removal, and the proceedings of the sessions thereon on the hearing; *per Cur.*, *Reg.* v. *Justices of Yorkshire* (*West Riding*), *ubi sup.*

(*u*) See *per Cur.*, but not decided in *Reg.* v. *Rotherham* (*Inh.*), 12 L. J., M. C. 20.

(*x*) The order of removal may properly be returned. See *Reg.* v. *Justices of Yorkshire*, *ubi sup.*

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that the appeal ought not to have been heard, or consequently the order of sessions, quashing the order of removal, made. *A case had been refused.* The court held, that the return was irregular for stating more than the order of sessions, and would not look to the other matters returned, and decided that the *return*, not the *writ*, ought to be quashed (*b*). But as a new return, if properly made, *viz.* of the order of sessions simply, would not support a motion to quash that order, they discharged the rule for a *certiorari* without quashing the return (*c*).

Ulterior proceedings on return of case, &c. from sessions.

We have shown the steps preliminary to bringing up a special case reserved by sessions for argument. If, upon such argument, any defect appears in the return, the court will make a rule that the case shall be sent back again, either generally to be re-stated, or for additional information on any particular point of it. This rule, together with the original record, is redelivered to the clerk of the peace for inquiry at the next session, if belonging to the sessions of the peace; and the matter, if it relate to doubtful *facts*, must be inquired into *de novo*, as if nothing had passed on it before (*d*); but this is otherwise if it arise from some mere informality to be corrected by the justices (*e*).

Amendment of order on return of writ.

If, upon the return to any writ of *certiorari*, any objection shall be made on account of any omission or mistake in the drawing up of any order or judgment, made or given by any justice or justices of the peace, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order and judgment, and to adjudicate thereon as if no such omission or mistake had existed: provided always, that no objection, on account of any omission or mistake in such order or judgment, brought up upon a return to a writ of *certiorari*, shall be allowed, unless such omission or mistake shall have been specified in the rule for issuing such *certiorari* (*f*). And no objection, on account of any omission or mistake in any order of removal, brought upon a return to a writ of *certiorari*, shall be allowed, unless such omission or mistake shall have been specified in the rule for issuing such writ (*g*).

(*b*) *Reg.* v. *Abergele* (*Inh.*), 8 A. & E. 394; 3 N. & P. 406. See *Reg.* v. *Justices of Yorkshire* (*West Riding*), 12 L. J., M. C. 15. In 2 Nolan, P. L. 4th ed. 592, the *writ* was quashed. If a *certiorari* was quashed, a second might issue, *R.* v. *Hedingham Sible*, 1 Burr. S. C. 114; *R.* v. *Newton*, *id.* 157.

(*c*) See *R.* v. *Abergele* (*Inh.*), 8 A. & E. 398; 3 N. & P. 406.

(*d*) *Ante*, p. 714; 2 Bott, 736, 743.

(*e*) *Ante*, p. 714; Burr. S. C. 682.

(*f*) 12 & 13 Vict. c. 45, s. 7.

(*g*) 11 & 12 Vict. c. 31, s. 6.

Proceedings when Case sent back to Sessions.

After the conviction has been removed by *certiorari* into the Queen's Bench, with a case from the sessions on appeal, and the conviction is affirmed, the court will order a *procedendo* to take the conviction back to the sessions, if it is required, for the purposes of enforcing it (*h*).

A *procedendo* cannot be moved for while the *certiorari* is on the file of the court (*i*).

Compelling payment of costs where order or judgment of quarter sessions is confirmed.

The judgment of the Queen's Bench is given in the shape of a rule, and entered as such in the rule book (*k*). If the party who removes an order of sessions by *certiorari* obtains such judgment, by his rule being made absolute, the recognizance (given under 5 Geo. 2, c. 19, s. 2, *ante*, p. 724) is discharged as a matter of course (*l*). He is not entitled to *receive* costs; though, if his rule is discharged, he must *pay* them as taxed by the master of the crown office (*m*), before the recognizance can be discharged (*n*). The discharge of the rule to quash the order of sessions confirms it (*o*). The amount is not confined to the sum mentioned in the recognizance (*p*). For, by 5 Geo. 2, c. 19, s. 3, if the order or judgment (*viz.* of the sessions) shall be confirmed by the court, the person entitled to the costs for the recovery thereof *within* (*i. e.* at the expiration or after the lapse of (*q*)) ten days after demand made on oath of such demand, and refusal of payment, shall have an attachment for the contempt, and the recognizance given on the allowance of such *certiorari* shall not be discharged till the costs are paid, and the order so confirmed complied with.

However, if the *certiorari* is superseded *quia improvide emanavit*, the party suing it out is not liable to costs, for they were occasioned by an improvident act of the court (*r*). So, if he succeeds in quashing a removed order of removal in part (*s*). But he will not have costs where the removal of the order was

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(*h*) *Reg.* v. *Rushworth*, 1 New Sess. C. 415; 9 Jur. 161; *R.* v. *Neville*, 2 B. & Ad. 299.

(*i*) 4 Burr. 2459.

(*k*) See the form, *R.* v. *St. Peter's in Worcestershire*, Burr. S. C. 27. See *Ibid.* p. 595, and Burrow's Preface. Also *R.* v. *Moor Critchell*, 2 East, 222.

(*l*) *R.* v. *Bray*, Burr. S. C. 687.

(*m*) *R.* v. *Dore*, Andrews, 252; 2 Nol. 4th ed. 621. If on special case granted by sessions, Q. B. approves their decision, it does not confirm their order in terms, but discharges the rule for quashing it. That of itself confirms the order within the meaning of this enactment, so as to fix the party who brought up the order of sessions with costs; *Reg.* v. *Latchford* (*Inh.*), 1 New Sess. C. 387, 396.

(*n*) *R.* v. *Edgeworth*, 4 T. R. 218.

(*o*) *Reg.* v. *Latchford* (*Inh.*), 6 Q. B. 567.

(*p*) *R.* v. *Dore*, And. 252.

(*q*) *R.* v. *Ireland*, 3 T. R. 512; see *post*, p. 730.

(*r*) *R.* v. *Wakefield*, Sayer on Costs, 306.

(*s*) *R.* v. *Madley*, Stra. 1198. Order of removal of man, wife, and daughter confirmed at sessions; orders quashed in K. B. as to the daughter, and confirmed as to man and wife.

Of Certiorari to remove Orders.

unnecessary and consequently vexatious; *e. g.* where the party was not affected by the act of the sessions which was quashed, though it might eventually make him liable to costs (*t*).

Where an order of sessions is brought up with a case reserving points raised on both sides, and the court confirmed the order, but both sides failed upon all the points raised by them, neither party was entitled to costs under 5 Geo. 2, c. 19, s. 2 (*u*).

Again, if an order is sent back to sessions to be re-stated, and is returned amended, the party removing it originally is not liable to pay costs (*x*), unless he disputes the amended order, instructing counsel, and taking the chance of a judgment of the court in his favour on it (*y*).

The expense of maintaining a pauper between the times of giving judgment at sessions on appeal against his removal, and in the Queen's Bench, cannot be allowed in the *latter court*, nor will they send back the original order of removal to the sessions, in order that they, by quashing it, may give the appellant those costs under 9 Geo. 1, c. 7, s. 9 (*z*); but if the case is not decided in the term in which it comes on to be argued, it has been made a term of the adjournment that these costs from the last day of that term should abide the event (*a*).

Filing the recognizance.

By 5 Geo. 2, c. 19, s. 3, "the recognizance (*b*) shall be certified to the King's Bench, and there filed with the *certiorari*, and order or judgment removed thereby (*c*); and if the said *order or judgment* shall be confirmed by the court, the persons entitled to such costs, for the recovery thereof, within ten days after demand made of the person who ought to pay the said costs, upon oath made of such demand and refusal, shall have an attachment for such contempt, and the recognizance so given upon the allowance of such *certiorari* shall not be discharged until the costs shall be paid, and the order so confirmed complied with and obeyed."

Form of Notice to Justices of Moving for a Certiorari.

To A. B., esquire, one of her Majesty's justices of the peace in and for the ——— [*or, as the case may be*].

Whereas you did, on the ——— day of ———, in the year of our Lord ———, take the examinations of ——— and ———, and upon such examinations as aforesaid [*or, as the case may be*] did issue your order, or did convict, &c. [*or, as the case may be*]. And whereas it appears that [*here state the objections to the order, conviction, or other proceeding*], and

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(*t*) *R.* v. *Madley*, 2 Stra. 1198.
(*u*) *Reg.* v. *Southampton Dock Co.*, 20 L. J., M. C. 228.
(*x*) *R.* v. *Hitcham*, Burr. S. C. 504; *R.* v. *Bray*, Burr. S. C. 687.
(*y*) *R.* v. *Edgeworth*, 4 T. R. 218.
(*z*) *R.* v. *Moor Critchell*, 2 East, 222; and *R.* v. *West Cranmore*, 2 Nol. 623, n. See *ante*.
(*a*) See *Overnorton* v. *Salford*, 1 Bla. Rep. 436.
(*b*) *Ante*, p. 724.
(*c*) See *ante*, p. 710.

Forms of Notice to Justices, and of their Return to Certiorari.

moreover that the said [order, conviction, *or other proceeding*] was irregular and illegal, wherefore the said ——— being resolved to seek a remedy for the injury which he [*or* they] has [*or* have] received and sustained by means of the said [order *or* conviction, *or other proceeding*], I do hereby on behalf of the said ———, according to the form of the statute in that case made and provided, give you notice that her Majesty's Court of Queen's Bench will in six days from the time of your being served with this notice, or as soon after as counsel can be heard, be moved on the behalf of the said ——— for a writ of *certiorari* to issue out of the said court, and to be directed to [*the proper officer of the quarter sessions of the peace, if it be a record of session, or otherwise, to the justice in whose possession it ought to be*] (*d*), for the removal of [the record of, &c. *as the case may be*] into her Majesty's said Court of Queen's Bench. Dated, &c.

P. Q., attorney for the said ———.

Form of Return to Writ of Certiorari to Quarter Sessions to certify an Order or Conviction, with the Order thereupon.

First on the back of the writ indorse—The execution of this writ appears in a schedule hereunto annexed.

Then this schedule on a separate piece of parchment may be attached to writ:—

County of ——— } I, T. P., one of the keepers of the peace and justices
to wit. } of our lady the Queen assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanours in the same county committed, by virtue of this writ to me delivered, do under my seal certify unto her Majesty in her Court of Queen's Bench, the order of which mention is made in the writ, together with all matters touching the same. In witness whereof I, the said T. P., have to these presents set my seal.

Given at ——— in the said county, the ——— day of ———, A.D.

T. P. (L.S.)

Form of Order of Sessions confirming Conviction (*f*).

Return to certiorari of an order of sessions confirming a conviction, or relating to an appeal (*e*).

At the general quarter sessions of the peace of our lady the Queen, held at ——— in and for the said county, on ——— in the first week after the ———, to wit, on the ——— day of ——— in the year of our Lord ———, and in the ——— year of the reign of our sovereign lady Victoria, before M. N., O. P., &c., justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county of ———, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed within the said county.

Whereas by a conviction or judgment, bearing date the ——— day of ——— in the year ———, under the hands and seals of, &c., thereby setting forth, &c. [*set out the whole of the conviction in the third person, and in the past tense*]. And whereas he the said C. D. [*the person convicted*] did appeal against the said conviction or judgment, to the then next and now last court of general quarter sessions of the peace, held at ——— in

(*d*) *R.* v. *Great Marlow*, 2 East, 244.

(*e*) See as to form in case of appeal, *Reg.* v. *Fordham*, 11 A. & E. 73; *Reg.* v. *St. Olave, Southwark*, 13 L. J., M. C. 162.

(*f*) 4 Ch. Cr. L. 257.

Forms of Notice to Justices, and of their Return to Certiorari.

and for the said county of ——— on ——— day, the ——— day of January, in the year, &c., when the said appeal was ordered to be continued to this present sessions, and of which said order of continuance the said A. B. [*the prosecutor*] had ——— days' notice previous to this present sessions. Now, upon hearing the said appeal, and what hath been alleged and proved on each party's behalf, and full debate and consideration had in the premises, it is ordered by this court, that the first-mentioned conviction or judgment shall be and is hereby confirmed and made absolute. And it is further ordered by this court that the said C. D. upon sight of this order, or a copy thereof left with him, do pay the said A. B. the sum of £——— towards the costs and charges in the law by him the said C. D. reasonably expended in and about the defence of the said appeal.

By the Court (*h*).

Form of such a Return from a single Justice (*i*).

County of ——— } I, A. B., one of the keepers of the peace and justices of
to wit. } our lady the Queen assigned to keep the peace within the said ———, and also to hear and determine divers felonies, trespasses, and misdemeanours in the same committed, by virtue of this writ to me delivered, do under my seal return in to her Majesty in her Court of Queen's Bench, the ——— of which mention is made in the same writ, together with all matters touching the same. In witness whereof I, the said A. B., have to these presents set my seal.

Given at ——— in the said county, the ——— day of ——— in the ——— year of the reign of ———.

Section 10.

OF MANDAMUS TO THE SESSIONS.

The subject of the control of the Court of Queen's Bench has been touched upon incidentally in previous observations on the trial of respited appeals, and on the entry of appeals (*k*).

The reversal by mandamus of the order of proceeding at quarter sessions, according to the rules of practice which there prevail in hearing appeals, is a part of the jurisdiction of the Court of Queen's Bench which it will not be inclined to exercise, unless it be apparent that gross injustice will follow the refusal of that remedy (*l*). Accordingly, the court refused a

(*h*) Where a return made by a quarter session of an order confirmed there on appeal was signed by four justices, who, however, had not described themselves as justices of the county, or put their seals to it, the court sent it back to be amended in this particular, in order to complete it; for if that had not been compelled, the justices wilfully or by negligence might have defeated the process of the court; *R.* v. *Kenyon*, 6 B. & C. 640.

(*i*) See *R.* v. *Eaton*, 2 T. R. 285.

(*k*) *Ante*, p. 677.

(*l*) *R.* v. *Justices of Suffolk*, 6 M. & S. 58, per Lord *Ellenborough*; *R.* v. *Justices of Norfolk*, 5 B. & Ad. 992, per Lord *Denman*.

Where Sessions refuse to hear Appeal.

mandamus to sessions to rehear an appeal, on the ground that their practice was inconvenient in a given particular, *viz.*, in obliging the appellant against a poor rate to begin by impugning it, instead of calling on the respondents to show a probable ground for the amount, at which they had charged him in it (*m*). So they may refuse to respite the trial of an appeal for the absence of a material witness, where full notice has been given, and both parties attend to try, unless on payment of costs of the day, according to their usual practice (*n*). Again, where, by the practice of a sessions, eight days' notice of appeal against an order of removal was required at the first sessions, but fourteen days' notice of an adjourned appeal, and an appeal was dismissed for want of sufficient notice for the second session, the practice was upheld by the court above (*o*). But if the sessions depart from their usual rule of practice in refusing to hear an appeal, the court above will interfere (*p*). Thus, where a court of quarter sessions dismissed an appeal against an order of removal for non-compliance with their practice, which, by requiring a notice to the respondents of the entry and respite of a respited appeal within one month after such entry and respite, was contrary to 9 Geo. 1, c. 7, s. 8, which requires only a reasonable notice of appeal, the court granted a mandamus, and directed the sessions, if they found that the notice was not reasonable, to adjourn the hearing of the appeal to the next sessions, and to determine it finally there (*q*). No mandamus lies to a session to receive evidence which they have rejected, its admissibility being exclusively a question for them (*r*). If the sessions rightly refuse to hear the appeal, the Court of Queen's Bench will not compel them to hear it, on the ground that they so refused for insufficient reasons (*s*). Where an appellant gave fourteen days' notice of appeal, calculating one day exclusive of that of giving the notice, and the other day inclusive of the first day of the sessions, the appeal was dismissed for want of compliance with a rule of the sessions, that such a notice should be "exclusive of the day of the notice, *and* of the day of holding the sessions at which the appeal was to

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(*m*) *R.* v. *Justices of Suffolk*, 6 M. & S. 57. And *R.* v. *Topham*, 12 East, 546, which seems contra, proceeded on special circumstances. See *R.* v. *Newbury* (*Inh.*), 4 T. R. 475.

(*n*) *R.* v. *Justices of Monmouthshire*, 1 B. & Ad. 895.

(*o*) *Ibid.*, 3 D. P. C. 306.

(*p*) *R.* v. *Justices of Wilts*, 8 B. & C. 380. Appeal against a poor's rate could not be properly held at the sessions when it was entered, no notice having been given. It was adjourned, however, on another ground. The sessions refused to hear it at the second sessions, according to their usual practice; and see *R.* v. *Justices of Gloucestershire*, 3 D. P. C. 298.

(*q*) *R.* v. *Justices of Norfolk*, 5 B. & Ad. 990. See *R.* v. *Justices of Kent*, 8 B. & C. 639, and *id.* 640, 641, n.

(*r*) *R.* v. *Justices of Cambridgeshire*, 1 D. & R. 325.

(*s*) *R.* v. *Justices of West Riding*, 1 G. & D. 630.

Of Mandamus to Sessions to hear Appeal.

be tried," a mandamus issued to compel the hearing of the appeal (*t*). This decision was followed up by another (*u*) on 55 Geo. 3, c. 68, s. 3, which required "ten days' notice" of appeal to the sessions against an order for stopping up highways. The sessions made a rule in cases of appeal *not otherwise directed by law, that ten days' notice should be given exclusive* of the day of notice, and of the first day of the sessions, and dismissed an appeal on the above statute for non-compliance with it. But a mandamus issued to hear the appeal, the court saying that it was not competent to the sessions to impose a rule of practice contrary to the act, which meant ten days' notice, one inclusive, and the other exclusive, so that either the rule of sessions practice did not apply, or if it was intended to do so, the court would exercise its discretionary power of controlling it. A like decision took place where the sessions, by their practice, made service of a notice requisite to the hearing of an appeal, though the act which gave it was silent on the subject (*x*). And again, where, in the absence of any practice of the sessions, and of any statutory provision, they required notice of trial of a respited appeal (*y*).

Where a quarter sessions improperly dismissed an appeal on an unfounded objection of a nature preliminary to its being heard, *viz.*, to their jurisdiction to entertain it at all, the court compelled them by a mandamus to hear it, even though a witness had been examined before the objection was taken (*z*).

If the sessions refuse to hear an appeal upon a preliminary objection of a matter of law, or on the ground of a practice of their own, which is not in its own nature legal or consistent with the manner by which the sessions professed to be guided, and they are wrong, a mandamus will issue to compel them to hear it (*a*); but not so where the objection is a matter of fact, and an objection to the grounds of objection to an order of removal, or notice of grounds of appeal, is a matter of fact for the sessions (*b*); and an objection to the admissibility of a document to prove the renting of a tenement is also for the ses-

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(*t*) *R.* v. *Justices of Lancashire*, 7 B. & C. 691. Explained by *Parke*, J., 5 B. & Ad. 671, 672; *Reg.* v. *Recorder of Richmond*, E. B. & E. 253; *Reg.* v. *Slawstone*, 18 Q. B. 388; 21 L. J., M. C. 145; *Reg.* v. *Mayor of Monmouth*, 39 L. J., Q. B. 77; L. R., 5 Q. B. 251.

(*u*) *R.* v. *Justices of Yorkshire* (*West Riding*), *In re Bower*, 4 B. & Ad. 685, relied on *per cur.* in *R.* v. *Goodenough*, 2 A. & E. 469.

(*x*) See *R.* v. *Justices of Staffordshire*, 4 A. & E. 842.

(*y*) *R.* v. *Justices of West Riding*, 5 B. & Ad. 667.

(*z*) *Reg.* v. *Goodrich*, 19 L. J., Q. B. 413; *Reg.* v. *Recorder of Liverpool*, 20 L. J., M. C. 35; *R.* v. *Justices of Gloucestershire*, 1 B. & Ad. 1; *R.* v. *Frieston*, 5 B. & Ad. 599, per *Parke*, B.

(*a*) *Reg.* v. *Justices of Montgomeryshire*, 2 New Sess. C. 78; *Reg.* v. *Justices of Derbyshire*, 22 L. J., M. C. 31.

(*b*) *Reg.* v. *Kesteven*, 3 Q. B. 810; overruling *Reg.* v. *Justices of Carnarvon*, 2 Q. B. 325, and *Reg.* v. *Justices of West Riding*, *ib.* 331.

sions (*c*); but where the objection taken is a preliminary one, and goes to oust the jurisdiction of the sessions, it makes no difference that it was not taken till after a witness had been examined by the respondents (*d*); in that the appeal was by one overseer against the accounts of his co-overseer, and the court refused to hear the appeal on the ground that it did not lie in such a case.

Where there has been a Hearing, though an imperfect one.

Where the sessions reject evidence tendered by the respondents in reply, on the ground that the tender of it has been improperly prefaced by remarks of the advocate tendering it, the court would not interfere by mandamus on the ground that it would be in effect ordering a rehearing; but it was said, that if they had improperly declined to hear one side at all, it would be the same as refusing to hear the appeal, and then the court would have interfered (*e*).

So, if the sessions have dismissed an appeal, on the ground of the invalidity in point of law of the notice of appeal which was not invalid, they will be compelled by mandamus to hear; but if they have dismissed it, on the ground that there was a want of a reasonable notice in point of fact, they will not be interfered with (*f*). As, for instance, if they were to hold that personal service of a notice was necessary when it was not, or that a notice served was invalid in law when it was valid, the court would compel them to hear the appeal (*g*); or that the appellants were too late in applying for a copy of the depositions, upon which an order of removal was made under 11 & 12 Vict. c. 31, s. 9, when in law they were in time (*h*); and it is immaterial whether the refusal to adjudicate takes place upon an objection made during the respondent's case or the appellant's (*i*).

Upon the cases of *Reg.* v. *Kesteven* and *Reg.* v. *The Freemen of Leicester* being cited in support of the proposition that the sessions were the sole judges of whether sufficient proof of due notice of appeal had been given, *Blackburn*, J., said, "Is that so? Are the justices to be the sole judges of the facts with regard to a preliminary point relating to their jurisdiction? But I do not think the justices have decided this as a matter of fact, but as a matter of law. I think it was a question of law. The fair inference from the affidavits is, that the justices thought

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(*c*) *Reg.* v. *Frieston* (*Inh.*), 5 B. & Ad. 597.

(*d*) *R.* v. *Justices of Gloucestershire*, 1 B. & Ad. 1. See also *Reg.* v. *Brown*, 7 E. & B. 757.

(*e*) *R.* v. *Justices of Carnarvon*, 4 B. & A. 86.

(*f*) *Reg.* v. *Recorder of Liverpool*, 15 Q. B. 1070; *Reg.* v. *Justices of Bucks*, 4 E. & B. 259; 24 L. J., M. C. 15; *Reg.* v. *Justices of Salop*, 4 E. & B. 257; *Reg.* v. *Recorder of Leeds*, 3 E & E. 561; 30 L. J., M. C. 86. See *ante*, p. 665, &c.

(*g*) *Reg.* v. *The Deputies of the Freemen of Leicester*, 15 Q. B. 671; *Reg.* v. *The Mayor, &c. of Monmouth*, 39 L. J., Q. B. 77; L. R., 5 Q. B. 251.

(*h*) *Reg.* v. *Recorder of Richmond*, E. B. & E. 253; 27 L. J., M. C. 197.

(*i*) *Reg.* v. *Brown*, 7 E. & B. 757.

Of Mandamus to Sessions to hear Appeal.

there was no legal evidence that the notice was fixed to the church door. Therein I think they were wrong. I put out of consideration the evidence of the contents of the written paper handed by the parish clerk to the witness; but it is clearly in evidence that there was a notice fixed on the church door relating to the stopping up of this way. In the absence of evidence to the contrary, I think that that was *primâ facie* evidence that a proper notice had been given on the church door. With regard to the time when it was fixed, *primâ facie* it must be presumed to have been first stuck up when it was first seen." And the rule was made absolute for a *mandamus* (*k*). But where an appeal against a local rate was dismissed, on the ground that by the local statute the amount of the rateable value of the person assessed was to be taken at such value as the person was assessed for in the last preceding poor's rate, and that, therefore, the amount was conclusively fixed by the poor rate, and that the sessions, therefore, had no jurisdiction to go into evidence of value to impeach the poor rate assessment; the court refused a *mandamus*, on the ground that the dismissal was *not a declining of jurisdiction*, but a decision on the hearing of the appeal, and that the court would not interfere whether the construction put upon the act by the recorder *was right or wrong*. And the court say, "Here there was no question as to any preliminary step, the appeal is duly entered, called on, and argued, and decided. Now, whether the decision proceeds upon a question of law or fact is wholly immaterial, it is equally a decision on the appeal. . . . This is a declining to hear further evidence, because the evidence already adduced, *viz.*, the poor rate, concludes the parties" (*l*).

So, where an appeal was formally entered at a sessions, as an appeal by an individual named, against the accounts of the "*churchwardens* and overseers" of a parish, and the appellant served a notice of it directed to the *overseers* only, it was held that as the churchwardens had not, in fact, received or disbursed any parish money, or kept any account, it was evident to one looking at the subject-matter of the appeal, that it was substantially against the accounts of the overseers, to whom notice had been given, and the sessions were ordered to hear the appeal (*m*).

It may turn out a safe criterion, by which to judge whether the court above will or will not interfere with those decisions of a quarter sessions which hinge on its own rules, to consider, whether the point be one of reasonable practice for the regulation of its own proceedings, and, as such, necessarily within its own discretion to adjudicate on, or one which also involves a legal question, and of which accordingly, though the magis-

(*k*) *Reg.* v. *Justices of Essex*, 34 L. J., M. C. 11.
(*l*) *Reg.* v. *Recorder of Liverpool*, 20 L. J., M. C. 35.
(*m*) *R.* v. *Justices of Norfolk*, 2 B. & Ad. 944.

trates are judges, they are not sole judges (*n*). The question which frequently occurs, *viz.*, what is that reasonable notice of appeal which gives a court of quarter sessions jurisdiction to hear it? is one of the latter kind; and in *R.* v. *Justices of Wilts* (*o*), the court interposed to prevent what appeared to them an unjust result of a novel practice at the sessions (*p*).

Lies to Sessions who refuse to hear by reason of a novel and unjust practice.

By a general rule of the Queen's Bench, a *mandamus* to enter continuances and hear an appeal must be applied for within the term following the sessions at which the refusal to hear the appeal was made, unless special circumstances are shown by affidavit to account for the delay to the satisfaction of the court (*q*). Where the time has passed within which the sessions is directed by statute to be held at which the act required to be done ought to have been done and was omitted to have been done, a *mandamus* may nevertheless issue to compel them to do the act at a sessions holden at a subsequent time to that mentioned in the statute (*r*).

Within what time mandamus to be applied for.

Mandamus to hold sessions nunc pro tunc.

After a *mandamus* has gone to hear an appeal, and it has been obeyed, the costs must be applied for within two terms after it has been obeyed (*s*).

(*n*) Lord *Denman*, in *R.* v. *Frieston* (*Inh.*), 5 B. & Ad. 597, says, "The cases where this court has interfered have turned upon matters of preliminary practice, and have arisen where the court has thought the practice not in its own nature legal, or not consistent with the rules by which the sessions themselves professed to be guided." See *Reg.* v. *Pawlett*, 42 L. J., M. C. 157; L. R., 8 Q. B. 491.

(*o*) 10 East, 404.

(*p*) See *R.* v. *Justices of West Riding*, 5 B. & Ad. 667; *Ex parte Blues*, 5 E. & B. 291; *Reg.* v. *Pawlett*, 42 L. J., M. C. 157; L. R., 8 Q. B. 491, *ante*, p. 677.

(*q*) *Reg.* v. *The Recorder of Richmond*, E. B. & E. 253; 27 L. J., M. C. 197; *R.* v. *Justices of the West Riding*, 2 Q. B. 706; 11 L. J., M. C. 80.

(*r*) *Mayor of Rochester* v. *The Queen*, E. B. & E. 1024; 27 L. J., Q. B. 434.

(*s*) *Reg.* v. *Justices of Kent*, 36 L. J., M. C. 130; 8 B. & S. 343.

CHAPTER II.

OF ORDERS IN BASTARDY, AND PROCEEDINGS CONCERNING THEM.

The mother's liability for her bastard's maintenance.

At common law the father is not liable for the maintenance of his bastard child, and a promise made by him to the mother of the child to pay her if she will support it is made without consideration (*a*); but contracts by the father with the mother to supply the child with necessaries for a certain sum payable in a particular manner were upheld since 7 & 8 Vict. c. 101, s. 3, in *Smith* v. *Roche* (*b*), and *Follit* v. *Koetzow* (*c*).

The mother's liability arises under 4 & 5 Will. 4, c. 76, s. 71, which enacts, that the mother of every child, born a bastard after that act, so long as she shall be unmarried, or a widow, shall be bound to maintain such child as part of her family, until such child shall attain the age of sixteen, and all relief granted to such child under the age of sixteen shall be considered as granted to such mother: provided always, that such liability of such mother shall cease on the marriage of such child if a female. This liability is personal only, and there is no provision by which when she dies and leaves an illegitimate child under sixteen surviving her, and leaves money which might be sufficient to provide for its maintenance, that that money shall be so applied by her representative (*d*).

By the 33 & 34 Vict. c. 93, s. 14, a married woman having separate property shall be subject to all such liability for the maintenance of her children, as a widow is now by law subject to for the maintenance of her children: provided always, that nothing in this act shall relieve her husband from any liability at present imposed upon him by law to maintain her children.

Before the passing of 4 & 5 Will. 4, c. 76, justices in quarter sessions had a clear original jurisdiction, under 13 Car. 2, c. 12, s. 19, to make orders of filiation in bastardy; but the order was much more commonly made by two or more (*e*) justices, under the statute of Elizabeth, and brought before the sessions by way of appeal. On such an appeal it was held, that the sessions,

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(*a*) *Mortimore* v. *Wright*, 6 M. & W. 482; *Seaborne* v. *Maddy*, 9 C. & P. 497; *Furillio* v. *Crowther*, 4 D. & R., M. C. 1; *Crowhurst* v. *Laversack*, 8 Ex. 208.

(*b*) 6 C. B., N. S. 223; 28 L. J., C. P. 237.

(*c*) 2 E. & E. 730; 29 L. J., M. C. 128.

(*d*) *Ruttinger* v. *Temple*, 33 L. J., Q. B. 1.

(*e*) *Hatton's case*, Salk. 477.

having original jurisdiction, might not only quash the order of bastardy appealed from, but might make a new order on another person (*f*). *Jurisdiction of Quarter Sessions.*

By 4 & 5 Will. 4, c. 76, the court of quarter sessions was constituted by sect. 72 the only tribunal which could make an order on the putative father of a bastard for its support.

By 2 & 3 Vict. c. 85, guardians of a union were enabled to apply to petty sessions for an order without appeal, and were prohibited from going to the quarter sessions.

The jurisdiction of quarter sessions in bastardy cases is now entirely appellate.

The clause giving the appeal is sect. 4 of 7 & 8 Vict. c. 101, which enacts, that "if within twenty-four hours after the adjudication and making of any order on the putative father as aforesaid, such putative father give notice of appeal to the mother of the bastard child, and also within seven days give sufficient security by recognizance or otherwise for the payment of costs to the satisfaction of some one justice of the peace, it shall be lawful for such putative father to appeal to the general quarter sessions of the peace, to be holden after the period of fourteen days next after the making of the said order for the county, city, borough or place for which such petty sessions may have been held, and the justices in such quarter sessions assembled or the recorder, as the case may be, shall thereupon hear and determine such appeal, and shall order such costs to be paid by either party as to them or him may seem fit. Clause of act giving the appeal. Notice of appeal.

By the 8 Vict. c. 10, s. 3, it is enacted, that the condition of such recognizance shall be for the appearance of the said putative father at such general quarter sessions of the peace as is required by the said act, and his trial of the appeal thereat, and the payment of such costs as he shall then and there be ordered to pay: and that in respect of any order to be made after the passing of this act the party entering into any such recognizance shall forthwith give or send a notice in writing of his having so entered into such recognizance to the woman in whose favour the said order shall have been made, and, unless he shall enter into the recognizance before one of the justices who shall have made the order, to one at least of such justices; and in default of his giving or sending such notice or notices as aforesaid, the appeal shall not be allowed; provided that the sending of such notice or notices by the post shall be taken to be sufficient. Recognizance to prosecute appeal. Notice of recognizance. Notice of recognizance may be sent by post.

By the 8 Vict. c. 10, it is enacted, that in 7 & 8 Vict. c. 101, and in the 8 Vict. c. 10, the word "recorder" shall be taken to apply to any person who shall preside as the judge at any court of general quarter sessions held for any city, borough, liberty, or other place of limited jurisdiction.

The notice may be verbal, and need not be in writing (*g*). As to notice of appeal.

(*f*) *Barrel's case*, 1 Mod. R. 20; *Pridgeon's case*, 1 Bulst. 255; *R.* v. *Smith*, 2 Bulst. 340.

(*g*) *Reg.* v. *Justices of Huntingdonshire*, 4 New Sess. C. 101; 19 L. J.,

Notice of Appeal.

It must be given within twenty-four hours after the adjudication and making of the order; and the order is deemed to be made the moment the justices have orally pronounced their decision in court (*h*).

Time for giving notice of appeal.

The time for appealing, therefore, runs from the time of pronouncing the order, and not after service or notice of the order (*i*). The signatures to the order must be taken to be affixed *nunc pro tunc*. The notice must be given within twenty-four hours after the adjudication and making of the order, and would be bad if made after that period of time has elapsed, although it be given during the day following the service of the order. But Sunday is excluded in this computation of time, and, therefore, where the order was made at five o'clock on Saturday, and the notice of appeal was not given until the following Monday morning, it was held to be in time (*k*).

Sunday not reckoned.

Parol evidence admissible to contradict the order as to the date it bears.

If the defendant gives notice of appeal within twenty-four hours after the making of the order, in fact, it is immaterial that the order bears an earlier date, and evidence is admissible to show when the order was in truth made notwithstanding the date (*l*).

Service of notice of appeal.

It is not necessary where the notice of appeal be a written one that it should be served personally, but it will be sufficient if left at the woman's dwelling-house under circumstances that it can reasonably be presumed to have come to her hands (*m*).

No grounds of appeal need be stated (*n*).

No practice of sessions can dispense with the requirements of the statute, so as to extend the time for giving the notice of appeal and recognizance (*o*).

Oral notice.

The notice of appeal, if oral, should be proved by the appellant, or some one who heard it given, or by the woman herself, as she is made a competent witness on the trial of an appeal, and this proof is part of the trial (*p*).

As to taking the recognizance.

The justice applied to to take the recognizance is not the proper person to decide on the validity of the notice of appeal,

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M. C. 12; *Reg.* v. *Justices of Surrey*, 5 B. & A. 539; *Reg.* v. *Justices of Salop*, 4 B. & A. 626.

(*h*) *Ex parte Johnson*, 3 B. & S. 947; 32 L. J., M. C. 193, overruling *R.* v. *Justices of Flintshire*, 2 New Sess. C. 236; 15 L. J., M. C. 50.

(*i*) *Ex parte Johnson, ubi sup.*; *Reg.* v. *Justices of Derbyshire*, 7 Q. B. 193; 14 L. J., M. C. 84; *Reg.* v. *Justices of Huntingdonshire*, 19 L. J., M. C. 127.

(*k*) *Reg.* v. *Justices of Middlesex*, 3 New Sess. C. 152; 17 L. J., M. C. 111.

(*l*) *Reg.* v. *Justices of Flintshire*, 2 New Sess. C. 236; 15 L. J., M. C. 50; overruled as to the time of the order being made.

(*m*) *Reg.* v. *Nunn*, 1 New Sess. C. 19; *Reg.* v. *Justices of North Riding of Yorkshire*, 7 Q. B. 154; 14 L. J., M. C. 91; *Reg.* v. *Justices of Huntingdonshire, ubi sup.*

(*n*) *Reg.* v. *Justices of Derbyshire*, 1 New Sess. C. 411.

(*o*) *Reg.* v. *Justices of Lincolnshire*, 3 B. & C. 548.

(*p*) *Reg.* v. *Justices of Middlesex*, 17 L. J., M. C. 111. See 8 Vict. c. 10, s. 6, *post*.

Preliminaries of Appeal.

and, therefore, he must take the recognizance of the appellant, whether due notice of appeal has been given or not to the woman (*q*); the validity of the notice of appeal being for the sessions.

As to notice of recognizance.

The recognizance is returned by the clerk to the justices to the court, and is producible on being called for.

Service of notice of recognizance.

The notice of recognizance may be sent by post (*r*).

The attorney for the appellant may prove service of the notice.

"Forthwith."

The notice of recognizance is required to be given forthwith by the statute, and that has been construed to mean with as little delay as the circumstances will reasonably admit of, and an interval of seventeen days consumed in attempting to serve the mother personally, which was not necessary to be done, is too great (*s*).

If the mother die before the lapse of a reasonable time within the statute for sending notice of recognizance, the appellant is excused from sending such notice, and the appeal must be heard without such notice being sent (*t*).

Contents.

The notice of recognizance need not state that the recognizance has the several conditions required by statute (*u*). It is sufficient if the notice reasonably construed give sufficient information (*x*).

If due service of the notice of recognizance is admitted by the woman or her attorney, it is evidence of service in due time, upon which the sessions may act and hear the appeal, whatever the lapse of time may have been (*y*).

If notice of recognizance is not duly given, the appeal is not to be allowed, and the sessions cannot confirm the order (*z*).

The evidence of the mother.

The evidence of the mother is expressly made admissible by the 8 Vict. c. 10, s. 6, whereby it is enacted, that on the trial of any such appeal before any court of quarter sessions, the justices therein assembled, or the recorder (as the case may be), shall hear the evidence of the said mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant, and proceed to hear and determine the said appeal in other respects according to law, but shall not confirm the order so appealed against unless the evidence of the said

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(*q*) *Re Carter*, 24 L. J., M. C. 72.
(*r*) 8 Vict. c. 10, s. 3.
(*s*) *Ex parte Lowe*, 3 D. & L. 737. See *Reg.* v. *Justices of Cheshire*, 11 Jur. 170.
(*t*) *Reg* v. *Justices of Leicestershire*, 4 New Sess. C. 124; 19 L. J., M. C. 209.
(*u*) *Reg.* v. *Holborow*, 14 L. J., Q. B. 421.
(*x*) *Reg.* v. *Recorder of Leeds*, 1 B. C. C. 50; 21 L. J., M. C. 171.
(*y*) *Reg.* v. *Justices of Gloucestershire*, 1 B. C. C. 29; 16 L. J., M. C. 57.
(*z*) *Reg.* v. *Holborow*, 14 L. J., Q. B. 421.

Trial of Appeal.

mother shall have been corroborated in some material particular by other testimony to the satisfaction of the said justices in quarter sessions assembled, or the said recorder.

Evidence of the mother.

The mother is competent to prove the notice of appeal under the above section, as this proof is part of the trial of the appeal (*b*).

The meaning of the above section is, that if upon the trial of the appeal the mother is examined in support of the order, the court of quarter sessions must not confirm the order without evidence in corroboration of her testimony, but it is not absolutely necessary that she should be examined, as, for instance, if the appellant, having relied upon points of law as preliminary objections to the hearing, and having had those decided against him, retires from the case (*c*); or, perhaps, if she dies before the appeal comes on to be heard, and has been examined and cross-examined by or on behalf of the putative father at the hearing of the application before the petty sessions (*d*), though at the hearing at petty sessions it has been decided that the order cannot be made without her evidence being given *viva voce* (*e*).

Corroborating evidence.

It is a corroborating circumstance that the alleged father has been seen with the mother at the time and place fixed by her as the occasion of the connexion from which the conception of the child resulted, under circumstances which would have allowed of the connexion taking place. So, proof of any admission made by the defendant that the child was his, or that he had connexion with her. If there be some evidence in corroboration, the Court of Queen's Bench will not interfere (*f*). The payment of money by the putative father for the maintenance of the child is corroborative evidence of the paternity (*g*).

When the summons is taken out more than twelve months from the birth of the child, it will be a necessary part of the applicant's proof that the putative father has, within such twelve months, paid money for the maintenance of the child (*h*), but it is not necessary that the evidence of proof of the payment of money, if given by the mother, should be corroborated (*i*).

The putative father may be examined in his own defence. An agreement with the mother for the payment by the putative father of a sum of money to her, in respect of and for the future

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(*b*) *Reg.* v. *Justices of Middlesex*, 17 L. J., M. C. 111.
(*c*) *Reg.* v. *Justices of Buckinghamshire*, 18 L. J., M. C. 113.
(*d*) See *Reg.* v. *Armitage*, 42 L. J., M. C. 15; L. R., 7 Q. B. 773.; *Reg.* v. *Justices of Leicestershire*, 19 L. J., M. C. 209; *R.* v. *Ravenstone*, 5 T. R. 373; *R.* v. *Clayton*, 3 East, 58.
(*e*) *Reg.* v. *Armitage*, 42 L. J., M. C. 15; L. R., 7 Q. B. 773.
(*f*) *Reg.* v. *Pearcey*, 16 Jur., Q. B. 193.
(*g*) *Reg.* v. *Berry*, Bell, C. C. 46; 28 L. J., M. C. 86.
(*h*) *Ib.*
(*i*) *Hodges* v. *Bennet*, 5 H. & N. 625; 29 L. J., M. C. 224.

support of the child, is not a bar to an application for an order so as to oust the jurisdiction of the justices (*k*). Nor is it the more a bar because she agreed to release him from all further payment in respect of the child (*l*). *Trial of Appeal.*

If the mother has fixed the time when the connexion took place which resulted in the birth of the child, evidence is admissible, on the part of the alleged father, to show that another person had connexion with her at or about that time, from which it might be inferred that he was the father of the child (*m*); but in such a case the mother ought to be cross-examined as to the latter fact. Though, however, she may be cross-examined as to connexion with other men than the alleged father on occasions which could have no reference to the paternity of the child, her answers then go to her credit only, and must be taken as conclusive, and evidence should not be admitted to contradict her (*n*); but if such evidence, in contradiction, be admitted, the witness who gives it, if false, may be convicted of perjury (*o*). Evidence on hearing.

When the justices at quarter sessions have the order before them, and hear the evidence and quash the order, on the ground that the evidence of the mother is not corroborated in some material particular, their decision is conclusive, and the defendant is freed for ever (*p*). Quashing the order at sessions, final.

If the case has been called on, but on a preliminary objection for a defect in the notice or such like it is dismissed, costs may be given under the 7 & 8 Vict. c. 101, s. 4 (*q*). So, the entry of an appeal and the calling on of the case and dismissal of the case for the non-appearance of one of the parties, would justify the court in giving costs (*r*); but if no notice of recognizance has been given it would seem that there is no appeal, and that there is therefore no power to give costs. Costs of the appeal.

By the 8 Vict. c. 10, s. 5, "If at any time before the hearing of the appeal the putative father, who shall have entered into his recognizance for the trial of the appeal and the payment of costs, shall give notice in writing of his abandonment of the appeal to the mother of the child, in whose favour the order shall have been made, and to the justice or justices before whom the said recognizance shall have been taken, and shall pay or tender to the said mother all sums then due under the said order, and such costs and expenses as she shall have incurred by reason of such notice of appeal, the said recognizance Abandonment of the appeal.

(*k*) *Follit* v. *Koetzow*, 2 E. & E. 730; 29 L. J., M. C. 128.
(*l*) *Ib.*
(*m*) *Garbutt* v. *Simpson*, 32 L. J., M. C. 186.
(*n*) *Reg.* v. *Gibbon*, L. & C. 109; 31 L. J., M. C. 98.
(*o*) *Ib.*
(*p*) *Reg.* v. *Glynne*, 41 L. J., M. C. 58; L. R., 7 Q. B. 16; *R.* v. *Tenant*, 2 Ld. Raym. 1423; *Pidgeon's case*, 1 Bulst. 252.
(*q*) See *R.* v. *Recorder of Exeter*, 5 Q. B. 342; decided on 5 & 6 Will. 4, c. 76.
(*r*) See *Reg.* v. *Stamper*, 1 Q. B. 119.

Abandoning Appeal by putative Father.

so entered into by the said putative father shall not be estreated or in any manner put in force or otherwise proceeded with."

Jurisdiction of justice to make the order.

The jurisdiction to make the order is conferred now by the 35 & 36 Vict. c. 65, s. 3, which enacts, that any single woman who may be with child, or who may be delivered of a bastard child after the passing of this act, may either before the birth or at any time within twelve months from the birth of such child or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child, the woman shall make a deposition upon oath stating who is the father of such child; and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child, to appear at a petty sessions to be holden after the expiration of six days at least for the petty sessional division, city, borough or other place in which such justice usually acts.

What women are within the operation of the act.

The term "single woman" in the above section includes a widow (*s*) and a married woman living separate from her husband; as, for instance, where the husband is undergoing a sentence of penal servitude or imprisonment (*t*).

An English woman delivered of a bastard child on an English ship on the high seas is within the act (*u*); but a foreign woman delivered of a bastard child out of England is not (*v*).

Of the application.

If the application is made after twelve months from the birth, there ought to be evidence on oath of the payment of money, within twelve months after the birth, before the summons issue; but any objections on the ground of the absence of such proof affect only the regularity of the summons; as to the effect of which, see *post*.

To whom application for summons to be made.

The application for a summons must be made by the woman.

To any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside. And the term "petty sessional division"

(*s*) *Reg.* v. *Wymondham*, 2 Q. B. 541; *Antony* v. *Cardenham*, Fost. 309; 2 Bott, 194.

(*t*) *Reg.* v. *Collingwood*, 12 Q. B. 681; 17 L. J., M. C. 168; *Reg.* v. *Pilkington*, 2 E. & B. 546; sub nom. *Ex parte Grimes*, 22 L. J., M. C. 153.

(*u*) *Marshall* v. *Murgatroyd*, 40 L. J., M. C. 7; L. R., 6 Q. B. 31.

(*v*) *Reg.* v. *Blane*, 13 Q. B. 69; 18 L. J., M. C. 216.

is defined by the 8 Vict. c. 10, s. 10, to be and include any division of a county, riding, or division having a separate commission of the peace, in which one or more petty sessions have been or shall be usually held, or any division for the holding of special sessions formed, or to be formed, under the provisions of 9 Geo. 4, c. 63, or of 6 & 7 Will. 4, c. 12, amending the same. And that where there are two or more petty sessions usually held in such division, or where any justice acts for two or more of such divisions, he shall require the party, whom he shall summon under 7 & 8 Vict. c. 101, to appear at the petty sessions to be held in any such division as he shall deem fit.

Jurisdiction of Justice.

Petty sessional division, what.

And by 12 Vict. c. 18, s. 1, every sitting and acting of justices of the peace, or of a stipendiary magistrate in and for any city, borough, or town corporate having a separate commission of the peace, or any part thereof, within England and Wales, at any police court or other place appointed in that behalf, shall be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division within the meaning of any acts of parliament, made or hereafter to be made, having relation to such petty sessions, or to any business to be transacted thereat.

The section is imperative as to the justice to whom application for the summons is to be made, and if application be made to one who does not answer the descriptions above mentioned, the summons and all the proceedings upon it will be void (*x*).

Residence of woman, where

A woman is to be taken to reside in a place, so as to give jurisdiction to the justice, where she went to lodge for the purpose of affiliating the child, if she has no other home at the time, and she went there because it was the most convenient place with reference to the meeting of the magistrates for the division, and not for the purposes of fraud, or of harassing the putative father (*y*); but if a woman goes to lodge in a particular jurisdiction for the mere purpose of getting an order from the justices of that jurisdiction, after having had her application twice dismissed on the merits in another jurisdiction, and without the intention of staying longer than might be necessary for that purpose, she does not reside there so as to give the justices jurisdiction (*z*).

Of the issuing of the summons.

If the application be made within twelve months after the birth of the child, the summons need not be issued till after the twelve months has expired, so long as it issue as soon as it can be made available in the opinion of the justice (*a*); and thus, if the putative father absconds before the birth of the child, and the mother does not ascertain his whereabouts until after a twelvemonth after the birth, it is sufficient if she has made her

(*x*) *R.* v. *Hickling*, 7 Q. B. 889; 15 L. J., M. C. 23; *Reg.* v. *Martin*, 2 Q. B. 1037; *Sharp* v. *Aspinall*, 10 B. & C. 47.
(*y*) *Reg.* v. *Hughes*, D. & B. 188; 26 L. J., M. C. 133.
(*z*) *Reg.* v. *Myott*, 32 L. J., M. C. 138.
(*a*) *Ex parte Harrison*, 16 Jur. 726.

Orders in Bastardy.

Application for summons.

application for a summons within the twelvemonth, and a summons issued after the twelvemonth upon such application is valid (*b*). When the statute says the summons is to issue "thereupon," it does not mean forthwith or immediately (*c*).

The justice to whom the application is made, is, however, the only person who can issue the summons, and, therefore, if an application be made to a justice for a summons, who does not issue the summons within the twelve months, and afterwards and before the issuing of the summons die, no proceedings can be taken on such application (*d*).

Where application made more than twelve months after birth of child.

If the application for the summons is made more than twelve months after the birth of the child, there should be proof on oath of the payment of money for its maintenance by the putative father within the twelve months, but any objection on the ground of the absence of such proof affects only the regularity of the summons, for the proceeding is in the nature of a civil suit within 14 & 15 Vict. c. 99, ss. 2, 3, and, therefore, if the defendant appears, and without objection defends the case, and gets a decision on the merits, he waives the irregularity in the process, and by so doing gives the court jurisdiction to hear and decide the suit (*e*), or if he appear and give evidence on his own behalf (*f*), and that whether the summons shows the defect or not (*g*); but if the objection were taken and insisted upon, probably it would be fatal (*h*), and the mere appearance of the defendant without more would, probably, not be deemed a waiver of the irregularity (*i*).

Of the hearing of the application.

By 35 & 36 Vict. c. 65, s. 4, After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person or left at his last place of abode six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to

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(*b*) *Potts* v. *Cumbridge*, 8 E. & B. 847; 27 L. J., M. C. 62.
(*c*) *Ibid.*
(*d*) *Reg.* v. *Pickford*, 1 B. & S. 77; 30 L. J., M. C. 133.
(*e*) *Reg.* v. *Berry*, Bell, C. C. 46; 28 L. J., M. C. 86; *Smith* v. *Roche*, 6 C. B., N. S. 223; 28 L. J., C. P. 237; and see *Reg.* v. *Lightfoot*, 6 E. & B. 822; 25 L. J., M. C. 115.
(*f*) *Reg.* v. *Simmons*, Bell, C. C. 168; 28 L. J., M. C. 183.
(*g*) *Reg.* v. *Berry*, *ubi sup.*; *Reg.* v. *Simmons*, *ubi sup.*
(*h*) *Reg.* v. *Berry*, *ubi sup.*
(*i*) *R.* v. *Justices of Carnarvon*, 5 Nev. & M. 364.

Hearing on the Summons.

have the custody of such child under the provisions of the 7 & 8 Vict. c. 101, of a sum of money weekly, not exceeding five shillings a-week, for the maintenance and education of the child, and of the expenses incidental to the birth of such child, and of the funeral expenses of the child, provided it has died before the making of such order, and of such costs as may have been incurred in the obtaining of such order: and if the application be made before the birth of the child, or within two calendar months after the birth of the child, such weekly sum may, if the said justices think fit, be calculated from the birth of the child. Then follow the provisions for enforcing the order by distress and commitment, which are not sufficiently connected with the present subject to require setting forth here. So, if the putative father appear at the petty sessions, and without objecting to the irregularity of the summons give notice of appeal, and enter into recognizances, he will not be allowed afterwards to object that there was a want of jurisdiction on that ground (*j*).

Irregularity in summons cured.

The summons may be served personally, or by leaving the same at the last place of abode of the putative father, six days at least before the petty sessions, and in cases where the putative father resides out of the petty sessional district where the mother applies for the summons, its service may be proved by affidavit (*k*).

Service of the summons.

By the words "last place of abode," is meant the present place of abode, if the party have any, or the last which he had if he has ceased to have any. It is not, therefore, sufficient in default of personal service to serve it at a house where the defendant formerly lodged, but did not lodge at the time of the service, and where it did not reach him till after the order was made, although the server believed him to reside there, and the mistress of the house said his clothes were still there (*l*); but the service was held sufficient where it was left at the house of the defendant's father with whom the defendant had always lived up to a fortnight before the service, and which place he left in anticipation of the bastardy proceedings, although he at the time thereof was residing and had obtained employment on a farm in a different part of the country, and as he stated had ceased to reside with his father, and had no intention of returning to him, and was not aware of the proceedings till they were over (*m*). In that case, however, the court deemed the residence away from his father's to be but temporary, and that no fresh permanent abode had been acquired. In one case the service of a summons, upon an application before birth, made on the 4th October, 1866, at the house where the putative father

"Last place of abode" of defendant.

(*j*) *Reg.* v. *Justices of Wiltshire*, 12 A. & E. 793; *Reg.* v. *Stoddart*, 1 G. & D. 654.
(*k*) 35 & 36 Vict. c. 65, s. 6.
(*l*) *Reg.* v. *Evans*, 19 L. J., M. C. 151.
(*m*) *Reg.* v. *Higham*, 7 E. & B. 557; 26 L. J., M. C. 116.

Of Service of Summons before Justices.

Last place of abode of defendant.

was residing until the first of the same month, when he left it with the intention of going to America, to which country he did go, and where he remained till March in the following year, the child having been born on the 29th of October, 1866, was held sufficient, and an order made in his absence, and without his knowledge, was upheld, but the observations in that case of the court were inconsistent with the decision in *Potts* v. *Cumbridge* (*n*), and that case was not brought to the attention of the court. A temporary absence from home when the summons is served, and no notice of it, are grounds for an application to the discretion of the justices to adjourn the hearing (*o*).

Decision of justices as to service may be reviewed.

If the magistrates making the order act upon what they deem due proof of service of the summons, though the order is made with jurisdiction, their decision is open to review if it can be shown that the facts upon which they proceeded failed; as, for instance, that the service, if personal, was made by mistake on the wrong person, or the place where the summons was served as being the last place of abode was not his last place of abode (*p*). If an application is made on certiorari to quash the order on the above grounds, the affidavits on which it is founded must however also aver that the alleged father was not the father in fact, and had no knowledge of the application or summons (*q*).

Where service to be effected.

The service must be within the limits of England or Wales, and a service outside, *viz.*, in Scotland, is not one upon which justices can proceed in the absence of the putative father (*r*).

Six days at least before petty sessions.

In computing the "six days at least" before the petty sessions, the whole of the day of the service and of the hearing must be excluded (*s*). Where the father resides out of the petty sessional division, whether the mother applies for the summons or order, the service of the summons or order may be proved by an affidavit in the form given in the schedule to 36 Vict. c. 9, or to the like effect made by a constable and sworn before a justice; and any affidavit purporting to be so made and attested shall be received in evidence, and shall be deemed to be duly made and attested till the contrary be shown (*t*).

Return of the summons.

Upon the application after birth the summons is returnable at a petty sessions to be holden after the lapse of six days at the least after the service for the petty sessional division, city, borough or other place in which such justice usually acts. But upon an application before birth, it is provided by 8 & 9 Vict. c. 10, that the "said justice to whom any application shall be

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(*n*) 8 E. & B. 847; 27 L. J., M. C. 62.
(*o*) *Reg.* v. *Brown*, 1 L. T., N. S. 29.
(*p*) *Reg.* v. *Evans*, 1 L. M. & P. 357; 19 L. J., M. C. 151.
(*q*) *Ib.*; *Reg.* v. *Davis*, 22 L. J., M. C. 143.
(*r*) *Reg.* v. *Lightfoot*, 6 E. & B. 822; 25 L. J., M. C. 115.
(*s*) *Reg.* v. *Justices of Middlesex*, 2 New Sess. C. 73; 14 L. J., M. C. 139; *Mitchell* v. *Foster*, 12 A. & E. 472; *R.* v. *Justices of Shropshire*, 8 A. & E. 173; *Zouch* v. *Empsey*, 4 B. & A. 522.
(*t*) 36 Vict. c. 9, s. 4.

made by any such woman being pregnant shall summon the man to appear at some petty sessions at which he usually acts, to be held on a day after the time when the said mother shall expect the said child to be born; provided that if on such day the woman shall not have been delivered or the justices shall be satisfied that she has been delivered at such a short period before such day that she cannot appear at the said session, it shall be lawful for the justices thereat to adjourn the hearing of the said case until some other day, and so from time to time until the child shall have been born and the woman shall be able to attend at the said sessions: and it shall be lawful for the justices at their petty sessions to make an order in respect of any such application so made by such woman so pregnant to a justice as aforesaid if she apply at such petty sessions within the space of two calendar months from the birth of the child, although more than forty days shall have elapsed from the time when the summons was served upon the alleged father or was left at his last place of abode. *Return of the Summons.*

An application for an order and a refusal by justices to make it, even on the merits, is no bar to a fresh application and fresh hearing (*u*); but after the previous hearing there must be a fresh application and summons thereon, as the former application is spent by the first hearing, and there is no jurisdiction to hear the case a second time on the same application (*x*). When prior adjudication makes res judicata.

By 35 & 36 Vict. c. 65, s. 5, "No order for the maintenance and education, or for contribution towards the relief of any such child made in pursuance of this act shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child, in respect of whom it was made, has attained the age of thirteen years, or after the death of such child; provided that the justices may in the order direct that the payments to be made under it in respect of the child shall continue until the child attains the age of sixteen years, in which case such order shall be in force until that period." As to order of maintenance.

By 7 & 8 Vict. c. 101, s. 4, no such order shall be made unless applied for at such petty sessions, within the space of forty days from the service of the summons, after the birth of the bastard child, on the person alleged to be the father of such bastard child. All money payable under any order as aforesaid shall be due and payable to the mother of the bastard child in respect of such time, and so long as she lives, and is of sound mind, and is not in any gaol or prison, or under sentence of transportation; and after the death of the mother of such bastard child, or whilst such mother is of unsound mind, or confined in any gaol or prison, or under sentence of transportation, any two

(*u*) *Reg.* v. *Brisby*, 2 C. & K. 962; 18 L. J., M. C. 157; *Reg.* v. *Justices of Bucks*, 3 New Sess. C. 500; 18 L. J., M. C. 113; *Reg.* v. *Machen*, 14 Q. B. 79; 18 L. J., M. C. 213; *Ex parte Westerman*, 16 L. T. 420; *Reg.* v. *Grant*, 36 L. J., M. C. 89; sub nom. *Reg.* v. *Gaunt*, L. R., 2 Q. B. 466.

(*x*) *Reg.* v. *Thomas*, 8 L. T., N. S. 60.

Enforcing the Order.

justices may, if they see fit, by order under their hands and seals, from time to time appoint some person who, with his own consent, shall have the custody of such bastard child so long as such bastard child is not chargeable to any parish or union. And any two such justices may revoke the appointment of such person, and may appoint another person in his stead; and every person so appointed to have the custody of a bastard child shall, so long as such child is not chargeable to any parish or union, be empowered to make application for the recovery of all payments becoming due under the order of the court of petty sessions as aforesaid, in the same manner as the mother of such bastard child might have done; and the clerk to the justices making any order on the putative father of a bastard child, or appointing any person to have the custody of such child as hereinbefore provided, shall, as soon as may be, send by post, or otherwise, a duplicate of such order or appointment signed by such clerk to the clerk of the guardians of the union or parish in which the mother of such bastard child resided at the time of the making such order or appointment: provided always, that after the death of such mother, or, if such mother be incapacitated as aforesaid, so often as any bastard child, for whose maintenance such order of petty sessions has been made, becomes chargeable to any parish or union by the neglect of the putative father to make the payments due under the orders of justices, then, and in such case, it shall be lawful for the board of guardians of a union or parish, or if there be no such board of guardians, for the overseers of any parish or place, to make such application for the enforcement of the order as might have been made by the mother of such bastard child if alive; but all payments for the maintenance of such child, made in pursuance of such application, shall be made to some person from time to time appointed by the justices as hereinbefore provided, and on condition that such bastard child shall cease to be chargeable to such parish or union.

As to amount payable under the order.

In fixing the amount payable under the order, the justices would properly have regard to the ability of the mother to maintain the child, and it would be a circumstance for their consideration if the father had already contracted to provide for it (*z*); and whether such agreement had been or were likely to be carried out or not (*a*).

By the 8 Vict. c. 10, s. 1, where any proceedings have been had or taken before the passing of the act, or shall hereafter be had or taken in matters of bastardy under 7 & 8 Vict. c. 101, and shall have been set forth according to the forms in the schedule hereunto annexed, or to the like tenor or effect, the same shall be taken respectively to have been and to be valid and sufficient in law: provided, that nothing herein contained

(*z*) *Smith* v. *Roche*, 6 C. B., N. S. 223; 28 L. J., C. P. 237.
(*a*) *Follitt* v. *Koetzow*, 2 E. & E. 730; 29 L. J., M. C. 128.

shall prevent any court of general quarter sessions from proceeding to hear and determine the merits of any case brought before them on appeal against any such order. *Forms given in Act to be valid.*

The court of quarter sessions, on appeal to them against any order made pursuant to the provisions of this act, may, if they think fit, reduce the amount directed to be paid for the maintenance and education, or on account of the relief of the child named in such order, and they shall thereupon alter the order accordingly (*b*).

The adoption of the statutory forms is not imperative but is advisable (*c*). Form of the order.

The truth of facts recited necessary to give jurisdiction can be inquired into on appeal (*d*).

The caption of an order is so far part of it that it may constitute an averment sufficient to make the order good; as where the caption stated that the order was made "before us, the Rev. F. S., Clerk, and T. P., Esquire, her Majesty's justices of the peace for the said riding, and a majority of the justices now present," and the order was simply signed by them, and it was not otherwise stated that there was a majority of those present, the caption was held to be a sufficient statement to that effect (*e*). Caption of the order.

The order must state that it was made at a petty sessions holden for the division, &c., in which the woman resides, and upon a summons issued by and on application made to a justice acting for such division (*f*). And the petty sessional division must be accurately described, but the holding of the petty sessions, and the existence of a petty sessional division, must not be confounded. Whenever two justices meet, and under their commission transact business within their powers, they then hold a petty sessions, if it be not a quarter or special sessions, but the place where they so meet does not thereby become a petty sessional division, nor by any act or acts of their own can they make it so, if such place be clearly within the ambit and parcel of a division already recognized (*g*). An inaccurate description of the petty sessional division would vitiate the order, and the appearance of the putative father does not cure the defect (*h*). The order must state the mother's residence to be within the petty sessional division of the justices (*i*).

The statutory form recites that application had been made to one "acting for this division," but in an order where the

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(*b*) 35 & 36 Vict. c. 65, s. 9.
(*c*) *R.* v. *Browne*, 2 Stra. 811.
(*d*) *R.* v. *Wilson*, 4 N. & M. 243; *Reg.* v. *Evans*, 1 L. M. & P. 357; 19 L. J., M. C. 151; *Reg.* v. *Davis*, 22 L. J., M. C. 143.
(*e*) *Ex parte Boynton*, 1 L. M. & P. 12.
(*f*) *Reg.* v. *Hickling*, 7 Q. B. 889; *Reg.* v. *Martin*, 2 Q. B. 1037.
(*g*) *Reg.* v. *Whittles*, 13 Q. B. 248; 18 L. J., M. C. 96.
(*h*) *Ibid.*
(*i*) *Reg.* v. *Higham*, 7 E. & B. 557; 26 L. J., M. C. 116.

Form of the Order in Bastardy.

word "in" was used instead of "for," it was held that the jurisdiction of the justices sufficiently appeared (*k*).

Necessary allegations in order.

The order must show that the application to the petty sessions for the order was within forty days from the service of the summons (*l*). But a statement of the appearance of the defendant on the adjournment of the hearing, and a hearing on the merits, will cure the want of an allegation of the service of the summons before the day of hearing (*m*). If the defendant appears, the order must state that the evidence was given in his presence and hearing, and if after appearance any special circumstances occurred whereby that averment cannot with truth be made, they should be stated on the face of the order (*n*). If the putative father appears by attorney it must be stated that the evidence was given in the presence and hearing of the attorney (*o*), and it is absolutely necessary that the evidence should be stated to have been given in the presence of one or the other (*p*). If the defendant does not appear, the note to the statutory form, by using the words "as is now proved before us" twice with reference to proof of service of the summons on the defendant six days at least before, shows that it is necessary that such fact should be clearly proved, and should therefore be stated (*q*). It need not be stated that the evidence of the woman was given on oath or affirmation, as it is not necessary to be inferred that the blank space left in the statutory form after the words "evidence of such woman" was intended to be so filled up (*r*).

If the defendant tender no evidence, then the words "and having also heard all the evidence tendered by " can be omitted (*s*). The order must state that the evidence in corroboration of the mother was in some material particular, and if it omit so to do it will be bad (*t*).

Order bad in part and good in part.

An order may be invalid in one part and enforceable as to the residue, if the bad part of the order can be clearly severed from the good (*u*).

Thus, where an order was made for the payment of a weekly sum from the birth of the child, where it appeared that the birth was more than two months before the application was made, the order was held good as to the payments payable from

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(*k*) *Reg.* v. *Milner*, 14 L. J., M. C. 157.
(*l*) *Reg.* v. *Rose*, 2 New Sess. C. 166; 15 L. J., M. C. 6.
(*m*) *Ex parte Boynton*, 1 L. M. & P. 12.
(*n*) *Reg.* v. *Duke of Grafton*, 17 L. J., M. C. 125.
(*o*) *R.* v. *Shipperbottom*, 2 New Sess. C. 641; 16 L. J., M. C. 113.
(*p*) *Reg.* v. *Duke of Grafton*, *ubi sup.*
(*q*) *Reg.* v. *Evans*, 19 L. J., M. C. 157.
(*r*) *Reg.* v. *Justices of Cheshire*, 2 New Sess. C. 161; 15 L. J., M. C. 3.
(*s*) *Reg.* v. *Pearcy*, 17 Q. B. 902; 21 L. J., M. C. 129.
(*t*) *Reg.* v. *Read*, 9 A. & E. 619.
(*u*) *Reg.* v. *Green*, 2 L. M. & P. 130; 20 L. J., M. C. 168; *Reg.* v. *Maulden*, 8 B. & C. 78.

the date of the application, and was enforced for so much (*x*); but if the bad part of the order cannot be clearly severed from the rest, the order is altogether bad; thus, the giving of costs is merely ancillary to the judgment, and therefore where an order is bad as to the judgment, it is not maintainable as to the costs (*y*). If an order be void for defects appearing on the face of it, it may be treated as no order at all, and the parties be considered in the same situation as if the first justices had declined to make any order at all, or having drawn up an order had refused to sign it (*z*).

Order divisible, when.

Void order may be treated as no order.

But it must be borne in mind, with reference to exceptions or objections to the form of the order or judgment, which are irrespective of the truth and merits of the matters in question, that it has been enacted by the 12 & 13 Vict. c. 45, s. 7, that "if upon the trial of any appeal to any court of general or quarter sessions of the peace against any order or judgment made or given by any justice or justices of the peace, any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed."

Power to amend order.

And the decision of the court as to such amendment is final, and not liable to be reviewed in any court (*a*).

But inasmuch as the order can only make the payments by the putative father begin from the date of the application upon which it is made, it is a fatal mistake to order the payments to begin from the date of a prior application to a different justice from the one who issued the summons on which the order was made, and is not amendable under the above 7th section (*b*).

A slight sketch of the more usual proofs of illegitimacy must suffice for this work, for though the difficult questions involved in that subject may arise at quarter sessions, the wisest course for that tribunal will be to make the order applied for subject to a case for the opinion of the Court of Queen's Bench. And, first, the operation of the old statutes of bastardy extended as well to the bastards of married as of unmarried women (*c*), and

(*x*) *Reg.* v. *Green*, 20 L. J., M. C. 168; and see *Ex parte Harrison*, 16 Jur. 726; 19 L. T. 114.
(*y*) *Reg.* v. *Stoke Bliss*, 6 Q. B. 158; *Reg.* v. *Green*, *ubi sup.*
(*z*) *Reg.* v. *Brisby*, 1 Den. C. C. 416; 18 L. J., M. C. 157.
(*a*) Sect. 9.
(*b*) *Reg.* v. *Tomlinson*, 42 L. J., M. C. 1; L. R. 8 Q. B. 12.
(*c*) *R.* v. *Luffe*, 8 East, 204; *Atchley* v. *Sprigg*, 33 L. J., Ch. 345; *Legge* v. *Edmonds*, 25 L. J., Ch. 138; *Goodright* v. *Moss*, 2 Cowp. 591.

Evidence of Illegitimacy.

we have seen the present one does the same (*d*). To prove a child born of a married woman in the lifetime of the husband to be a bastard, non-access of the husband must be proved by some other evidence than that of the mother (*e*); but if the fact of non-access is found by the justices upon evidence independent of the mother, it is immaterial that she should also have given evidence to that fact (*f*). The rule that non-access could only be proved by showing the husband to have been beyond the four seas during the period when the child must have been begotten is now exploded, and the rule is laid down as follows:—"Where a child is born in lawful wedlock, the husband not being separated by divorce (or now by a decree of judicial separation), sexual intercourse is presumed till that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that it did not take place, when by the laws of nature the husband could be the father of the child. By the term access, must be understood sexual intercourse, for otherwise a husband might be said to have access because he was in the same place with his wife, although under circumstances which tended to prove that no sexual intercourse could take place" (*g*).

Access, in that sense, is to be presumed where there has been opportunity for it by personal access, though after voluntary separation; and strong evidence is requisite to show that it has not taken place (*h*): but the non-access of the husband need not be proved during the whole pregnancy, if he was absent at such a time as shows a natural impossibility that he could be the father (*i*). Absence to within six months prior to delivery was in one case deemed sufficient (*k*). Where he has access, the criminal intercourse of his wife with others will not

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(*d*) *Ante*, p. 736.

(*e*) *R.* v. *Reading*, 2 Sess. Cas. 75; *R.* v. *Kea*, 11 East, 132; *Goodright* v. *Moss*, Cowper, 591; yet she may prove her own adultery to fix the paternity (8 East, 203), from the necessity of the case.

(*f*) *Yates* v. *Chippendale*, 11 C. B., N. S. 512.

(*g*) See per Sir *James Mansfield*, C. J., in the *Banbury Peerage case*, Dom. Proc. 1831, acted on in *Morris* v. *Davies* (in error), Dom. Proc. 1837; 5 Cl. & Fin. 163, 265, where the wife lived near the husband, but in admitted and habitual adultery with another.

(*h*) *R.* v. *Luffe*, 8 East, 207; 8 Bl. C. 457; *Morris* v. *Davies*, 3 C. & P. 215, 457; *Head* v. *Head*, 1 Turn. & Russ. 638; 1 Sim. & St. 158. But evidence of the conduct of the parties and of the circumstances explanatory of it is admissible to show non-access, though the parties were living within fifteen miles of one another, as in *Morris* v. *Davis;* or in the same town, as in *Atchley* v. *Sprigg*, and *Selbett* v. *Ainsley*, 3 L. T., N. S. 583; or even if the parties have met and been alone within four walls, the circumstances attending the visit are admissible to show that no connection took place; *Gurney* v. *Gurney*, 32 L. J., Ch. 456; *Morris* v. *Davies*, *ubi sup.*; *Atchley* v. *Sprigg*, 33 L. J., Chanc. 345; Burn's J., vol. 1, p. 404, 30th ed.

(*i*) *R.* v. *Luffe*, 8 East, 207.

(*k*) *Heathcote's Divorce*, 1 H. of L. 277.

bastardize the issue (*l*). Where a decree of judicial separation exists, obedience to it is to be presumed, and the child born of the woman divorced or separated would be presumed not to be the husband's (*m*). *Evidence of Illegitimacy.*

If the child is born after the husband's death, but within the usual period of gestation (*viz.*, nine, or even ten calendar months) (*n*), it is legitimate, if otherwise, not. The father or mother may be admitted to disprove his or her marriage (*o*), and the mother may prove her adultery, in order to fix the paternity of the child after proof aliunde of non-access (*p*). The declaration of a parent on oath, or otherwise, may, after his or her death, be adduced as evidence to disprove a marriage (*q*); but the evidence of the parent to prove non-access is rejected, and such rejection of the evidence of the mother or her husband as to non-access after marriage is on the general ground of decency, morality and policy (*r*); and, therefore, the rule prevails although at the time of the examination of the mother the husband were dead (*s*). It is also evidence to prove the time of birth, but not the want of access (*t*), or the place of birth (*u*).

The order may, it seems, include more than one bastard child, if begotten by the same father, or the same mother (*x*).

The father may be indicted for disobedience to the order just as in the case of any other legal order of justices (*y*); but the effect of *Reg.* v. *Ferrall* (*z*) is now destroyed by the Mutiny Acts, 35 Vict. c. 3, s. 40; c. 4, s. 54; under which no order for the maintenance of a bastard child can be enforced against a soldier or sailor within those acts.

As to estreating and putting in process the recognizance to abide the order in case of default, the name of the defaulter must be placed in a list in writing, stating the nature of the offence in respect of which such person was bound, together with the residence, &c. of such person, distinguishing principal from surety, and stating the cause, if any, of such non-appearance, Estreating recognizance to abide order.

(*l*) *Cope* v. *Cope*, 1 M. & Rob. 269; *Morris* v. *Davies*, 5 Cl. & Fin. 163; *Legge* v. *Edmonds*, 25 L. J., Chanc. 138; *Atchley* v. *Sprigg*, *supra*, p. 754.
(*m*) Burn's J., vol. 1, p. 404, 30th ed.
(*n*) Co. Lit. 124 b, Dr. John Hunter's evidence, stated in Hargr. and Butler's Co. Lit. 123 b, and the *Gardner Peerage case*, by Le Marchant.
(*o*) *R.* v. *Bromley*, 6 T. R. 330; Bull. N. P. 112; 2 Sess. Cas. 298.
(*p*) *Legge* v. *Edmonds*, 25 L. J., Chanc. 138; *Reg.* v. *Sourton*, 5 A. & E. 180; *Yates* v. *Chippendale*, 11 C. B., N. S. 512.
(*q*) *Ibid.*, and see per *Bayley*, J., *Doe* d. *Warren* v. *Bray*, 8 B. & C. 817; *Vowels* v. *Young*, 15 Ves. jun. 148.
(*r*) *Goodright* v. *Moss*, 2 Cowp. 594; *Legge* v. *Edmonds*, 25 L. J., Chanc. 138; Taylor on Ev., 4th ed., vol. 1, p. 821.
(*s*) *R.* v. *Kea*, 11 East, 132.
(*t*) *Herbert* v. *Tuckal*, T. Raym. 84; 1 Nol. 335.
(*u*) *R.* v. *Erith* (*Inh.*), 8 East, 539.
(*x*) *R.* v. *Skinn*, 1 Bott, 6th ed., pl. 527, 470.
(*y*) *Reg.* v. *Brisby*, 1 Den. C. C. 416; 18 L. J., M. C. 157; *R.* v. *Ferrall*, 2 Den. C. C. 51; 20 L. J., M. C. 39.
(*z*) *Ubi sup.*

Enforcing Recognizance.

and whether by reason of the non-appearance the ends of justice have been frustrated or delayed, and such list must be laid by the officer of the court before the chairman or two justices or recorder before any such recognizance may be estreated, who may make such order touching the estreating or putting in process as they may deem just, and no such recognizance may be estreated without the written order of the chairman or recorder (*a*).

Certiorari.

A *certiorari* to remove an order of bastardy was discharged, not having been applied for within six months (*b*). If the order is quashed as bad, the court will bind the defendant to appear at the next sessions and abide their order (*c*); for which purpose it is said that he must be in court at the time of the quashing (*d*). The order may now be amended after being brought up in certain cases under 12 & 13 Vict. c. 45, s. 7; see *ante*, p. 745.

Enforcing the order.

The goods of the putative father may be distrained and sold to pay the sum ordered (*e*); or he may be committed for not more than three months (*f*); or he may be indicted for disobeying the order (*g*). Again, an order confirmed in the Queen's Bench on *certiorari* may be enforced by attachment.

Statutory forms of order.

The 8 Vict. c. 10, has, with the view of providing against doubts and difficulties, furnished a great variety of forms of proceedings, which, although it is not *imperative* on the justices to use, it is for the above reasons advisable they should adopt. Sect. 1 of this act enacts, "that where any proceedings have been had or taken before the passing of this act, or shall hereafter be had or taken in matters of bastardy, under the provisions of the recited act" (*h*), "and shall have been set forth according to the forms in the schedule hereunto annexed, or to the like tenor or effect, the same shall be taken respectively to have been and to be valid and sufficient in law."

The following are the forms of the orders given by the foregoing statute:—

Form of Order when Application was made by a Woman after Birth.

——— } At a petty session of her Majesty's justices of the peace for the
to wit. } *county* (*i*) of ——— holden in and for the ——— (*i*) *division* of ——— in the said (*i*) *county*, at ——— on the ——— day of ——— in the year of our Lord one thousand eight hundred and ——— before us ——— of her Majesty's justices of the peace for the said (*i*) *county*.

Whereas one ———, single woman, residing at ———, within this ——— (*i*) *division* ——— did, on the ——— day of ——— in the year of our Lord one thousand eight hundred and ———, having been delivered of

(*a*) 7 Geo. 4, c. 64, s. 31.
(*b*) *R.* v. *Howlett*, 1 Wils. 35.
(*c*) *R.* v. *Gibson*, Bla. R. 198.
(*d*) *Id.*; but see 2 Salk. 475; *R.* v. *Price*, 6 T. R. 147.
(*e*) 35 & 36 Vict. c. 65, s. 4.
(*f*) *Ibid.*
(*g*) *R.* v. *Robinson*, 2 Burr. 799.
(*h*) 7 & 8 Vict. c. 101.
(*i*) *Or* city, borough, *or other place, as the case may be.*

Statutory Form of Order.

a bastard child *within* twelve calendar months prior thereto, make application to ———, one of her Majesty's justices of the peace acting for this (*i*) division, for a summons to be served upon one ———, of ———, whom she alleged to be the father of the said child (*k*); and the said justice thereupon issued his summons to the said ——— to appear at a petty session to be holden on this day for this (*i*) *division* ——— in which the said justice usually acts, to answer her complaint touching the premises:

And whereas the said ———, having been duly served with the said summons within forty days from *this day* (*l*) ——— (*m*), *and now appearing in pursuance thereof* ———, and the said ——— having now applied to us the justices in petty session assembled, for an order upon the said ———, according to the form of the statute in such case made and provided; and it being now proved to us, *in the presence and hearing of the said* (*n*) ———, that the said child was, *since* (*o*) the passing of an act passed in the eighth year of the reign of her present Majesty, intituled "An Act for the further amendment of the laws relating to the poor in England," (that is to say) on the ——— day of ——— in the year of our Lord one thousand eight hundred and ———, born a bastard of the body of the said ———; and we having, *in the presence and hearing of the said* (*n*) ———, heard the *evidence of such woman* ——— and such other evidence as she hath produced, *and having also heard all the evidence tendered by* (*p*) ———, *the said* ———, and the evidence of the said ——— the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby *adjudge* the said ——— to be the putative father of the said bastard child; and having regard to all the circumstances of this case, we do now hereby order, that the said ——— do pay unto the said ———, the mother of the said bastard child, so long as she shall live and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such bastard child under the provisions of the said statute, the sum of (*q*) ——— *per week for the first six weeks from the birth of the said child, and from the*

(*i*) *Or* city, borough, *or other place, as the case may be.*

(*k*) *When the application is made after the expiration of twelve months from the birth, but the alleged father has paid money for the maintenance of the child, for the word* "within" *substitute the words* "more than" *and after the word* "child" *insert* "and who was proved before the said justice to have paid money for the maintenance of the said child within twelve calendar months after its birth."

(*l*) *If the order be made at an adjourned session, insert the day of the commencement of the session, adding the words* "from which day the hearing of this case has been adjourned," *and erase the words* "this day."

(*m*) *If the defendant do not appear, insert here,* "and six days at least before this day, as is now proved before us," *or* "the same having been left at his last place of abode six days at least before this day, as is now proved before us," *and erase the words which follow in italics.*

(*n*) *Should the defendant not appear, erase the words in italics.*

(*o*) *Or* within six calendar months before.

(*p*) *Should the defendant appear by attorney or counsel it will be then only necessary to erase the word* "by" *and add* "on behalf of;" *but should he not appear himself, or by attorney or counsel, then erase the words in italics.*

(*q*) *Not to exceed five shillings. This larger amount for the six weeks cannot be allowed, unless the application has been made within two calendar months after the birth. If the application has not been made within this time, or the justices do not think it right to allow that or any less sum from the birth, erase the words in italics, and proceed thus:* " per week from the said day of last, being the day upon which such application was made to the said justices as aforesaid."

Statutory Form of Order.

expiration of such six weeks the sum of ——— *per week* ——— until the said child shall attain the age of thirteen years, or shall die, or the said ——— shall marry; and we do hereby further order the said ——— to pay to the said ——— the sum of ——— being the costs incurred in obtaining this order (*r*).

Given under our hands and seals, at the session aforesaid ———.

If the application was made by a woman *before* the birth of the child, the statute has given the form following:—

Form of Order when Application was made by a Woman with Child.

——— } At a petty session of her Majesty's justices of the peace for the
to wit. } *county* (*s*) of ———, holden in and for the ——— (*s*) *division of* ——— in the said *county* (*s*) at ———, on the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, before us ——— her Majesty's justices of the peace for the said (*s*) *county*.

Whereas one ———, single woman, residing at ———, within this ——— (*s*) *division*, being with child, did, on the ——— day of ——— in the year of our Lord one thousand eight hundred and ———, make application to ———, one of her Majesty's justices of the peace acting for this (*s*) *division*, for a summons to be served upon one ———, of the parish of ———, in the *county* (*s*) of ———, whom she, *being duly sworn* before the said ———, *upon her oath stated* (*t*) to be the father of the child with which she was then pregnant, and the said justice thereupon issued his summons to the said ——— to appear at a petty session to be holden on this day for this *division* (*s*) in which the said justice usually acts, to answer her complaint touching the premises: and whereas the said ——— hath been lately delivered of a bastard child: and whereas the said ——— having been duly served with the said summons, *and appearing in pursuance thereof* (*u*) ———; and the said ——— having now applied to us, the justices in petty session assembled, for an order upon the said ——— according to the form of the statute in such case made and provided; and it being now proved to us, *in the presence and hearing of the said* (*x*) ——— that the said child was, since the passing of an act passed in the eighth year of the reign of her present Majesty, intituled "An Act for the further amendment of the Laws relating to the Poor in England," that is to say, on the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, born a bastard of the body of the said ———, and we having, *in the presence and hearing of the said* (*x*) ———, heard the evidence of such woman ——— and such other evidence as she hath produced, *and having also heard all the evidence tendered by* (*y*) ——— *the said* ———, and the evidence of the said ———, the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby adjudge the said ——— to be the putative father of the said bastard child; and having re-

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(*r*) *If the justices should decide upon allowing such expenses, insert here*, "and the sum of ten shillings for the midwife."

(*s*) *Or* city, borough, *or other place, as the case may be.*

(*t*) *Or* affirmed.

(*u*) *Insert here, if the defendant do not appear*, "six days at least before this day, as is now proved before us," *or*, "the same having been left at his last place of abode six days at least before this day, as is now proved before us, *and erase the words in italics.*

(*x*) *Should the defendant not appear, erase the words in italics.*

(*y*) *Should the defendant appear by attorney or counsel, it will be then only necessary to erase the word* "by" *and add* "on behalf of," *but should he not appear himself, or by attorney or counsel, then erase the words in italics.*

Statutory Form of Order.

gard to all the circumstances of this case, we do now hereby order, that the said ——— do pay unto the said ———, the mother of the said bastard child, so long as she shall live and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such child under the provisions of the said statute, *the sum of* (*z*) ——— *per week for the first six weeks from the birth of the said child, and from the expiration of such six weeks* the sum of (*a*) ——— per week, until the said child shall attain the age of thirteen years, or shall die, or the said ——— shall marry; and we do hereby further order the said ——— to pay to the said ——— the sum of ———, being the costs incurred in obtaining this order (*b*).

Given under our hands and seals at the session aforesaid ———.

Notwithstanding the statute has prescribed the foregoing forms as those which may be used, some discretion will be required in adapting them to meet special circumstances not provided for by the legislature. In the case of *The Queen* v. *The Duke of Grafton and others* (*c*), the form used was that provided in the case of the application by a woman after birth, and after reciting that the father was duly summoned, "and *now appearing in pursuance* thereof," went on, according to the form, to the words "and it being now proved to us, *in the presence and hearing of the said*," which words in italics were struck out; and so, further on, where the same words occur the same erasure was made. Upon this order being brought up by *certiorari*, it was objected that as the order recited that the father was present, the evidence ought to have been stated to have been given in his presence. And after argument, and taking time to consider, Mr. Justice *Wightman* made the rule absolute for quashing the order, holding that if the man had appeared, the order should have stated that the evidence was given in his presence; or if there had arisen any special circumstances after his appearance, such as his going away, those circumstances ought to have been set out. But in the case of *Reg.* v. *Shipperbottom* (*d*), in which the order recited that the "said N. S. having been duly served with the said summons within forty days from this day, and *now appearing* in pursuance thereof," it was stated that the evidence was given "in the presence and hearing *of the attorney attending on behalf of the said N. S.*," and it was held sufficient, the act contemplating the defendant's appearing by attorney.

In the case of *Reg.* v. *Milner* (*e*), in which an order recited

(*z*) *Not to exceed five shillings. If the justices decline to allow the payment from the birth of any sum, erase the words in italics, and before the word* "until" *insert the time from which payment is to be made, according to their judgment.*

(*a*) *Not to exceed two shillings and sixpence.*

(*b*) *If the justices should decide upon allowing such expenses, insert here* "and the sum of ten shillings for the midwife."

(*c*) 17 L. J., M. C. 125; 11 L. T. 156.

(*d*) 16 L. J., M. C. 113; 2 New Sess. C. 641.

(*e*) 14 L. J., M. C. 157; 2 New Sess. C. 54.

Order in Bastardy.

Sufficiency of order.

that application had been made for a summons to a justice of the peace usually acting *in* this division, without saying "for," it was held that as by the 8 Vict. c. 10, the words "in" and "for" are used synonymously, the jurisdiction of the justice who issued the summons sufficiently appeared on the face of the order.

In *Reg.* v. *Higham* (*f*), an order of affiliation omitted to state that the mother's residence was within the petty sessional division; but the summons, a copy of which was in evidence before the justices, alleged this fact, which was not otherwise proved; and upon a rule to quash the order (upon being returned by *certiorari*) for this objection, it was held that the justices had sufficient grounds before them to have drawn up the order without the omission, and that the court might therefore amend it, under the 12 & 13 Vict. c. 45, s. 7.

Copy of Indictment for disobeying an Order of Justices.

Sussex } The jurors of our lady the Queen upon their oath present that
to wit. } S. H., now residing in the parish of D., within the division of L., in the county of Sussex, single woman, before the making of the order of justices hereinafter mentioned, to wit, on the second day of June, in the year of our Lord ——, at M., within the said county, was delivered of a bastard child; and the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H., having been so delivered of such bastard child, and having come to reside within the parish of D. aforesaid, and within the said division and county, afterwards, to wit, on the twenty-ninth day of April, in the year of our Lord —— (being within twelve calendar months after the birth of the said child), did make application to J. L. E., esquire, one of her Majesty's justices of the peace, acting in and for the said division and county at P., in the said division and county, for a summons to be served upon one W. B. of H., in the county of Surrey, grocer, whom she alleged and still doth allege to be the father of the said child; and the jurors aforesaid, upon their oath aforesaid, do further present that the said J. L. E., so being such justice acting in and for the said division and county as aforesaid, did thereupon, afterwards, to wit, on the same day and year last aforesaid, at P. aforesaid, duly issue his summons to the said W. B., to be and appear at a petty sessions to be holden for the said division at P. aforesaid, within the said division and county, on the sixth day of May next, to answer the complaint of her the said S. H. touching the premises; and the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B. was duly served with the said summons within forty days of and more than six days before the holding of the said petty sessions, and the making of the order hereinafter mentioned, to wit, on the twenty-ninth day of April, ——, to which said summons he, the said W. B., notwithstanding such service thereof aforesaid did not then, to wit, at the said petty sessions so holden for the said division, on the said sixth day of May, appear or offer any defence, nor show cause why an order of maintenance should not be made upon him, whereupon J. N. esquire, and the said J. L. E., esquire, being two of her Majesty's justices of the peace acting in and for the said division and county in petty session assembled, at the said petty session holden for the said division at P., within the said division and county, on the said sixth day of May, ——, the said S. H. having then, to wit, at the said petty sessions, applied to them the said J. N. and J. L. E., as such justices aforesaid, for an order upon the said W. B., according to

(*f*) 26 L. J., M. C. 116.

the form of the statute in such case made and provided, did by their order in writing, under their hands and seals, bearing date the sixth day of May, in the year of our Lord ——, after having heard such evidence as the said S. H. had produced; and the evidence of the said S. H., mother of the said child, having been corroborated in some material particular by other testimony to the satisfaction of the said justices, declare and adjudge the said W. B. to be the putative father of the said bastard child, and did thereby order that the said W. B. should pay to the said S. H., the mother of the said bastard child, so long as she should live and be of sound mind, and should not be in any gaol or prison or under sentence of transportation, or to the person who should be appointed to have the custody of the said bastard child, under the provisions of the said statute, the sum of ——— shillings per week from the said twenty-ninth day of April last, until the said child should attain the age of thirteen years or should die, or the said S. H. should marry, for and towards the relief and keeping of the said bastard child; and the said justices did thereby further order that the said W. B. should pay to the said S. H. the sum of £———, being the costs incurred in obtaining the said order. And the jurors aforesaid, upon their oath aforesaid, do further present that after the making the said order and before taking of this inquisition, to wit, on the fifteenth day of May, in the year ——, at H. aforesaid, notice of the aforesaid order was duly given to him the said W. B., and that he the said W. B. was duly made acquainted with the contents thereof, by being personally served with the said order; and the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H. is still living unmarried and never having been married, and is of sound mind, and is not and has not been, since the making of the said order, in any gaol or prison or under sentence of transportation, and from the time of making of the said order hitherto has been and still has, as the proper person in that behalf, none other having been appointed, the sole care and custody of the said bastard child. And the jurors aforesaid, upon their oath aforesaid, do further present that the said bastard child is yet living, and is under the age of thirteen years, to wit, of the age of sixteen months only or thereabout, and hath always from the time of making the said order, until the day of taking this inquisition, been and continued and now is chargeable to and entirely supported by the said S. H., the mother. And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B. not regarding the said order, nor the laws and statutes in such case made and provided, hath not upon notice of the said order aforesaid, at any time or times since the making thereof as aforesaid, hitherto paid or caused to be paid to the said S. H., or any person on her behalf, the said sum of ——— shillings per week from the said twenty-ninth day of April last aforesaid, nor any part thereof; nor the sum of £———, being the costs of obtaining the said order as aforesaid nor any part thereof, but on the contrary thereof, notwithstanding such notice aforesaid, he the said W. B., on and from the said sixth day of May, in the said year of our Lord ——, unto the taking of this inquisition, unlawfully, wilfully, obstinately and contemptuously hath neglected and refused, and still doth neglect and refuse, to pay or cause to be paid to the said S. H. the said sum of ——— shillings weekly, from the said twenty-ninth day of April, ——, or any part thereof; and also the said sum of £———, the costs incurred in obtaining the said order as aforesaid, or any part thereof, contrary to the direction of the said order, and in manifest breach and contempt of the same, to the great damage of the said S. H., to the evil and pernicious example to all others in the like case offending, and against the peace of our said lady the Queen, her crown and dignity.

Form of Indictment for disobeying the Order of Justices.

Second count: And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on the sixth day of May, A.D. ——, J. N. and J. L. E., Esquires, two of her Majesty's justices of the peace, acting in and for the division of L., in the county of Sussex, in petty sessions assembled, at the petty sessions holden for the said division and county, at P. within the said division and county, on the sixth day of May, A.D. ——, duly made their order in writing, under their hands and seals,

Indictment for disobedience of Order of Justices.

bearing date the said sixth day of May, ——, which said order was and is in the words and figures following, that is to say:—

"Sussex to wit. At a petty sessions of her Majesty's justices of the peace for the county of Sussex, holden in and for the division of L. in the said county, at the town hall in P., on the sixth day of May, in the year of our Lord one thousand eight hundred and seventy-four, before us, J. N. and J. L. E., Esquires, two of her Majesty's justices of the peace for the said county: Whereas one S. A., single woman, residing at D., within this division, did on the twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-four, having been delivered of a bastard child, within twelve calendar months prior thereto, make application to J. L. E., Esquire, one of her Majesty's justices of the peace, acting for this division, for a summons to be served upon W. B., of H., in the county of Surrey, grocer, whom she alleged to be the father of the said child, and the said justice thereupon issued his summons to the said W. B., to appear at a petty sessions to be holden on this day for this division, in which the said justice usually acts, to answer her complaint touching the premises. And whereas the said W. B. having been duly served with the said summons within forty days from this day, and six days at least before this day, as is now proved before us, and the said S. H. having now applied to us, the justices in petty session assembled, for an order upon the said W. B. according to the form of the statute in such case made and provided; and it being now proved to us that the said child was, since the passing of an act passed in the eighth year of the reign of her present Majesty, intituled 'An Act for the further amendment of the Laws relating to the Poor in England,' that is to say, on the second day of June, in the year of our Lord one thousand eight hundred and seventy-three, born a bastard of the body of the said S. H., and we have heard the evidence of such woman, and such other evidence as she hath produced, and the evidence of the said S. H., the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby adjudge the said W. B. to be the putative father of the said bastard child, and having regard to all the circumstances of this case, we do now hereby order that the said W. B. do pay unto the said S. H., the mother of the said bastard child, so long as she shall live and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such bastard child, under the provisions of the said statute, the sum of ——— shillings per week from the said twenty-ninth day of April last until the said child shall attain the age of thirteen years or shall die, or the said S. H. shall marry. And we do hereby further order the said W. B. to pay to the said S. H. the sum of ——— being the costs incurred in obtaining this order. Given under our hands and seals at the sessions aforesaid.

J. N. (L.S.) J. L. E. (L.S.)"

And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B. was personally served with the said order after the making thereof, and before the taking of this inquisition, to wit, on the fifteenth day of May, ——; and the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H. is still living, without having been married, and is of sound mind, and is not nor hath been in any gaol or prison since the making of the said order, nor under any sentence of transportation, and from the time of the making the said order hitherto has had and still has the sole care and custody of the said bastard child, no other person having at any time been appointed in that behalf; and the jurors aforesaid, upon their oath aforesaid, do further present that the said bastard child is still living and under the age of thirteen years, to wit, of the age of sixteen months or thereabouts, and hath always, from the time of making the said order until the day of taking of this inquisition been and continued, and still is chargeable to and entirely supported by the said S. H., the mother: and the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B. not regarding the said order, nor the

laws and statutes in such case made and provided, hath not, upon notice of the said order as aforesaid, at any time or times since the making thereof, as aforesaid, hitherto paid or caused to be paid to the said S. H., or any person on her behalf, the said sum of ——— shillings per week, from the twenty-ninth day of April last aforesaid, nor any part thereof, nor the sum of ———, being the costs of obtaining the said order as aforesaid, nor any part thereof, but on the contrary thereof, notwithstanding notice thereof as aforesaid, he, the said W. B., from the said sixth day of May, in the year ——, to the day of the taking of this inquisition, unlawfully, wilfully, obstinately and contemptuously hath neglected and refused, and still doth neglect and refuse, to pay the said sum of ——— shillings weekly, from the said twenty-ninth day of April, ——, or any part thereof, and also the said sum of ———, the costs incurred in obtaining the said order as aforesaid, or any part thereof, contrary to the direction of the said order, and in manifest breach and contempt of the same, to the great damage of the said S. H., to the evil and pernicious example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

Form of Indictment for disobedience of an Order of Maintenance.

CHAPTER III.

OF HIGHWAYS.

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Section 1.

PROCEEDINGS FOR DIVERTING OR STOPPING HIGHWAYS UNDER 5 & 6 WILL. 4, C. 50, OR FOR DIRECTING THAT HIGHWAYS SHALL CEASE TO BE REPAIRABLE UNDER 27 & 28 VICT. C. 101, AND APPEALS AGAINST THEM.

Commencement of proceedings for diverting or stopping up highways.

THE subject of stopping and diverting highways, with the right of appeal against orders of justices for so doing, was regulated by 13 Geo. 3, c. 78, until the 55 Geo. 3, c. 68 was substituted for it. Both acts are now repealed by 5 & 6 Will. 4, c. 50, s. 1; and a new system is introduced, under which two justices, on application of a vestry, or of a surveyor of a parish, if on behalf of a private party, may view the existing highways, and after giving certain notices, may certify that such view has been had; which certificate, being lodged with the clerk of the peace, together with the plan, &c. pointed out by the act, and the consent of the owner of any land taken for the new road, shall be read in open court at the quarter sessions, held next after four weeks from the day of lodging the justices' certificate, and enrolled among the records of the quarter sessions. An appeal is given, and a jury of twelve disinterested men out of the panel returned to serve at the sessions is to determine whether the new highway is nearer, and more commodious to the public, or whether the old one is unnecessary, or the appellant is injured or aggrieved. The passing of the 25 & 26 Vict. c. 61, and the 27 & 28 Vict. c. 101, by which highway districts are formed and highway boards erected, transfers the rights and duties of the parish surveyor to the board, who act by their district surveyor.

Application to justices by

By 5 & 6 Will. 4, c. 50, s. 84, it is enacted, that when the inhabitants in vestry assembled shall deem it expedient that any

highway should be stopped up, diverted, or turned, either entirely, or reserving a bridleway or footway along the whole or any part or parts thereof, the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorize him to pay all the expenses attending such view, and the stopping up, diverting, or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this act.

Surveyor of Highway to apply to Justices to view Highway, &c.

Provided nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid, for the purposes aforesaid; and in such case, the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this act: and the said surveyor is hereby required to make such application as aforesaid.

vestry or private person in order to stopping highway.

When it shall appear (*a*) upon such view of such two justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned, either entirely, or subject as aforesaid (viz. sect. 84), so as to make the same nearer, or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto, by writing under his hand, *or* if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to fix a notice in the form or to the effect of schedule (No. 19) to this act annexed (*b*), in legible characters, at the place and by the side of *each end of the* said highway from whence the same is proposed to be turned, diverted, or stopped up, either entirely or subject as aforesaid, and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be

View of highway by justices —Notices of diverting or stopping it— Certificate of justices, with plan of highway.

(*a*) 5 & 6 Will. 4, c. 50, s. 85.

(*b*) *Viz.* as follows:—Notice is hereby given, that on the ——— day of ——— next, application will be made to her Majesty's justices of the peace assembled at quarter sessions in and for the county of ——— at ——— for an order for [*if the order be for turning, diverting, and stopping up, &c., here state it, and describe the road ordered to be turned, diverted, and stopped up; if the order be for stopping up a useless road, here state it, and describe the road ordered to be stopped up*], and that the certificate of two justices having viewed the same, &c., with the plan of the old and proposed new highway, will be lodged with the clerk of the peace for the said county on the ——— day of ——— next.

A. B., Surveyor, *or*
C. D., Surveyors of the parish of ———.

Certificate of Justices in order to stopping up of Highway.

diverted and turned, or stopped up, either entirely or subject as aforesaid (as the case may be), shall lie, for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid, or any part thereof, shall lie, on four successive Sundays next after the making such view: and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them at the same time, particularly describing the old and the proposed new highway, by metes, bounds, and admeasurements thereof (which plan shall be verified by some competent surveyor), the said justices shall proceed to certify under their hands the fact of their having viewed the highway as aforesaid, and that the proposed new highway is nearer *or* more commodious to the public, and if nearer, the said certificate shall state the number of yards and feet it is nearer; or if more commodious, the reason why it is so; and if the highway is proposed to be stopped up, as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary.

As to what new highway may be.

The new highway need not be an entirely new road, but may consist of land thrown into and added to so as to widen or make of uniform width an old passage or right of way, if it is made for the purpose of being in lieu of, and in substitution of, another highway, so as to justify the inhabitants of the parish in assenting to the stopping of it up (*d*).

The notices must be stated to have been placed at each end of the road (*e*).

Contents of certificate.

It is sufficient for the certificate to state that the new road will be more commodious, and need not say that it is so (*f*); but they cannot certify on the ground that it will be shorter than the existing road when the latter shall have been altered pursuant to the powers given by a local act (*g*).

The certificate need not show that the preliminaries necessary to give the justices jurisdiction to certify have been complied with, and it seems to be good although it omit to show, not only that the surveyor applied to the justices, but also that the surveyor had been properly put into operation by the vestry, or by any other party (*h*); and that the highway was one over which

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(*d*) *Reg.* v. *Phillips*, 35 L. J., M. C. 217, 226; L. R., 1 Q. B. 648, overruling *Welch* v. *Nash*, 8 East, 394.

(*e*) *Reg.* v. *Justices of Surrey*, 39 L. J., M. C. 145; L. R., 5 Q. B. 466.

(*f*) *Reg.* v. *Phillips*, 35 L. J., M. C. 217.

(*g*) *Reg.* v. *Local Board of Midgley*, 33 L. J., M. C. 188; 5 B. & S. 621.

(*h*) *Reg.* v. *Harvey*, Q. B., Mich. Term, 1874, overruling *Reg.* v. *Justices of Worcestershire*, 3 E. & B. 477; 23 L. J., M. C. 113.

the justices had jurisdiction, and the vestry of inhabitants the proper vestry (*i*).

Certificate of Justices to be lodged with Clerk of the Peace and enrolled.

The certificate is sufficient if it certify that the new highway is one of the two, *i. e.*, either nearer or more commodious, and need not state that it is both (*j*).

And (*k*) the certificate of the said justices, together with the proof and plan so laid before them as aforesaid, shall, as soon as conveniently may be after the making of the said certificate, be *lodged with* (*l*) the clerk of the peace for the county in which the said highway is situated, and shall (at the quarter sessions which shall be holden for the limit within which the highway so diverted and turned or stopped up, either entirely or subject as aforesaid, shall lie, next after the expiration of four weeks from the day of the said certificate of the said justices having been lodged with the clerk of the peace as aforesaid) be read by the said clerk of the peace in open court, and the said certificate, together with the proof and plan as aforesaid, as well as the consent in writing of the owner of the land through which the new highway is proposed to be made, shall be *enrolled* (*m*) by the clerk of the peace amongst the records of the said court of quarter sessions: provided always, that any person whatever shall be at liberty at any time previous to the said quarter sessions to inspect the said certificate and plan so as aforesaid lodged with the said clerk of the peace, and to have a copy thereof, on payment to the clerk of the peace at the rate of sixpence per folio, and a reasonable compensation for the copy of the plan.

The quarter sessions for the county mentioned in the above section have been holden, in *Reg.* v. *Justices of Suffolk* (*n*), to mean the general quarter sessions for the county, and not any adjournment thereof. So that where the sessions were holden on certain fixed days at different places for different divisions of a county, but on each by adjournment, from the preceding four weeks from the day of the certificate being lodged, and the ten days' notice of appeal under the 88th section must be reckoned with reference to the commencement of the sessions for the first division, though the highway be not situate in such division; but this case must be taken now to be overruled by *Reg.* v. *Justices of Sussex* (*o*).

It is the duty of sessions, as well when there is no appeal and where there is one, to be satisfied that the certificate comes

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(*i*) *Wright* v. *Overseers of Frant*, 32 L. J., M. C. 204; 4 B. & S. 118.
(*j*) *Reg.* v. *Phillips*, 35 L. J., M. C. 217; L. R., 1 Q. B. 648, overruling *Reg.* v. *Shiles*, 1 Q. B. 919; 10 L. J., M. C. 157. See sect. 89.
(*k*) Sect. 85, continued.
(*l*) See *De Ponthieu* v. *Pennyfeather*, 5 Taunt. 634; 1 Marsh. 261.
(*m*) *Ibid.*
(*n*) 17 L. J., M. C. 143.
(*o*) 34 L. J., M. C. 69 (Exch.); 4 B. & S. 966.

Contents of Certificate of Justices.

before them correct on its face, and accompanied by plan and proof such as the statute requires. And if there are apparent defects on its face, the court must determine whether they are merely formal or substantial, and if substantial, they should refuse to confirm it. The certificate must be supposed to contain the mind of the two viewing justices who have framed it, so that if it omits to state any substantial matter on which the statute requires them to express a judgment, the quarter sessions, whose whole jurisdiction depends upon the certificate, cannot know that they have ever considered it, or if they have, that in the order which they shall make they will be carrying out what it was intended to recommend (*p*).

Including different highways in one order or certificate.

And it is provided, that in any case where it is proposed to stop up or divert more than one highway, which highway shall be deemed to be so connected together, as that they cannot be separately stopped or diverted without interfering one with the other, it shall be lawful to include such different highways in one order or certificate (*q*).

Quarter sessions may confirm certificate for diverting more highways than one, wholly or in part.

And it is further provided, that in the event of any appeal being brought against the whole, or any part or parts of any order or certificate for diverting more highways than one, it shall be lawful for the court to decide upon the propriety of confirming the whole, or any part or parts of such order or certificate, without prejudice to the remaining part or parts thereof (*r*).

Persons aggrieved by diverting or stopping highways to appeal to quarter sessions, on giving fourteen days' notice of appeal, with statement of grounds thereof.

And it is further provided (*s*), that when any such certificate shall have been so given as aforesaid, it shall and may be lawful for any person who may think that he would be injured or aggrieved if any such highway should be ordered to be diverted and turned, or stopped up, either entirely or subject as aforesaid, and such new highway set out and appropriated in lieu thereof as aforesaid, or if any unnecessary highway should be ordered to be stopped as aforesaid, to make his complaint thereof, by appeal to the justices of the peace at the said quarter sessions, upon giving to the surveyor fourteen (*t*) days' notice in writing of such appeal, together with a statement in writing of the grounds of such appeal, who is hereby required within forty-eight hours after the receipt of such notice to deliver a copy of the same to the party by whom he was required to apply to the justices to view the said highway: provided, that in all cases where the said surveyor shall have been directed by the inhabitants in vestry assembled to apply to such justices as aforesaid, then

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(*p*) *Reg.* v. *Justices of Worcestershire*, 3 E. & B. 477; 23 L. J., M. C. 113.

(*q*) 5 & 6 Will. 4, c. 50, s. 86. See *R.* v. *Milverton*, 5 A. & E. 841; *R.* v. *Downshire* (*Marquis*), 4 A. & E. 698. See *Reg.* v. *Stephen Jones*, 12 A. & E. 684.

(*r*) 5 & 6 Will. 4, c. 50, s. 87.

(*s*) *Ibid.* s. 88.

(*t*) 12 & 13 Vict. c. 45, s. 1, *ante*, p. 665; *Reg.* v. *Maule*, 41 L. J., M. C. 47.

the said surveyor shall not be required to deliver a copy of such notice to any party: provided also, that it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into or give evidence of any other grounds of appeal than those set forth in such statement as aforesaid.

Appeal against Certificate or Order from stopping up.

A notice of appeal against the stopping up of a specified part of the road is good (*u*). Upon an appeal the sessions have jurisdiction to inquire into defects on the face of the certificate; and they are not limited to trying by a jury the three questions stated (*x*). And (*y*) in case of such appeal, the justices of the said quarter sessions shall, for the purpose of determining whether the proposed new highway is *nearer* (*z*) or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions; and if, after hearing the evidence produced before them, the said jury shall return a *verdict*, that the proposed new highway is nearer or more commodious to the public, *or* that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, *or* that the party appealing would not be injured or aggrieved, *then* the said court of quarter sessions shall dismiss such appeal and make the order herein mentioned for diverting and turning and stopping up such highway, either entirely or subject as aforesaid, or for diverting, turning and stopping up of such old highway, and purchasing the ground and soil for such new highway, or for stopping up such unnecessary highway, either entirely or subject as aforesaid; but if the said jury shall return a verdict, that the proposed new highway is *not* nearer *or* not more commodious (*a*) to the public, *or* that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, *or* that the party appealing would be injured or

Impanelling jury.

(*u*) *Reg.* v. *Justices of Huntingdonshire*, L. R., 1 Q. B. 36. Where the highway is within the highway district, see *post*.

(*x*) *Reg.* v. *Justices of Worcestershire*, 3 E. & B. 477; 23 L. J., M. C. 113; *Wright* v. *Overseers of Frant*, 32 L. J., M. C. 206; but see now *Reg.* v. *Harvey*, Q. B., Mich. T. 1874.

(*y*) 5 & 6 Will. 4, c. 50, s. 89. "A section perplexed and obscure in the extreme." *Per Cur.* in *Reg.* v. *Shiles*, 1 Q. B. 919; 1 G. & D. 309, overruled as to the point decided in *Reg.* v. *Phillips*, 35 L. J., M. C. 217, *ante*, p. 767.

(*z*) Means "as between the point at which the new and old lines of footpath diverged, and the point where the old line touched the road," *Reg.* v. *Shiles*, 1 Q. B. 919; 1 G. & D. 304, now overruled as to the point decided by *Reg.* v. *Phillips*, 35 L. J., M. C. 217, *ante*, p. 767.

(*a*) Where *justices certify* that the new way is "more commodious," they must certify the reason why it is so (*see* p. 767).

Findings of the Jury on Appeal.

aggrieved (*d*), then the court of quarter sessions shall allow such appeal, and shall not make such order as aforesaid.

This clause means that, according to the allegations in the certificate of the justices, the jury are to find the one way or the other. If the justices certify that the proposed new highway is nearer, the jury are to find whether it is nearer; but if the justices do not find that it is nearer, but that it is more commodious, then the jury are to find whether it is more commodious or not. If the justices do not find both they are to find one or the other (*e*).

Costs of appeal.

And (*f*) the court of quarter sessions is hereby authorized and *required* to award to the party giving or receiving notice of appeal, such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not; and such costs and expenses shall be paid by the surveyor or other party as aforesaid, at whose instance the notice for diverting and turning or stopping up the highway, either entirely or subject as aforesaid, shall have been given; and in case the said surveyor or other party as aforesaid shall not appear in support thereof, the said court of quarter sessions shall award the costs of the appellant to be paid by such surveyor or other party as aforesaid; and such costs shall be recoverable in the same manner as any penalties or forfeitures are recoverable under this act.

The sessions are bound to give costs in a case within this 90th section, and if they refuse the court will grant a mandamus to them to enter continuances and make the order; and it is no answer to an application for such costs at the sessions that earlier in the day of the application the appeal was called on and neither party appearing it had been struck out, for the appellant was not bound to apply immediately for the costs, but is in time if he come at any time on the same day (*g*).

Proceedings on dismissal of appeal.

Proviso (*h*), that if no such appeal be made, or being made, shall be dismissed as aforesaid, then the justices at the said quarter sessions shall make an order to divert and turn, and to

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(*d*) The sessions are to allow the appeal if either of these matters is found. But if a jury find only one, *e. g.*, that the road is "not unnecessary," without more, no one can tell whether they thought the party grieved or not, and their verdict is defective; and the like, if they find that the appellant is aggrieved, but do *not* find whether the way is necessary or unnecessary. In neither case would the finding be sufficient to justify the sessions in allowing the appeal. In order to such a result, both these alternatives in the act must be found. Per *Alderson*, B., in *Selwood* v. *Mount*, 9 C. & P. 75; 1 Q. B. 726.

(*e*) *Reg.* v. *Phillips*, 35 L. J., M. C. 217, per *Blackburn*, J., at p. 225; L. R., 1 Q. B. 648.

(*f*) Sect. 90.

(*g*) *Reg.* v. *Justices of West Riding*, 31 L. J., M. C. 271; 2 B. & S. 811.

(*h*) Sect. 91.

stop up such highway, either entirely or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid, by such ways and means, and subject to such exceptions and conditions in all respects as in this act is mentioned, in regard to highways to be widened; and the proceedings thereupon shall be binding and conclusive on all persons whomsoever; and the new highways so to be appropriated and set out shall be, and for ever after continue, a public highway to all intents and purposes whatsoever; but no old highway (except in the case of stopping up of such useless highway as herein is mentioned) shall be stopped until such new highway shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof, which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the court of quarter sessions next after such order as aforesaid shall have been made, pursuant to the directions hereinbefore contained.

Order of Sessions final.

Proviso (*i*), that in every case in which a highway shall have been turned or diverted, under the provisions of this act, the parish or other party, which was liable to the repair of the old highway, shall be liable to the repair of the new highway, without any reference whatever to its parochial locality.

No order made, or any other matter or thing done, or transacted in, or relative to, the execution of this act, shall be vacated or quashed for want of form, or be removed by *certiorari* or other process, to any court of record at Westminster. But in cases of appeals (*l*), the quarter sessions may, if they think fit, state the facts specially for the determination of the Queen's Bench thereon; in which case it shall be lawful to remove the proceedings by writ of *certiorari*, or otherwise, into that court. An indictment for not repairing a highway may be removed from sessions by *certiorari*, see *post*.

Certiorari taken away (*k*).

Justices upon their view may order highways to be widened, and in case of difference with the owners, &c. of property required to be taken, compensation is to be assessed at quarter sessions by a jury (*m*).

All the provisions of 5 & 6 Will. 4, c. 50, for widening, diverting and stopping up highways, shall be applicable to all highways which now are, or may hereafter be, paved, repaired or cleansed under or by virtue of any local or personal act or acts of parliament, or which may be situate within the limits of any such act or acts, except highways which any railway company, or the owners, conservators, commissioners, trustees or undertakers of any canal, river or inland navigation are

5 & 6 Will. 4, c. 50, applied to highway about to be paved under local acts.

(*i*) 5 & 6 Will. 4, c. 50, s. 92.
(*k*) *Ibid.* s. 107.
(*l*) *Ibid.* s. 108. See *Reg.* v. *Shiles*, 1 Q. B. 919, *ante*, p. 769.
(*m*) 5 & 6 Will. 4, c. 50, ss. 82, 83.

Proceedings before Justices where Highway out of Repair.

liable by virtue of any act of parliament relating to such railway, canal, river or inland navigation to make, maintain, repair or cleanse (*o*).

Section 2.

Proceedings before Justices where Highway out of Repair, and Appeals from them.

As to surveyors.

Surveyors of highways may be elected and appointed by a parish maintaining its own highways at their first meeting in vestry for the nomination of overseers of the poor in every year (*p*), or by a local board under Local Government Amendment Act, 1861 (*q*); and a surveyor so appointed may provide a sufficient deputy, who is to be approved of by the justices at a special sessions for the highways, who shall, by writing under their hands, testify their consent thereto (*r*), but no surveyor is to be appointed under that act for a parish within a highway district under 25 & 26 Vict. c. 61, s. 43; or the vestry may elect one paid surveyor (*s*), but that is not to apply to any parish within a district formed under 25 & 26 Vict. c. 61, s. 42.

With respect to special sessions.

Justices within their respective divisions, or any two or more of them, are required to hold not less than eight or more than twelve special sessions in every year for executing the Highway Act, the days of the holding thereof to be appointed at a special sessions, to be held within fourteen days after the 20th of March in every year (*t*).

The 25 & 26 Vict. c. 61, is to be construed as one with the above act so far as is consistent with its provisions (*u*), and so also is the 27 & 28 Vict. c. 101, see s. 2.

Omission to elect surveyor.

If it appears on oath to the justices at a special session for the highways that the inhabitants of any parish have not elected such a surveyor or surveyors, or that the outgoing surveyor (except directed by the inhabitants so to do) has delivered no statement of the name and residence of his successor or successors (as directed by sect. 10), or that the surveyor is dead, or has ceased to possess the qualification required by sect. 7, or is become disqualified in any manner mentioned in the act, or has neglected to act, or refused to carry into operation his duties imposed on him by this act, the justices are required at their *next succeeding special sessions* for the highways, to dismiss such surveyor so neglecting to act, or refusing to carry into

(*o*) 25 & 26 Vict. c. 61, s. 44.
(*p*) 5 & 6 Will. 4, c. 50, s. 6.
(*q*) 24 & 25 Vict. c. 61, s. 10.
(*r*) 5 & 6 Will. 4, c. 50, s. 6.
(*s*) Sect. 9.
(*t*) 5 & 6 Will. 4, c. 50, s. 45.
(*u*) Sect. 42.

operation the duties imposed on him by this act, and to appoint any person whom they may think fit to be a surveyor for such parish, till the annual meeting then next ensuing for the nomination of overseers or election of surveyors (as in sect. 6, *supra*), with or without such salary as to the justices shall seem proper; such surveyor, when so appointed, to be invested with the same powers, and be subject to the same duties, penalties, &c. as any surveyor appointed by the inhabitants would have been (*y*).

Appointment of Surveyor of Highways.

If the parish in question is situated in more than one county, division or liberty, the surveyor so to be appointed by the justices shall be appointed at a special sessions for the highways, assembled in that county, &c. in which the parish church is situate (*z*). An appeal lies to the quarter sessions against the appointment of surveyor by justices in special sessions (*a*). As to the effect of the informality of an appointment by the surveyor on a rate made by him, see *post*, p. 784.

Justices in petty sessions may appoint overseers, or otherwise deal with an extra-parochial place, with a view to constituting it a highway parish or part of a highway parish, in the same manner as the justices may deal with such place, for the purpose of constituting it a place or part of a place maintaining its own poor, in pursuance of the powers for that purpose given by the act 20 Vict. c. 19.

Power to constitute an extra-parochial place a highway parish.

After the first meeting in any highway district of the board of such district all property, real and personal, belonging to and vested in the surveyor or surveyors of any parish forming part of the district shall vest in the highway board of the district, and all powers, rights, duties, liabilities, capacities and incapacities (except the power of making, assessing and levying highway rates) as are vested in, or attach to, any surveyor or surveyors of any parish forming part of the district, shall vest in and attach to the highway board (*b*).

Consequences of the formation of a highway district.

The highway board is to maintain in good repair the highway within their district, and as respects them the highway in each parish in such district, perform the same duties, have the same powers, and be liable to the same legal proceedings as the surveyor of such parish would have performed and been liable to but for this act (*c*).

Works and duties of highway board.

Waywardens are to be elected in every year for the year ensuing in every parish forming part of a highway district under a highway board (*d*), and such waywarden or waywardens are to be elected in every parish forming part of a highway district at the meeting and time, and in the manner, and subject to the same qualification and the same power of appoint-

(*y*) 5 & 6 Will. 4, c. 50, s. 11.
(*z*) *Ibid.* s. 12.
(*a*) *R.* v. *King's Newton* (*Inh.*), 1 B. & Ad. 828.
(*b*) 25 & 26 Vict. c. 61, s. 11.
(*c*) *Ibid.* s. 17.
(*d*) *Ibid.* s. 10.

Proceedings before Justices where Highway out of Repair.

ment in the justices in the event of no election taking place, or in the event of a vacancy, at, in, and subject to which a person or persons to serve the office of surveyor would have been chosen or appointed, as if this act had not passed (*e*).

As to districts under highway boards.

The salaries of the officers appointed for each district, and any other expenses incurred by any highway board for the common use or benefit of the several parishes within such district, shall be annually charged to a district fund, to be contributed by and charged upon the several highway parishes within such district in proportion to the rateable value of the property in each parish, but the expenses of maintaining and keeping in repair the highways of each highway parish within the district, and all other expenses legally payable by the highway board in relation to such parish, including any sums of money that would have been payable out of the highway rates of such parish, if the same has not become part of a highway district, except such expenses as are in this act authorized to be charged to the district fund, shall be a separate charge on each parish (*f*).

Proceedings at special sessions if parish highway out of repair.

If a highway is out of repair, and information thereof on oath of one credible witness is given to a justice, he is required to issue a summons to the surveyor of the parish, or other person or body politic or corporate, chargeable with such repairs, to appear before the justices at some special sessions for the highways, in the summons mentioned to be held within the division in which the highway is situate—and the said justices shall either appoint a competent person to view it, and report thereon to them at special sessions at a fixed day and place at which such surveyor or other party shall be directed to attend, or the justices shall fix a day whereon they or two of them will view the highway, and if it appears to them at the special sessions, on the day, and at the place fixed, either on the report of the viewer, or on their own view, that the highway is not in thorough and effectual repair, they shall convict the surveyor, &c. in a penalty not exceeding 5*l.*, and shall make an order on him or them, limiting a time to repair the same; and if the repairs are not effectually made within that time, the surveyor, &c. shall pay to some person to be named in a second order a sum to be therein stated, and equal in amount to the sum which the said justices shall, on the evidence produced before them, judge requisite for repairing such highway, to be recoverable in the same manner as any forfeiture is recoverable under the act, and such money when recovered shall be applied to the repair of the highway, and in case more parties than one are bound to repair it, the order shall direct what proportion each party shall pay.

Provided that if the highway so out of repair is a part of

(*e*) 25 & 26 Vict. c. 61, s. 10.
(*f*) 27 & 28 Vict. c. 101, s. 32.

the turnpike road, the justices shall summon the treasurer, or surveyor, or other officer as aforesaid, and the money therein mentioned shall be recoverable as aforesaid (*g*).

Proceedings before Justices where Highway out of Repair.

The liabilities of the surveyor of the parish attach now to the highway board (*h*).

Boundaries of parishes passing across or through the middle of a highway.

Before the passing of the following enactment (*i*), much inconvenience and litigation had resulted from the boundary line of two parishes or townships running along the centre or *medium filum* of a highway, the general consequence of such a state of facts being that neither parish repaired their side in an adequate manner (*k*); accordingly, after reciting that whereas it frequently happens that the boundaries of parishes pass across or through the middle of a common highway, and one side of such highway is situated in one parish and the other side in another parish, whereby great inconveniences often arise in repairing the same, it is enacted, that the justices at a special sessions for the highways, on complaint of any surveyor of any parish, stating in writing and on a plan thereunto annexed, that there is such a highway, one side whereof ought to be repaired by one parish, and the other side by another, and particularly describing the same by metes, bounds and admeasurements thereof, may issue their summons, with a copy of such writing and plan thereunto annexed, to the surveyor of such other parish, to appear before them on a day mentioned in such summons. If the parties appear, the justices may proceed finally to decide the matter in the manner herein mentioned, in case all the parties consent thereto; but in case the surveyor summoned shall not appear on such first summons, or appearing, shall require further time, the justices must adjourn the further consideration of the matter for not more than twenty-one nor less than fourteen days from the date of such adjournment, of which such surveyor shall have notice. On that day the said justices shall proceed to hear the parties and the witness, and where the party summoned does not appear, shall proceed to examine and shall finally determine the matter in form following: by dividing the whole of such common highway by a transverse line crossing such highway into equal parts, or into such unequal parts and proportions as in consideration of the soil, waters, floods, and inequality of such highway, or any other circumstances attending the same, they in their discretion shall think just and right, and to declare, adjudge, and order that the whole of such highway, on both sides thereof in any of such parts, shall be maintained and repaired by one of such parishes, and that the whole thereof on both sides in the other of such parts shall be main-

(*g*) 5 & 6 Will. 4, c. 50, s. 94.
(*h*) See *ante*, p. 773.
(*i*) 5 & 6 Will. 4, c. 50, s. 58.
(*k*) And see *R.* v. *St. Pancras*, Peake's N. P. C. 220; *R.* v. *Eardisland*, 2 Camp. 494; 3 Chitty on Crim. Law, 571; 6 Went. 409.

Of Proceedings before Justices when Highway out of Repair.

tained and repaired by the other of such parishes, and shall cause such their order, and a plan of such highway, and the allotment thereof as before mentioned, to be fairly delineated on paper or parchment, and filed with the clerk of the peace of the county in which such highway shall happen to lie, and shall also cause such posts, stones, or other boundaries to be placed and set up in such highway as in their judgment shall be necessary for ascertaining the division and allotment thereof: provided nevertheless, that in case of any such last-mentioned highway, the repair of any part of which belongs to any body politic or corporate, or to any person by the reason of tenure of any lands or otherwise howsoever, the same proceedings may be adopted, but the said body politic or corporate, or person, or some one on their behalf, may appear before such justices and object to such last-mentioned proceedings; in which case the said justices shall, before they divide such highway as aforesaid, hear and consider the objection so made, and determine the same.

When boundaries of parishes pass along a highway.

This section only operates when the road is on the boundary line of two parishes or townships (*l*).

After filing such order and plan with the clerk of the peace, such parishes, &c. shall be bound as of common right to keep in repair those parts of the highway which are allotted to them, and shall be discharged from the repair of any other part not included in such allotment (*m*).

Mode of indicting where party disputes his obligation to repair.

If on the hearing of any such summons respecting the repair of any highway, *the duty or obligation of such repairs* is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required, to *direct* (*n*) a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place, wherein such highway shall be, against the inhabitants of the parish, or the party to be named in such order, for suffering and permitting the said highway to be out of repair; and the *costs* (*o*) of such prosecution *shall* be directed by the judge of assizes before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rates made and levied in pursuance of this act in the parish in which such highway shall be situate: provided, nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid, to

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(*l*) *Reg.* v. *Perkins*, 14 Q. B. 229; 19 L. J., M. C. 105.

(*m*) 5 & 6 Will. 4, c. 50, s. 59.

(*n*) Their order must show the highway to be in the division for which the special sessions are held, or the subsequent proceedings at quarter sessions will be void even though *they* show the highway within *their* jurisdiction. *Reg.* v. *Martin*, 13 L. J., M. C. 45.

(*o*) See *ante*, p. 577.

remove such indictment by *certiorari* or otherwise into the King's Bench (*p*). The only ground on which the surveyor could deny the duty or obligation to repair, is that some one else is liable; *e. g.*, a corporation, or an individual *ratione tenuræ* (*q*).

Order for Costs of Prosecution to be paid out of Highway Rate.

The justices, before making their order for a bill to be preferred, must be satisfied that the road is a highway (*r*); but if it is an admitted highway, and the liability to repair is simply denied, the justices are bound to direct an indictment (*s*).

Payment of costs of prosecution out of rates.

The judge of assizes mentioned in this section means one sitting under the commission of oyer and terminer, who has finally to determine the matter, and does not mean a judge sitting at Nisi Prius on circuit; and therefore, after an indictment has been removed by *certiorari* into the Queen's Bench, and tried on circuit, the judge has no power to order the costs of the prosecution to be paid out of the highway rates (*t*). Costs may be ordered out of the rates though the defendant plead guilty (*u*). If the jury are discharged because they cannot agree upon a verdict, the judge or quarter sessions cannot order the costs out of the rates (*x*).

Sect. 103 of this act does not apply to costs ordered under this section (*y*). As to the proceedings where the highway is within a highway district, see *post.*

No parish or township is bound to repair any road newly made, or any old road continued by the award of commissioners of inclosure, under 41 Geo. 3, c. 109, s. 9, till it is declared by the justices in special sessions to be fully completed and repaired (*z*).

Costs of indictment.

The reason why the parish was made liable for the costs of the indictment is, that the prosecutor, on behalf of the public, is entitled to insist on the road being repaired, if it be a highway out of repair, and he is right in coming on the parish for the

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(*p*) 5 & 6 Will. 4, c. 50, s. 95. It was held by all the judges that after conviction the judge or justices *must* grant an order on this section for paying the costs out of the highway rate, *Reg.* v. *Yarkhill (Inh.)*, 9 C. & P. 218. The trial was of a traverse at the Crown side of the assizes. They cannot grant such an order where the existence of the highway was disputed and denied by the verdict of acquittal. *Reg.* v. *Chedworth (Inh.)*, 9 C. & P. 285. (See "Non-repair of Highways," *ante*, p. 577.)

(*q*) *Reg.* v. *Farrer*, 35 L. J., M. C. 210, 215; L. R., 1 Q. B. 558.

(*r*) *Reg.* v. *Johnson*, 34 L. J., M. C. 85; *Bartlett, Ex parte*, 30 L. J., M. C. 65.

(*s*) *Reg.* v. *Arnould*, 8 E. & B. 550; 27 L. J., M. C. 92; *Reg.* v. *Justices of Surrey*, 21 L. J., M. C. 95.

(*t*) *Reg.* v. *Ipstones*, 37 L. J., M. C. 37; L. R., 2 Q. B. 216, overruling on that point *Reg.* v. *Eardisland*, 3 E. & B. 960.

(*u*) *Reg.* v. *Hazlemere*, 32 L. J., M. C. 30.

(*x*) *Reg.* v. *Hettesbury*, 8 L. T., N. S. 315.

(*y*) *Reg.* v. *Eyton*, 3 E. & B. 390; 23 L. J., M. C. 45.

(*z*) *R.* v. *Hatfield (Inh.)*, 4 A. & E. 156. See *ante*, p. 571; "Non-repair of Highways," *ante*, p. 578.

Of Non-repair of Highways.

repairs. If the parish seek to get rid of the liability by fixing some one else with it, then it should be disputed at the expense of the parish; but sections 94 and 95 only apply to cases of admitted highway. Therefore, if the fact of the road out of repair being a highway is disputed, the parties are left to their ordinary remedy by indictment (*a*).

Proceedings at petty sessions if district highway under highway board out of repair.

It is the duty of the highway board formed under 25 & 26 Vict. c. 61, to repair the highways within their district (*b*); and by sect. 18, where complaint is made to any justice of the peace that any highway within the jurisdiction of the highway board is out of repair, the justice shall issue two summonses, the one addressed to the highway board, and the other to the waywarden of the parish liable to the repair of such highway, requiring such board and waywarden to appear before the justices at some petty sessions in the summons mentioned, to be held in the division where such highway is situate: and at such petty sessions, unless the board undertake to repair the road to the satisfaction of the justices, or unless the waywarden deny the liability of the parish to repair, the justices shall direct the board to appear at some subsequent petty sessions to be then named, and shall either appoint some competent person to view the highway and report to them on its state at such other petty sessions, or fix a day previous to such petty sessions at which two or more of such justices will themselves attend to view the highway.

Order of petty sessions to highway board to repair.

At such last-mentioned petty sessions, if the justices are satisfied either by the report of the person so appointed or by such view as aforesaid, that the highway complained of is not in a state of complete repair, it shall be their duty to make an order on the board limiting a time for the repair of the highway complained of; and if such highway is not put in complete and effectual repair by the time limited in the order, the justices in petty sessions shall appoint some person to put the highway into repair, and shall by order direct that the expenses of making such repairs, together with a reasonable remuneration to the person appointed for superintending such repairs, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the board; and any order made for the payment of such costs and expenses may be recovered into the Court of Queen's Bench in the same manner as if it were an order of general or quarter sessions, and be enforced accordingly.

Where liability of parish to repair is denied by waywarden.

The highway board may appear before the justices at petty sessions by their district surveyor or clerk or any member of the board (*c*). When on the hearing of any such summons respecting the repair of any highway the *liability to repair* is denied by the waywarden on behalf of his parish, or by any

(*a*) *Reg.* v. *Farrer*, 35 L. J., M. C. 210; L. R., 1 Q. B. 558.
(*b*) Sect. 17.
(*c*) 25 & 26 Vict. c. 61, s. 18.

party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed at the next assizes to be holden in or for the said county *or at the next general quarter sessions of the peace* for the county, riding, division or place wherein such highway is situate, against the inhabitants of the parish or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and if directed to be paid by the parish shall be deemed to be expenses incurred by such parish in keeping its highways in repair and shall be paid accordingly (*d*). If the jury should find that the road out of repair was not a highway, the court has no jurisdiction to order payment of the costs of the prosecution (*e*). The words "liability to repair be denied" are to bear the same meaning as the words in the 95th section of the 5 & 6 Will. 4, c. 50, "if the duty or obligation of such repairs is denied," and the justices have therefore no power to order an indictment where there was no dispute by the parish of their liability to repair if the road was a highway, that latter fact being *bonâ fide* denied (*f*).

Order for Costs of Repairing on Highway Board.

No road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out, or to be hereafter set out, as a private driftway or horsepath in any award of commissioners under an inclosure act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair unless the person, body politic or corporate proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner, and of the width required by this act, and to the satisfaction of the said surveyor, and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required on receiving notice from such person, or body politic or corporate, to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this act at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof, and in such case after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is

When new highways are proposed to be dedicated to parishes.

(*d*) 25 & 26 Vict. c. 61, s. 19.
(*e*) *Reg.* v. *Buckland* (*Inh.*), 34 L. J., M. C. 178; 6 B. & S. 397.
(*f*) *Reg.* v. *Farrer*, 35 L. J., M. C. 210; L. R., 1 Q. B. 558.

Utility of a new Highway proposed to be dedicated, to be determined by Justices.

situate: provided, nevertheless, that on receipt of such notices as aforesaid, the surveyor of the parish shall summon a vestry meeting of the inhabitants of such parish, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party, proposing to make the new highway, to appear before the justices at the next special sessions of the highways, to be held in and for the division in which the said intended highway shall be situate; and the question as to the utility as aforesaid of such highway shall be determined at the discretion of such justices (*f*); and there is an appeal under sect. 105 to the quarter sessions from the decision of the petty sessions, on the question of the utility of the road (*g*).

Appeal against decision of justices as to utility of proposed highway.

Where a local board are the surveyor of highways the road must be made to their satisfaction (*h*).

Where the highway is in a highway district the notice must be given to the highway board, under 25 & 26 Vict. c. 61, s. 11, which body would then act in the place of the surveyor, and probably the district surveyor would be directed to summon the vestry.

Highways repairable, *ratione tenuræ*, within a highway district.

Where any highway which any body politic or corporate or any person is liable to repair by reason of any tenure of any land or otherwise, howsoever, is duly adjudged to be out of repair, the highway board of the district in which such highway is may direct their surveyor to repair the same, and the expenses of such repair shall be paid by the party liable to repair; and any justice upon the application of any person authorized in this behalf by the highway board may summon the party liable to pay such expenses to appear before two justices at a time and place to be named in such summons; and upon the appearance of the parties, or in the absence of either of them, the justices may hear and determine the matter, and make such order as well as to costs or otherwise as to them may seem just (*i*).

Proceedings to make highways repairable, *ratione tenuræ*, &c., within a highway district, repairable by the parish.

Where any person or corporation is liable *ratione tenuræ* of lands or otherwise to repair any highway situate in a highway district under a highway board, the person or corporation so liable, or the highway board of the district in which such parish is (*j*), may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; and such justice shall thereupon issue summonses requiring the

(*f*) 5 & 6 Will. 4, c. 50, s. 23.
(*g*) *Reg.* v. *Justices of Derbyshire*, 1 E. B. & E. 69; 27 L. J., M. C. 189.
(*h*) *Reg.* v. *Dukinfield* (*Inh.*), 32 L. J., M. C. 230; 4 B. & S. 158.
(*i*) 25 & 26 Vict. c. 61, s. 34.
(*j*) 27 & 28 Vict. c. 101, s. 24.

waywarden of such parish, the district surveyor, and the party so liable to repair such highway, to appear before two or more justices in petty sessions assembled; and the justices at such petty sessions shall proceed to examine and determine the matter, and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district in full discharge of all claims thereafter in respect of the repair and maintenance of such highway (*k*).

Order of Justices to make Highway repairable, ratione tenuræ, repairable by the Parish.

Any person aggrieved by any order of justices made in pursuance of the above sect. 35 of 25 & 26 Vict. c. 61, may appeal to a court of general or quarter sessions holden within four months from the date of such order; but no such appeal shall be entertained unless the appellant has given to the other party to the case a notice in writing of such appeal and of the matter thereof within fourteen days after such order and seven clear days at the least before such sessions, and has entered into a recognizance with two sufficient sureties, before a justice of the peace, conditioned to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as may by the court be awarded; and upon such notice being given and such recognizance being entered into, the court at such sessions shall hear and determine the matter of the appeal, and shall make such order thereon, with or without costs to either party, as to the court may seem meet (*l*). Such highway, upon such order, becomes repairable as a parish highway (*m*).

Appeal against an order of petty sessions making a highway repairable, *ratione tenuræ*, repairable by the parish.

If there is no appeal, such highway becomes repairable in all respects as a parish highway (*n*).

No justice of the peace shall act as such in any matter in which he has already acted as a member of the highway board, and in which the decision of such board is appealed against (*o*); but the mere fact that he is, by virtue of his office, a member of a highway board complaining, is not to disable him from acting as a justice of the peace in a matter at petty or special sessions (*p*).

Disqualification of justice for acting on appeal who has acted as a member of highway board.

Where any waywarden of a highway parish of a district, or any ratepayer of such parish, feels aggrieved in respect of the matters following: in respect of any order of the highway board for the repair of any highway in his parish, on the ground that such highway is not legally repairable by the parish, or in respect of any other order of the board, on the ground that the

Appeal given to waywarden or ratepayer, when.

(*k*) 25 & 26 Vict. c. 61, s. 35.
(*l*) *Ibid.*
(*m*) *Ibid.*
(*n*) *Ibid.*
(*o*) *Ibid.* s. 38.
(*p*) 27 & 28 Vict. c. 101, s. 46.

Disqualification of Justice from acting on an Appeal in Highway Matter.

matter to which such order relates is one in regard to which the board have no jurisdiction to make an order, he may, upon complying with the conditions hereinafter mentioned, appeal to the court of general or quarter sessions having jurisdiction in the district (*q*).

See *post*, "Highway Rates," for the sections 38 and 39 in full.

Hearing of the appeal.

Power to summon a jury where the dispute is whether a road is repairable or not.

If upon the hearing of the appeal it appears to the court of quarter sessions that the question in dispute involves an inquiry as to whether a road is or is not a highway repairable by the public, or an inquiry as to any other important matter of fact, the court may either themselves decide such question, or may impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions, and submit to such jury such questions in relation to the matters of fact in dispute as the court think fit; and the verdict of such jury, after hearing the evidence adduced, shall be conclusive as to the questions submitted to them.

The questions so submitted shall be in the form and shall be tried as nearly as may be in the manner in which feigned issues are ordinarily tried, and the court shall decide the parties to be plaintiffs and defendants in such trials.

Subject as aforesaid the court may, upon the hearing of any appeal under this act, confirm, reverse or modify any order of the highway board, or rectify any account appealed against (*r*).

Costs of appeal.

If the appellant is successful the costs shall, unless the court otherwise orders, be paid by the board, and shall be charged to the parishes within the jurisdiction of the board, other than the parish to which the appellant belongs, in the same proportions in which such parishes contribute to the common fund of the board.

If the appellant is unsuccessful, the board, if the waywarden be the appellant, may charge the costs of the appeal to the parish to which the appellant belongs, in the same manner as if they were expenses incurred in repairing the roads in such parish, and may levy the sum accordingly, and may carry the sum so levied to the account of the several parishes within the jurisdiction of the board, other than the parish to which the appellant waywarden belongs, in the same manner as if they were expenses contributed by such parishes to the common fund of the board; but if some ratepayer other than the waywarden is appellant the court may order the costs of the appeal to be paid by such appellant; and such costs shall be recoverable in the same manner as a penalty is recovered under the Highway Act, 1862 (*s*). Such penalties are recoverable under 11 & 12 Vict. c. 43, by the 47th section of the 25 & 26 Vict. c. 61, by which section an appeal to quarter sessions is

(*q*) 27 & 28 Vict. c. 101, s. 38; see section in full, pp. 793, 794.
(*r*) *Ibid.* s. 42.
(*s*) *Ibid.* s. 43.

given, where the amount of the money recoverable is more than five pounds, in manner provided by 24 & 25 Vict. c. 96, s. 110.

Costs of Highway Board on Appeal.

When any highway board consider any highway unnecessary for public use, they may direct the district surveyor to apply to two justices to view the same, and thereupon the like proceedings shall be had as where application is made under the Highway Act, 1835, to procure the stopping up of any highway, save only that the order to be made thereupon, instead of directing the highway to be stopped up, shall direct that the same shall cease to be a highway which the parish is liable to repair, and the liability of the parish shall cease accordingly, and for the purpose of such proceedings under this enactment such variation shall be made in any notice, certificate or other matter preliminary to the making of such order, as the nature of the case may require (*t*).

Order directing unnecessary highways to cease to be repairable.

The words "like proceedings shall be had" carry with them the power of appealing against the order or certificate (*u*).

Appeal against such order.

If at any time after an order has been made directing that a highway shall cease to be a highway which the parish is liable to repair under 27 & 28 Vict. c. 101, s. 21, upon application of any person interested in the maintenance of such highway, after one month's previous notice in writing thereof to the clerk of the highway board for the district in which such highway is situated, it appear to any court of general or quarter sessions of the peace that from any change of circumstances since the time of the making of any such order as aforesaid, and under which the liability of the parish to repair such highway has ceased, the same has become of public use, and ought to be kept in repair by the parish, they may direct that the liability of the parish to repair the same shall revive from and after such day as they may name in their order, and such liability shall revive accordingly, as if the first-mentioned order had not been made; and the said court may by their order direct the expenses of and incident to such application to be paid as they may see fit.

Proceedings to revive the liability of a parish to repair a highway which has ceased to be repairable under an order of justices.

Section 3.

HIGHWAY RATES.

1. *Allowance of the Rate* .. 783
2. *Levying of the Rate and Monies due to Board* .. 784
3. *Rateable Property, what* .. 786
4. *Rateable Value of Property* 788
5. *Appeal against Rate* .. 788

Every highway rate shall be signed by the surveyor for the parish and allowed by two justices of the peace, and

Allowance by justices.

(*t*) 27 & 28 Vict. c. 101, s. 21.
(*u*) *Reg.* v. *Justices of Surrey*, 39 L. J., M. C. 49; L. R., 5 Q. B. 87.

Of Highway Rates.

published in the same way as poor rates are now allowed and published (*v*).

Allowance by justices.

The allowance of a rate is necessary to its validity, and if there be no allowance the justices have no jurisdiction to enforce the rate by granting their distress warrant (*x*).

When the allowance of the rate was by mistake entered and signed by the justices at the foot of a page in the middle of the rate, and stated the allowance to be of the foregoing rate, the rate was held to be invalid, at all events as to the assessments below the allowance (*y*); but, perhaps, if the allowance so made had in terms affected to authenticate the subsequent part of the rate as well as the foregoing part it might have been sufficient.

Rate invalid if made by a surveyor unduly appointed, when.

The appointment of the surveyor by the justices in default of the vestry must not be made before the special sessions for the highways next succeeding the sessions at which the default of the vestry or surveyor shall be proved, and if the justices appoint at the same special sessions at which proof of the default is made it is invalid, and a rate made by a surveyor so appointed cannot be enforced (*z*). So, if due notice be not given of the meeting of the vestry who appoint a surveyor, the surveyor appointed thereat is not properly appointed, and upon that fact being shown to justices in special sessions for the highways, they must wait till the next succeeding special sessions for the highways and then appoint (*a*).

2. *Levying of Rates and Monies due to Board.*

Sums required by highway board.

To obtain payment of the sums required by the board, precepts are to be issued by the highway board to the waywardens or overseers, stating the sum required to be paid to the treasurer, and the time within which the same must be paid to the treasurer of the board (*b*).

Precept of highway board, to whom addressed.

Where a highway parish is not a parish separately maintaining its own poor, or where in any highway parish it has for a period of not less than seven years immediately preceding the passing of the Highway Act, 1862, been the custom of the surveyor of the highways for such parish to levy a highway rate in respect of property not subject by law to be assessed to poor rates, the precept of the highway board shall be addressed to the waywarden of the parish, and in all other cases it shall be addressed to the overseers (*c*).

(*v*) 5 & 6 Will. 4, c. 50, s. 27.

(*x*) *Sibbald* v. *Roderick*, 11 A. & E. 38; *Re The Justices of North Staffordshire*, 23 L. J., M. C. 17.

(*y*) *Skelton, Surveyor of, Ex parte*, 1 B. C. C. 211; sub nom. *In re Justices of North Staffordshire*, 23 L. J., M. C. 17.

(*z*) *Reg.* v. *Best*, 16 L. J., M. C. 102; 2 C. B. 90.

(*a*) *Ibid.* As to the power of quarter sessions to appoint officers of highway board for default of the board, see 27 & 28 Vict. c. 101, s. 45.

(*b*) 27 & 28 Vict. c. 101, s. 33.

(*c*) *Ibid.* See on the proviso to 5 & 6 Will. 4, c. 50, s. 27, *supra*.

Power to levy Highway Rates.

Where the precept is addressed to a waywarden, he shall pay the sum thereby required out of a separate rate, and such separate rate shall, in case of a parish in which for such period as aforesaid it has been the custom for the surveyor of highways to levy a highway rate in respect of property not subject by law to be assessed to poor rate, be assessed on and levied upon the persons and in respect of the property on, from, and in respect of which the same has been assessed and levied during such period as aforesaid; and in all other cases such rate shall be assessed on and levied from the persons and in respect of the property on, from, and in respect of which a poor rate would be assessable and leviable if the parish of which he is waywarden were a place separately maintaining its own poor (*d*); but where a district surveyor is appointed by a highway board under 25 & 26 Vict. c. 61, s. 12, it is his duty to account to the board (*e*).

Where precept of board to waywarden, what property rateable.

All waywardens and overseers to whom precepts of a highway board are hereby directed or authorized to be issued, shall, within their respective parishes, have the same powers, remedies and privileges for and in respect of assessing and levying any rates required to be levied for making payments to a highway board in the case of overseers, as they have in assessing and levying ordinary rates for the relief of the poor, and in the case of waywardens as they would have if the parish of which they are waywardens were a place separately maintaining its own poor and they were overseers thereof, and the rate to be levied by them were a duly-authorized poor rate (*f*).

Where rates to be levied as in the case of poor rates under precept of highway board.

If any payment required to be made by the overseers or waywardens of any parish of monies due to a highway board is in arrear, it shall be lawful for any justice, on application under the hand of the chairman for the time being, or by the clerk of such board, to summon the said overseers or waywardens to show cause at petty sessions why such payment has not been made; and the justices at such petty sessions, after hearing the complaint preferred on behalf of the board, may, if they think fit, cause the amount of payment in arrear, together with the costs occasioned by such arrear to be levied and recovered from the said overseers or waywardens, or any of them, in like manner as monies assessed for the relief of the poor may be levied and recovered, and the amount of such arrear, together with the costs aforesaid, when levied and recovered, to be paid to the said board (*g*).

Mode of enforcing payments to highway boards.

Summons to overseers or waywardens.

No rate leviable by a waywarden under 27 & 28 Vict. c. 101, shall be payable until the same has been published in manner in which rates for the relief of the poor are by law required to

Publication of rate.

(*d*) 27 & 28 Vict. c. 101, s. 33.
(*e*) *Ibid.* ss. 31, 42.
(*f*) *Ibid.* s. 34. As to poor rates, see *post*, Chap. IV.
(*g*) *Ibid.* s. 35.

Of Highway Rates.

be published (*g*). Whether it is still necessary, or not, that a highway rate levied under the precept of the highway board should be allowed as well as published, it is more prudent to procure its allowance as in the case of a poor rate.

Any surplus of a rate levied by a waywarden, remaining in his hands at the end of his term of office, shall go in reduction of the next highway rate leviable in such parish (*h*).

Where a precept is addressed to the overseers, they shall pay the sum thereby required out of a poor rate to be levied by them, or out of any monies in their hands applicable to the relief of the poor (*i*).

Power to recover rates by surveyor.

And by 5 & 6 Will. 4, c. 50, s. 34, for levying and recovering the said rate by this act authorized to be made, the surveyor shall have the same powers, remedies and privileges as the overseers of the poor in the parish have by law for the recovery of any rate made for the relief of the poor.

Local board of health may levy highway rate, when.

Where the local board of health are surveyors of highways for their district, and such district is coterminous with the parish, they may levy a highway rate for the repair of highways within their district under 5 & 6 Will. 4, c. 50, s. 27, and 11 & 12 Vict. c. 63, s. 117. There is nothing inconsistent in the act with their being invested with the powers, duties or authorities of the surveyors of highways, and they are not bound to make a general district rate under 11 & 12 Vict. c. 63, s. 88 (*j*).

Power to appoint paid collectors of rates.

The power of appointing paid collectors of highway rates, with the consent of the vestry, vested in the surveyor under 5 & 6 Will. 4, c. 50, is vested in any waywarden required to levy rates under the Highway Act, 1862, and a meeting of ratepayers entitled to elect a waywarden is to stand in the place of the vestry as respects that section (*k*).

3. *Property rateable.*

It was upon the abolition of the obligation to perform statute duty imposed by 13 Geo. 3, c. 75, 34 Geo. 3, c. 74, and 54 Geo. 3, c. 109, and the means pointed out to raise a fund for the repairs necessary for highways in the shape of a composition in lieu of statute duty by the General Highway Act of 5 & 6 Will. 4, c. 50, that it became necessary to substitute some other mode of raising such a fund; and accordingly, by 5 & 6 Will. 4, c. 50, s. 27, it is enacted that a rate shall be made, assessed and levied by the surveyor upon all property now liable to be rated and assessed to the relief of the poor, provided that the same rate shall also

Power to make rate.

(*g*) 27 & 28 Vict. c. 101, s. 33.
(*h*) *Ibid.*
(*i*) *Ibid.*
(*j*) *Hanson* v. *Epsom Local Board of Health*, 7 E. & B. 599; 25 L. J., M. C. 27.
(*k*) 27 & 28 Vict. c. 101, s. 31.

Of Property rateable.

extend to such woods, mines, and quarries of stone or other hereditaments as have heretofore been usually rated to the highways; and provided also, that every such rate shall be signed by the said surveyor and allowed by two justices of the peace, and published in the same way as poor rates are now allowed and published.

Highway rate leviable upon property liable to poor rate.

The words usually rated refer not to legal rateability, but to rating in point of fact, and to the practice of rating in the particular parish, not in the county generally, and, therefore, it is right to inquire in every particular case whether the woods, mines, quarries, &c., were in fact rated to the highways at the time of the passing of the act (*l*). But this proviso is not limited to the identical mines, woods, &c. before actually rated, it extends to others of the same class and description as those actually rated, though worked for the first time since the Highway Act came into operation (*m*).

Object of Highway Act, 1862.

The 25 & 26 Vict. c. 61 was passed not to affect the liability to highway maintenance, but only to extend the area of management, equalize the costs of repair, and simplify the machinery for providing the necessary funds (*n*). Where the occupiers of a house and lands in a hamlet which maintained its own highways, and was locally situated within, and was assessed to the poor rate for the township of W., which township separately maintained its own poor, were exempt from liability to contribute to the repairs of the highways in the hamlet before the passing of the Highway Act, 1835; and by sect. 27 of that act, all property liable to be assessed to the relief of the poor was made rateable to the repair of highways, but by sect. 33, all legal exemptions were preserved; and after the passing of the Highway Act, 1862, the hamlet was combined with the township and other places, by an order of quarter sessions, into a highway district under that act, and the highway board for such district under that act issued a precept to the overseers of the township to contribute out of the poor rates a certain sum for the repair of the highways of the township, now including the hamlet; upon appeal against a poor rate made to include the sum required for the highways, and assessed upon the occupiers of the house and lands in the hamlet in question, they were held to be exempt from contributing to a poor rate levied by the overseers of the township in respect of the portion required for the highway, and the rate was amended and reduced accordingly (*o*).

An occupier of land in a parish or district would, upon the analogy of the poor rate decisions, be required to appeal if he denied his liability to pay the highway rates. See *post*, Chap. IV., p. 801.

(*l*) *Reg.* v. *Rose*, 6 Q. B. 153.
(*m*) *Reg.* v. *Randall*, 24 L. J., Q. B. 57.
(*n*) *Reg.* v. *Heath*, 35 L. J., M. C. 113; L. R., 1 Q. B. 218.
(*o*) *Ibid.*

Of Property rateable.

As to what is to be taken as the boundary of a parish, &c., with respect to highway rates, see "Poor Rates," *post*, Chap. IV., p. 815.

When the property or the owner or occupier in respect thereof has, before 1835, been legally exempted from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property and the owners or occupiers thereof shall be exempt from the rate imposed by the 5 & 6 Will. 4, c. 50 (*p*).

Hamlet or tything repairing its own highways.

If a hamlet or tything forming part of a parish has never been rated to the highway rate for the parish, though rateable to the poor's rate, and has repaired its own highways, it is sufficient to show that the hamlet or tything is liable for the repairs of its own district, and that the parish is not (*q*); but if a hamlet or tything, being part of one parish and contributing to the poor rate of the parish, has been for a number of years assessed to the highway rates for another parish, by which latter parish the highways of the hamlet were repaired jointly with the highways of such parish, in the absence of any consideration for a liability on the part of the latter parish to repair the highways in the hamlet, it was held that the hamlet was not relieved from its *primâ facie* liability to the highway rate of its own parish, the court saying, that "no such thing was known to the law as part of one parish being united to another parish for the purpose of the repair of the highways; although it may sometimes happen that a parish may be bound to repair the highways in a part of another parish, if a good and continuing consideration for such an obligation can be shown" (*r*).

4. *Rateable Value of Property.*

Rateable value of property, how ascertained.

The rateable value of the property in each parish shall be ascertained according to the valuation list, or other estimate for the time being in force in such parish, for the purposes of the poor rate (*s*), or the justices in petty sessions are to determine in what manner the rateable value of the property in each parish of a highway district under a highway board is to be ascertained for the purpose of a rate to meet the expenses of the board where there is no valuation list or estimate in force in such parish, subject to an appeal by any person aggrieved to the next general or quarter sessions (*t*).

As to the valuation list, see *post*, Chap. IV., p. 798.

5. *Appeals against Rates.*

Appeal to special ses-

If any person feels aggrieved by any rate levied on him for

(*p*) 5 & 6 Will. 4, c. 50, s. 33.
(*q*) *Freeman* v. *Read*, 32 L. J., M. C. 226.
(*r*) *Dawson* v. *Surveyor of Highways of Willoughby-cum-Sloothby*, 34 L. J., M. C. 37; 5 B. & S. 920.
(*s*) 27 & 28 Vict. c. 101, s. 32.
(*t*) *Ibid.*

the purpose of raising monies payable under a precept of a highway board, on the ground of incorrectness in the valuation of any property included in such rate, or of any person being put on or left out of such rate, or of the inequality or unfairness of the sum charged on any person or persons therein, he may appeal to the justices in special sessions in manner provided by 6 & 7 Vict. c. 96, ss. 6 and 7, and all the provisions of the said sections shall be applicable to such appeal (*u*).

Appeal to Special Sessions.

sions against rate to meet the precept of the highway board.

The 6th section of 6 & 7 Will. 4, c. 96, enacts, that the justices acting in and for every petty sessions division shall, four times at least in every year, hold a special sessions for hearing appeals against the rates of the several parishes within their respective divisions, and shall cause public notice of the time and place when and where such special sessions will be holden to be affixed to or near to the door of the parish church of the said parishes twenty-eight days, at the least, before the holding of the same; and such special sessions shall and may be adjourned from time to time by the justices there present as they may think fit; and at such special or adjourned sessions the justices then present shall hear and determine all objections to any such rate on the ground of inequality, unfairness or incorrectness in the valuation of any hereditaments included therein, which decision shall be binding and conclusive on the parties unless the person or persons impugning such decision shall, within fourteen days after the same shall have been made, cause notice to be given in writing of his, her or their intention of appealing against such decision, and of the matter or cause of such appeal, to the person or persons in whose favour such decision shall have been made; and within five days after giving such notice shall enter into a recognizance before some justice of the peace with sufficient securities conditioned to try such appeal at the then next general sessions or quarter sessions of the peace, which shall first happen, and to abide the order of and pay such costs as shall be awarded by the justices at such quarter sessions or any adjournment thereof; and such justices, upon hearing and finally determining such matter of appeal, shall and may, according to their discretion, award such costs to the party or parties appealing or appealed against as they shall think proper; and their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever: provided always, that no such objection shall be inquired into by the said justices in special session unless notice of such objection in writing under the hand of the complainant shall have been given seven days, at least, before the day appointed for such special session to the collector, overseer or other persons by whom such rate was made: provided also, that the said justices in special session shall not be authorized to inquire into the liability of any hereditaments to be rated, but only into the true value thereof, and

Objections to the rate on appeal to special sessions.

Notice of appeal from special sessions.

Recognizance to try appeal.

Judgment of quarter sessions to be final.

Limited jurisdiction of special sessions.

(*u*) 27 & 28 Vict. c. 101, s. 37

Of Highway Rates.

into the fairness of the amount at which the same shall have been rated.

It is sufficient if the recognizance be verbally acknowledged within the five days: it may be perfected afterwards (*v*). Objections to any rate must be brought before the first practicable special sessions held after the publication of the rate, having regard to the necessity for giving notice of objection to the collector, &c. (*x*).

Notice of objection served on one of the overseers by whom the rate was made is sufficient (*y*).

Appeal to special sessions.

Power to amend rate.

By sect. 7, the justices present at any such special or adjourned sessions shall for the aforesaid purpose have all the powers of amending or quashing any such rate so objected to of any parish or other district within their division, and likewise of awarding costs to be paid by or to any of the parties, and of recovering such costs which any court of quarter sessions of the peace has upon appeals from any such rate, except as herein excepted: provided always, that no order of the said justices shall be removed by *certiorari* or otherwise into any of his majesty's courts of record at Westminster: provided also,

Not to hinder appeal to quarter sessions.

that nothing in this act contained shall be construed to deprive any person or persons of the right to appeal against any rate to any court of general or quarter sessions: provided also, that no order of the said justices in special session shall be of any force pending any appeal touching the same subject-matter to the court of general or quarter sessions of the peace having jurisdiction to try such appeal, or in opposition to the order of any such court upon such appeal.

Form of the rate.

Every rate shall contain the names of the occupiers, the description of the premises or property they occupy, and the full annual value of such premises or property, and shall also specify the sum in the pound at which it is made, and no rate to be levied or assessed as aforesaid shall exceed at any one

Rate must not exceed ten pence in the pound.

time the sum of ten pence in the pound, or the sum of two shillings and sixpence in the pound in the whole of any one year: provided, nevertheless, that with the consent of four-fifths of the inhabitants of any parish contributing to the

Rates in the year must not exceed two shillings and sixpence in the pound.

highway rate assembled at a meeting specially called for that purpose, ten days' previous notice of the same having been given by the surveyor of the said parish, the rates to be levied and assessed as aforesaid may be increased to such sum as the said inhabitants so assembled may think proper (*z*).

A contribution order of highway board

So, when the highway rate is required for a highway board of a highway district, it is enacted, that no contribution to be paid by any parish at any one time in respect of highway rates

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(*v*) *Reg.* v. *St. Albans*, 8 A. & E. 932; 8 L. J., M. C. 33.
(*x*) *Reg.* v. *Justices of Lancashire*, 19 L. J., M. C. 199; 15 Q. B. 200.
(*y*) *Reg.* v. *Devon*, 3 New Sess. C. 96.
(*z*) 5 & 6 Will. 4, c. 50, s. 29.

shall exceed the sum of ten pence in the pound, and the aggregate of contributions required to be paid by any parish in any one year in respect of highway rates shall not exceed the sum of two shillings and six pence in the pound, except with the consent of four-fifths of the ratepayers of the parish in which such excess may be levied present at a meeting specially called for the purpose, of which ten days' previous notice has been given by the waywarden of such parish, and then only to such extent as may be determined by such meeting (*a*).

Power to Surveyor to correct the Rate.

must not exceed the like amount.

Errors in highway rates may be rectified by the surveyor, with the consent and approbation of justices at special or petty sessions signed by the justices.

Whenever it shall appear to the surveyor that there has been any omission or error in any rate or assessment made under that act, or in the name of any person, parson or vicar, or of any house, shop, warehouse, coach-house, stable, cellar, vault, building, workshop, manufactory, garden ground, land, tenement, wood, tithe, mines, pits or quarries of any minerals, stone or other matter whatsoever, or hereditament liable to be rated for the purposes of that act, it shall be lawful for the surveyor, with the consent and approbation of the justices at a special sessions (*b*), to cause to be added or corrected in the said rate or assessment the name of the person, parson or vicar omitted, or erroneously stated, and a description of the property in respect of which he ought to be rated; and every such addition or correction made in any of the said rates and signed by such justices shall be as valid and effectual as if the same had been part of the original rate at the time when it was first made (*c*).

Surveyor, with consent of special sessions, may amend rate.

Justices at special or petty sessions may direct a person to be excused from the payment of a highway rate upon proof, after summoning the surveyor, of the inability through poverty of such person to pay the rate, and their order is final (*d*). They are also to fix the payments to be made in respect of task-work, and to hear any complaints of the surveyor respecting the manner in which it is performed (*e*), and to hear complaints of the surveyor in respect of his accounts, &c., against the rate collector, and adjudicate upon them (*f*).

An appeal direct to quarter sessions is also given by 5 & 6 Will. 4, c. 50, s. 105, which enacts, that "if any person shall think himself aggrieved by any rate made under or in pursuance of this act, or by any order, conviction, judgment or determination made, or by any matter or thing done by any justice or other person in pursuance of this act and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next

Appeal to quarter sessions against highway rates and against the appointment or election of surveyors of highways.

(*a*) 27 & 28 Vict. c. 101, s. 33.
(*b*) Or petty, 27 & 28 Vict. c. 101, s. 46.
(*c*) 5 & 6 Will. 4, c. 50, s. 31.
(*d*) *Ibid.* s. 32.
(*e*) *Ibid.* s. 35.
(*f*) *Ibid.* s. 38.

Of Highway Rates.

general or quarter sessions of the peace to be held for the county, division, riding or place wherein the cause of such complaint shall arise, such appellant first giving or causing to be given to the surveyor or surveyors, or to such justice or other person by whose act such person shall think himself aggrieved, notice in writing of his intention to bring such appeal, together with a statement in writing of the grounds of such appeal, within fourteen days after such rate shall have been made or cause of complaint shall have arisen, and within four days after such notice entering into a recognizance before some justice, with two sufficient sureties, conditioned to try such appeal at and abide the order of and pay such costs as shall be awarded by the justices at such general or quarter sessions; and such justices, upon hearing and finally determining the matter of such appeal, shall and may, according to their discretion, award such costs to the party appealing or appealed against as they shall think proper; and their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever: provided, nevertheless, that in case there shall not be time to give such notice and enter into recognizances as aforesaid before the next sessions to be holden after the making of any rate or the cause of complaint shall have arisen, then and in every such case such appeal may be made to the next following sessions, and shall be then heard and determined: provided also, that it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid."

Notice of appeal.

Grounds of appeal.

Recognizance.

On appeal, provisions of 41 Geo. 3, c. 23, to apply.

In all cases of appeal against the rate or assessment made under 5 & 6 Will. 4, c. 50, the several provisions and enactments contained in 41 Geo. 3, c. 23, "An Act for the better Collection of Rates made for the Relief of the Poor," shall be applicable as if the same had been repealed and re-enacted in this act with respect to such appeals (*g*). Provided always, that no rate nor any proceeding to be had touching any order made, or other matter or thing done or transacted in or relative to the execution of this act shall be vacated or quashed for want of form or be removed or removable (except as herein mentioned) by *certiorari* (*h*); but by sect. 108, in any case of appeal, the court of quarter sessions, before whom the same is heard and determined, may, if they think fit, state the facts specially for the determination of the Court of Queen's Bench, in which case the proceedings may be removed by *certiorari* or otherwise into the court.

When appeal does not lie.

An appeal does not lie under the 105th section to the quarter

(*g*) 5 & 6 Will. 4, c. 50, s. 106.
(*h*) *Ibid.* s. 107.

Appeal to Quarter Sessions.

When appeal lies.

sessions at the instance of the parishioners against the allowance of the surveyor's accounts at special sessions (*i*); nor against, nor at the instance of the surveyor against, a disallowance of them (*k*); but it does against a decision of justices at special sessions, under sect. 23, upon the utility of a highway proposed to be dedicated (*l*). And though the court of quarter sessions dismiss an appeal against a decision of petty sessions dismissing an appeal against the allowance of the accounts of surveyors of highways, on the ground that they (the quarter sessions) had no jurisdiction to hear it, they have power to give costs under the 12 & 13 Vict. c. 45, s. 5 (*m*).

A case stated under 20 & 21 Vict. c. 43, on an application to justices to issue their distress warrant to enforce a highway rate, is not the proper mode of raising the question whether the land rated was exempt from highway rates, and an appeal raised in that manner will be dismissed (*n*).

Service of a notice of appeal.

A notice of appeal need not be personally served on the respondent (*o*).

Appeal against penalties imposed under the Highways BetterManagement Act, 25 & 26 Vict. c. 61.

Where any sum adjudged to be paid under the 25 & 26 Vict. c. 61, in respect of penalties under that act, or monies recoverable as penalties, exceeds 5*l*., an appeal may be had by any person aggrieved to a court of general or quarter sessions in manner provided by the 110th section of the 24 & 25 Vict. c. 96 (The Law of Larceny, &c. Consolidation Act), *post*.

Appeal to quarter sessions by waywarden or ratepayer.

Where any waywarden of a highway parish of a district, or any ratepayer of such parish, feels aggrieved in respect of the matters following:—

(1.) In respect of an order of the highway board for the repair of any highway in his parish, on the ground that such highway is not legally repairable by the parish, or in respect of any other order of the board, on the ground that the matter to which such order relates is one in regard to which the board have no jurisdiction to make an order:

(2.) In respect of any item of expense charged to the separate account of his parish, on the ground that such item of expense has not in fact been incurred, or has been incurred in respect of a matter upon which the board have no authority by law to make any expenditure whatever:

(3.) In respect of any item of expenditure charged to the district fund, on the ground that such item of expense has not in fact been incurred, or has been incurred in

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(*i*) *R.* v. *Justices of West Riding*, 1 Q. B. 624.
(*k*) *Reg.* v. *Justices of Leicestershire*, 8 E. & B. 557.
(*l*) *Reg.* v. *Justices of Derbyshire*, E. B. & E. 69; 27 L. J., M. C. 189.
(*m*) *Reg.* v. *Padwick*, 27 L. J., M. C. 113; 8 E. & B. 704.
(*n*) *Walter* v. *The Great Western Railway Company*, 2 E. & E. 325; *Reg.* v. *Newman*, *ib.* 420; but now see *Steele* v. *Brannan*, 41 L. J., M. C. 85.
(*o*) *Reg.* v. *Justices of North Riding*, 7 Q. B. 154.

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respect of a matter upon which the board has no authority by law to make any expenditure whatever:

Appeal to way-warden or rate-payer.

(4.) In respect of the contribution required to be made by each parish to the district fund, on the ground that such amount, when compared with the contribution of other parishes in the district, is not according to the proportion required by this act:

He may, upon complying with the conditions hereinafter mentioned, appeal to the court of general or quarter sessions having jurisdiction in the district; but no appeal shall be had except in respect of the matters and upon the grounds hereinbefore mentioned (*q*).

Conditions of appeal as to time.

No appeal shall be entertained by any court of general or quarter sessions in pursuance of this act unless the following conditions have been complied with —

(1.) Notice of the intention to appeal must be served by the appellant on the clerk of the highway board in the case of an appeal against an order within two months after the order, and in the case of an appeal in respect of any item of expense or contribution, within one month after the statement of the account of the board has been sent to each member of the board as mentioned in the act:

(2.) The notice must state the matter appealed against and the ground of the appeal.

How the highway board may bar the appeal.

On the receipt of the notice the board may serve a counter notice on the appellant requiring him to appear in person, or by his agent, at the next meeting of the board, and support his appeal.

On hearing the appellant, the board may rectify the matter complained of, and if they do so to a reasonable extent, and tender to the appellant a reasonable sum for the costs of his attendance, it shall not be lawful for the appellant to proceed with his appeal.

In any other case the appellant may proceed with his appeal, and the reasonable costs of his attendance on the board shall be deemed part of the costs of the appeal (*r*).

Power to the court to refer the appeal to arbitration.

If at any time after notice of appeal has been given it appears to the court of general or quarter sessions, on the application of either party in the presence of or after notice has been given to the other party, that the matter in question in such appeal consists wholly or in part of matters of mere account which cannot be satisfactorily tried by the court, it shall be lawful for such court to order that such matters, either wholly or in part, be referred to the arbitration of one or more persons to be appointed by the parties, or in case of disagreement by the court; and the award made on such arbitration shall be en-

(*q*) 27 & 28 Vict. c. 101, s. 38.
(*r*) *Ibid.* s. 39.

forceable by the same process as the order of the court of quarter sessions (*s*). As to enforcing an order of quarter sessions, see 12 & 13 Vict. c. 45, s. 18, *ante*, p. 699. *Reference of Appeal.*

And the provisions of the "Common Law Procedure Act, 1854," relating to compulsory references, shall be deemed to extend to arbitrations directed by the court of quarter sessions; and the word "court" in the said act shall be deemed to include the court of quarter sessions (*t*).

In the Highway Act, 1862, the word "parish" includes any place maintaining its own highways, and the expressions "highway district" and "highway board" shall refer only to highway districts formed and highway boards constituted under that act. Meaning of term "parish," under Highway Acts.

The mode of forming a highway district commences by a notice being given by the clerk of the peace that at a certain quarter sessions a proposal will be made to divide the county into highway districts, mentioning the parishes to be included, to the churchwardens and overseers, of which the clerk of the peace is also to give notice, and at such quarter sessions a provisional order appointing the places in the district, may be made which requires to be confirmed at a subsequent quarter sessions (*u*). Formation of highway districts.

Notice has to be given of the sessions at which the order is to be confirmed, and such sessions may quash, confirm, or vary the order, or adjourn the consideration of it; and if the variation extend to altering the parishes appointed for a district by the provisional order, the variation is also provisional, and notice as to the particular districts varied (*x*) must be given of it in such district under the act, and so if an adjournment is made, notice according to the act must be given of it. And the act also provides for the contents of the provisional and final orders in certain points (*y*).

No objection can be made at any trial, or in any legal proceeding, to the validity of any orders or proceedings relating to the formation of a highway district after the expiration of three calendar months from the date of the publication in the Gazette of the order under which the district is formed; and the production of a copy of the London Gazette, containing a copy of the order of justices forming a highway district, is receivable in all courts of justice and in all legal proceedings as evidence of the formation of the district, and of the matters in the order mentioned (*z*).

The highway board is a corporation, and consists of the way- Highway board is a corporation.

(*s*) 27 & 28 Vict. c. 101, s. 40.
(*t*) *Ibid.* s. 41.
(*u*) 25 & 26 Vict. c. 61, s. 5.
(*x*) 27 & 28 Vict. c. 101, s. 4.
(*y*) *Ibid.* s. 6.
(*z*) 25 & 26 Vict. c. 61, s. 8

Of Proceedings of Highway Boards.

the justices acting for the county and residing within the district (*b*).

Board minutes of proceedings to be evidence.

Any minute made of proceedings at meetings of the board, or of committees of the board, if signed by any person purporting to be the chairman of the board or committee of the board, either at the meeting of the board or committee of the board at which such proceedings took place, or at the next ensuing meeting of the board or committee of the board, is receivable in evidence in all legal proceedings without further proof; and, until the contrary is proved, every meeting of the board or committee of the board, in respect of the proceedings of which minutes have been so made, shall be deemed to have been duly convened and held, and all the members thereof to have been duly qualified (*c*).

Duties of district surveyor.

Among other officers the highway board of a district are to appoint under seal or by minute of the board (*d*) a district surveyor, and may appoint an assistant surveyor (*e*), and the district surveyor is to act as the agent of the board in carrying out the works and duties of the board, and the assistant surveyor is also to perform such duties as the board may require under the district surveyor (*f*).

Service of notices, precepts, summonses and orders of highway board.

Any notice in respect of which no other mode of service is provided by the highway board in pursuance of the powers conferred on them, and any precept, summons or order may be served:—(1) By delivery of the same personally on the party required to be served; or (2) By leaving the same at the usual or last known place of abode of such party as aforesaid; or (3) by forwarding the same by post as a prepaid letter addressed to the usual or last known place of abode of such party (*g*). In proving service of a document by post it is sufficient to prove that the document was properly directed, and that it was put as a prepaid letter into the post-office; and in serving notice on the overseers or the waywardens (if more than one) of any parish, it shall be sufficient to serve the same on any one of such officers in the parish (*h*).

Jurisdiction as to place.

Places situated in different counties, when united in one highway district, shall, with respect to appeals under 27 & 28 Vict. c. 101, against accounts, be subject to the jurisdiction of the county in which the district is situate, to which such places shall have been united by the provisional and final order (*i*).

Borrowing money on improvements.

A highway board may, with the approval of the justices in general or quarter sessions, borrow money to meet the expense

(*b*) 25 & 26 Vict. c. 61, s. 9.
(*c*) *Ibid.* s. 5.
(*d*) 27 & 28 Vict. c. 101, s. 30.
(*e*) *Ibid.* s. 12.
(*f*) *Ibid.* s. 16.
(*g*) *Ibid.* s. 26.
(*h*) *Ibid.*
(*i*) *Ibid.* s. 44.

Of Highway Boards.

of improvements in the highways within their jurisdiction, but they must previously cause an estimate of the expense to be made and notice given of their intention to apply for the approval of the justices, at least two months before making their application (*k*). The notices are to state the certain particulars mentioned in the above section, and to be given in the manner prescribed by the same section.

Upon the hearing of the application any person or persons may oppose the approval of the justices being given, and it shall be lawful for the justices to give or withhold their approval, with or without modification, as they think just (*l*). And the justices may, from time to time, make general orders in relation to the mode in which applications are to be made to them for their consent under this act, to the borrowing of any monies (*m*).

What are to be deemed improvements.

Improvements are defined by the 48th section of the act to be—

(1.) The conversion of any road that has not been stoned into a stoned road:

(2.) The widening of any road, the cutting off the corners in any road where land is required to be purchased for that purpose, the levelling roads, the making any new road, and the building or enlarging bridges:

(3.) The doing of any other work in respect of highways beyond ordinary repairs essential to placing any existing highway in a proper state of repair.

(*k*) 27 & 28 Vict. c. 101, s. 47.
(*l*) *Ibid.*
(*m*) *Ibid.*

CHAPTER IV.

OF APPEALS AGAINST POOR RATES.

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Section 1.

OF THE VALUATION LIST AND APPEAL AGAINST SUCH LIST.

By the Union Assessment Committee Act, 1862 (*a*), the board of guardians of every union, formed under 4 & 5 Will. 4, c. 76, shall every year appoint a certain number of their body to be the assessment committee of the union for the investigation and supervision of valuations to be made in such union. By sect. 14, subject to any order which may be made by the committee, the overseers of each parish in the union shall make a list of all the rateable hereditaments in such parish, with the annual value thereof respectively, in so much of the form shown in the schedule annexed to 6 & 7 Will. 4, c. 96, as is set out in the schedule to this act, and such list is to be styled "the valuation list." By sect. 17, the valuation list, made and signed by the overseers, shall be deposited by the overseers in the place in such parish in which rate books are deposited. And by sect. 18, any overseer or overseers of any parish in any union, who have reason to think that such parish is aggrieved by the valuation list of any parish within such union, or any

Place of deposit of list.

Appeal against valuation list.

(*a*) 25 & 26 Vict. c. 103.

Of the Valuation List.

person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time after the deposit of such list, and before the expiration of twenty-eight days after the notice of the deposit, give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof; and when the ground shall be unfairness or incorrectness in the valuation of any hereditament in respect of which any person other than the person objecting is liable to be rated, or the omission of such hereditament, shall also give notice in writing of such objection, and of the ground thereof, to such other person.

Every valuation list approved by the committee, and delivered to the overseers of the parish to which the same relates, shall with and subject to the alterations and additions for the time being made therein or thereto by any supplemental valuation lists so approved and delivered, be the valuation list in force in such parish except in the case of any parish in which the poor rate or assessment for the poor rate is made under the authority of a local act, until a new valuation list in substitution for the same be approved and delivered in like manner.

Poor rate must be on value appearing in valuation list.

Provision is made for new valuations and supplemental lists, and by sect. 28, in every parish where a valuation list under this act has been approved and delivered to the overseers, no rate for the relief of the poor, or other rate which by law is required to be based upon the poor rate, shall be of any force unless the hereditaments included in such rate, except as herein provided, be rated according to the annual rateable value thereof appearing in the valuation list in force in such parish.

Appeal by overseers on behalf of a parish against a valuation list.

An appeal lies against a valuation list by the overseers of a parish in a union under the Union Assessment Committee Act, 1862 (*b*), sect. 32, which enacts, that "if the overseer or overseers of any parish in any union shall have reason to think that such parish is aggrieved by the valuation list of any parish within such union, whether it be on the ground that the rateable hereditaments comprised in the valuation list of such parish are valued at sums beyond the annual rateable value thereof, or on the ground that the rateable hereditaments comprised in the valuation list of some other parish in such union are valued at sums less than the annual rateable value thereof, it shall be lawful for such overseer or overseers, with the consent of a vestry summoned for the purpose of considering the expediency of giving such consent, to appeal to the quarter sessions for the county or borough in which the greatest number of parishes belonging to the union is situate, or in case the number of parishes in any two or more such jurisdictions is equal to the quarter sessions of the county or borough having jurisdiction over the parish in which the workhouse of the union is situate,

Appeal by overseers of a parish against a valuation list on ground either of parish being overrated or another parish underrated.

(*b*) 25 & 26 Vict. c. 103.

Appeal by Overseers, with consent of Vestry, against a Valuation List.

at the sessions to be holden after the expiration of a month after the allowance of and deposit of such valuation list as aforesaid, against such valuation list of the parish which shall appear to be overvalued or undervalued; and if in any case any such overseer or overseers appeal against the valuation list of any other parish on the ground that the rateable hereditaments in such list are valued at less than the annual rateable value thereof, such overseer or overseers shall give fourteen clear days' notice in writing previous to the first day of the said quarter sessions at which the appeal is to be made of the intention to appeal and the grounds thereof to the overseers of the poor of such parish and to the guardians of the union comprising such parish; and if any overseer or overseers of any parish appeal against the valuation list of such parish on the ground that the rateable hereditaments in such list are valued beyond the annual rateable value thereof, such overseer or overseers shall give fourteen days' notice in writing previous to the quarter sessions at which the appeal is to be made of the intention to appeal and the grounds thereof to the guardians of the union in which such parish shall be situate, the said court shall be empowered to hear and determine such appeal, and either confirm such valuation list or correct such irregularities or inaccuracies as shall be proved to exist therein, as to them may appear fair and just; but no such valuation list shall upon such appeal be quashed or destroyed in regard to any other parish, unless the court deem it necessary to proceed to the making of an entire new valuation list as hereinafter provided.

Section 2.

OF THE RIGHT OF APPEAL AGAINST POOR RATES, AND TO WHAT SESSIONS.

Who may appeal.

The right of appealing against rates for relief of the poor was given originally by 43 Eliz. c. 2, s. 6, which enables any persons "who shall find themselves grieved with any cess or tax, or other act done by the churchwardens and other persons, or by the justices allowing the rate," to appeal generally to the general quarter session, who were to make such order thereon as by them should be thought convenient; the same to conclude and bind all parties. This provision being thought to confine the remedy to persons complaining of pecuniary grievance, stat. 17 Geo. 2, c. 38, s. 4, gives the right of appeal to any person who "shall find himself aggrieved by any rate or assessment made for the relief of the poor; *or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein;* or shall have any material objection to such account (*i.e.*, the overseers' accounts) as aforesaid, or any part thereof; or shall find himself aggrieved by any neglect,

act or thing done or omitted by the churchwardens and overseers of the poor, or by any of his majesty's justices of the peace." Under this clause it behoves all parties, complaining of insertions or omissions made improperly in a rate for election purposes, to appeal; for they will not be permitted to impeach the rate, against which they made no appeal, either on the trial of an election petition, or at the Revision Court (*c*), unless the rate be void altogether, and therefore no rate at all; as where it has not been allowed by two justices (*d*), or they can show general criminality and fraud in the parish officers. A rate cannot be abandoned by overseers after its allowance and publication; and the only mode of getting rid of it is by quashing it at the sessions on appeal (*e*). Thus, where a sessions refused to hear an appeal against a rate, because the respondents had previously given notice of abandoning it, a mandamus issued to compel the hearing (*f*); but if the rate is bad and cannot be supported, the overseers ought not to incur the expense of appearing at sessions to support it (*g*). Though where the rate is a nullity it may be disregarded. The safest remedy against an improper rating is by appeal; for, if the objections rest on inadequate description of property in the rate (*h*), or on any other ground short of absolute want of jurisdiction by the justices (*e. g.*, the nullity of the rate as regards the party assessed, where he is not rateable at all), an appeal is the only remedy (*i*).

Ground of Appeal, what.

If the rate is good on its face, and made by competent authority, and on a person and in respect of occupation of property apparently within the jurisdiction of that authority, the only remedy of the person seeking to resist it is by appeal (*k*). So, if the party rated, being in the visible occupation of property within the rating parish, objects that his occupation is devoid of benefit to him, his remedy is by appeal (*l*); and such an objection cannot

When appeal is the only remedy.

(*c*) *Baker* v. *Locke*, 34 L. J., C. P. 49.

(*d*) *Fox* v. *Davies*, 6 C. B. 11; 18 L. J., C. P. 48; *Bushell* v. *Luckett*, 2 C. B. 111.

(*e*) *R.* v. *Justices of Cambridge*, 2 A. & E. 370.

(*f*) *Reg.* v. *Recorder of Stamford*, 1 P. & D. 72. See the *Milborne Port case*, Phillipps's Election Cases, 275. This doctrine was acted on by the late Lord *Tenterden* when recorder of Reading, and since by a committee of the House of Commons in the Reading Election case, 1827; and see 2 Will. 4, c. 45, s. 27; Dick. Q. S., ed. Talf. p. 661.

(*g*) *Reg.* v. *Fouch*, 2 Q. B. 308.

(*h*) *Cortis* v. *Kent Waterworks Company*, 7 B. & C. 314.

(*i*) See *Marshall* v. *Pitman*, 9 Bing. 595, collecting the cases from *Milward* v. *Caffin*, 2 Bla. R. 1330. Trespass, replevin and case for excessive levy are the other remedies; 9 Bing. 595; 1 A. & E. 264. As to remedies by appeal under local acts, see *R.* v. *Justices of Kent*, 9 B. & C. 283; *R.* v. *Tucker*, 3 B. & C. 544; *R.* v. *St. James, Westminster*, 1 A. & E. 241; *R.* v. *Justices of Suffolk*, 1 B. & A. 640. The Sudbury act, *R.* v. *Justices of Norwich*, 3 D. & R. 42.

(*k*) *Overseers of Birmingham* v. *Shaw*, 10 Q. B. 868; 18 L. J., M. C. 89; *Reg.* v. *Justices of Kingston*, E. B. & E. 256; 27 L. J., M. C. 199.

(*l*) *Ibid.*; *Reg.* v. *Bradshaw*, 2 E. & E. 836; 29 L. J., M. C. 176; *Mersey Docks* v. *Cameron*, 9 C. B., N. S. 812; 30 L. J., M. C. 194.

Appeal against Rate when necessary.

be urged in opposition to an application for a distress warrant at petty sessions (*m*); but if the land in respect of which the rate is imposed is locally situate out of the rating parish, or if the person rated is not the occupier, in fact, of the premises, an appeal is not necessary; but the rate may either be appealed against on that ground, or may be treated as void, and its enforcement by the justices resisted, or an action be brought against the party enforcing it (*n*). And the same principle applies to a person rated as an inhabitant possessing visible personal property in the parish. If he be, in fact, an inhabitant, he must appeal, though he has no rateable property of any value (*o*).

Form of the heading of a rate.

A rate by its heading, or something appearing on its face, must give information as to the purpose for which it is made, or by whose authority it is made (6 & 7 Will. 4, c. 96, s. 2); and, therefore, a poor rate made with a heading merely naming the parish, stating the date on which the rate was made, without stating for what purpose, whether for the relief of the poor or otherwise, is void, and cannot be enforced though not appealed against (*p*); but if a poor rate has a heading showing sufficiently the purpose for which it is made, and does not describe the property rated sufficiently in the columns of the form of rate given by the Parochial Assessment Act, and omitted to fill up the column as to situation of property or estimated extent, the rate is not therefore void, but is liable to be appealed against to the sessions, who will inquire whether the deviations from the form are substantial or not (*q*). But if the sessions, in the case of a farm extending into two parishes, are satisfied upon the evidence that the farmer rated occupies land in the parish of the extent and value at which he is assessed, they are not bound to determine the boundaries, or to say that this particular close belongs to one parish, and this other close to another (*r*).

To what sessions in respect of place and time.

This appeal must be made to the general or quarter sessions of the peace for the particular jurisdiction in which the parish lies, whether county, riding, or other division. If it be situate in the borough of a corporate city or town, having a grant of a court of separate quarter sessions under the late Municipal Corporations Act (*s*), the appeal may be to that court. But there, as well as in franchises or corporate towns where no such separate court is so granted, and having less than six corporate justices, it seems that this appeal may still be to the

(*m*) *Reg.* v. *Bradshaw*, 2 E. & E. 836; 29 L. J., M. C. 176.

(*n*) *Overseers of Birmingham* v. *Shaw, ubi supra; Weaver* v. *Price*, 3 B. & Ad. 409; *Milward* v. *Caffin*, 2 W. Bl. 1330; *Amherst* v. *Sommers*, 2 T. R. 372.

(*o*) *Marshall* v. *Pitman*, 9 Bing. 595.

(*p*) *Reg.* v. *Eastern Counties Railway Company*, 5 E. & B. 974; 25 L. J., M. C. 49.

(*q*) *Ibid.*

(*r*) *Reg.* v. *Woods*, E. B. & E. 481; 27 L. J., M. C. 289.

(*s*) 5 & 6 Will. 4, c. 76, s. 105. See *R.* v. *St. Mary, Taunton*, 1 Bott, 274, 282.

sessions of the county, riding, or division (*t*). And since the Municipal Corporation Act, in a borough having a separate court of quarter sessions, but which was subject to the jurisdiction of the county justices at the passing of the act, the appeal against a rate still lies to the county quarter sessions (*u*).

To what Sessions in respect of Place and Time.

By 6 & 7 Will. 4, c. 96, s. 6, the justices acting in and for every petty sessions division shall, four times at least in every year, hold a special sessions for hearing appeals against the rates of the several parishes within their respective divisions, and shall cause public notice of the time and place when and where such special sessions will be holden to be affixed to or near to the door of the parish church of the said parishes twenty-eight days, at the least, before the holding of the same; and such special sessions shall and may be adjourned from time to time by the justices there present, as they may think fit; and at such special or adjourned sessions, the justices there present shall hear and determine all objections to any such rate on the ground of inequality, unfairness or incorrectness in the valuation of any hereditaments included therein, which decision shall be binding and conclusive on the parties, unless the person or persons impugning such decision shall, within fourteen days after the same shall have been made, cause notice to be given in writing of his, her or their intention of appealing against such decision, and *of the matter or cause of such appeal*, to the person or persons in whose favour such decision shall have been made; and within five days after giving such notice shall enter into a recognizance before some justice of the peace with sufficient sureties, conditioned to try such appeal at the then next general sessions or quarter sessions of the peace which shall first happen, and to abide the order of and pay such costs as shall be awarded by the justices at such quarter sessions, or any adjournment thereof; and such justices, upon hearing and finally determining such matter of appeal, shall and may, according to their discretion, award such costs to the party or parties appealing or appealed against as they shall think proper, and their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever: provided always, that no such objection shall be inquired into by the said justices in special sessions, unless notice of such objection in writing under the hand of the complainant shall have been given seven days at least before the day appointed for such special sessions to the collector, overseers or other persons by whom such rate was made (*v*); provided

To and from special sessions.

Notice of appeal.

Recognizance.

Appeal to quarter sessions from decision of special sessions.

(*t*) See *ante*, p. 5; 17 Geo. 2, c. 38, s. 4; 1 Geo. 4, c. 36. See *R.* v. *Justices of Essex*, 5 M. & S. 513.

(*u*) *Reg.* v. *Bridgwater*, 10 A. & E. 711.

(*v*) It is sufficient if notice of objection be served on one of the overseers or other persons by whom the rate was made, *Reg.* v. *Justices of Devon*, 3 New Sess. Cas. 96.

Appeal from Special Sessions to Quarter Sessions.

also, that the said justices in special session shall not be authorized to inquire into the liability of any hereditaments to be rated, but only into the true value thereof, and into the fairness of the amount at which the same shall have been rated.

It is sufficient if the recognizances under this section be verbally acknowledged before a justice within the five days, for the record of the recognizances may be drawn up afterwards from the minute then made (*v*).

The appeal to the special sessions must be to the next practicable special sessions or within a reasonable time (*w*), and not later than the second after publication of the rate (*x*).

Power to amend and quash rate, and order costs at special sessions.

By 6 & 7 Will. 4, c. 96, s. 7, the justices present at any special or adjourned session mentioned in sect. 6 (*supra*) shall for the aforesaid purpose have all the powers of amending or quashing any such rate so objected to, of any parish or other district within their division, and likewise of awarding costs to be paid by or to any of the parties, and of recovering such costs which any court of quarter sessions of the peace has upon appeal from any such rate except as herein excepted: provided always, that no order of the said justices shall be removed by certiorari or otherwise into any of his Majesty's courts of record at Westminster;

Appeal against rate to quarter sessions preserved.

provided also, that nothing in this act contained shall be construed to deprive any person or persons of the right to appeal against any rate to any court of general or quarter sessions; provided also, that no order of the said justices in special session shall be of any force pending any appeal touching the same subject-matter to the court of general or quarter sessions of the peace having jurisdiction to try such appeal, or in opposition to the order of any such court upon such appeal.

Of appeals to quarter sessions.

The appeal must be lodged at the next practicable quarter sessions after publication of the rate (*y*); for it is by the assessment that the party is "aggrieved," and against that he appeals (*z*); but an appeal before such allowance is premature (*a*). By "practicable" is meant the next session for which the appellant is in time to give an effectual notice of appeal after publication of the rate (*b*). If, from a refusal of a copy of the rate, or its late publication, only one day intervenes between its publication and the next immediate quarter ses-

(*v*) *Reg.* v. *Justices of St. Albans*, 8 A. & E. 932.

(*w*) *Reg.* v. *Justices of Lancashire*, 19 L. J., M. C. 199; sub nom. *Reg.* v. *Trafford*, 15 Q. B. 200.

(*x*) *Reg.* v. *Hammond*, 4 New Sess. Cas. 316.

(*y*) 17 Geo. 2, c. 38, s. 4; *R.* v. *Justices of Sussex*, 15 East, 206; and where general sessions are held, as well as general quarter sessions, and distinct from them, as in London and Middlesex, the appeal must be to the next general quarter sessions; *R.* v. *Justices of London*, 15 East, 632. The regularity of the publication in church, or the reverse, will not be inquired into in the Queen's Bench on a case reserved, if it was not intended to be referred; *R.* v. *Aire and Calder Navigation*, 2 T. R. 660.

(*z*) *R.* v. *Micklefield*, Cald. 507; 1 Bott, 279, 204, n.; 43 Eliz. c. 2, is repealed *quoad hoc*, by 17 Geo. 2, c. 38, s. 4; *R.* v. *Coode*, 1 Bott, 276.

(*a*) *R.* v. *Atkins*, 4 T. R. 12.

(*b*) See *ante*, p. 657.

sions, the appellant is not bound to lodge his appeal there (*c*). It may be lodged at an adjourned general quarter sessions if the practice admits of so doing (*d*); but the appellant is not bound so to enter it (*e*). Yet, if sufficient notice of appeal has not been previously given, or if any other sufficient reason appear to postpone the hearing, the court may and ought to respite it to the following sessions (*f*); and where it was the practice of a session to allow appeals against poor's rates to be entered as matter of course at the sessions immediately following the publication, though there had been sufficient time for giving notice of appeal, and preparing for trial at that sessions, and an appellant had acted on that practice, the Court of King's Bench declined to sanction the refusal of the sessions to hear the adjourned appeal (*g*). And, in a modern case, the enactment in 17 Geo. 2, c. 38, that where reasonable notice of appeal has not been given for the next sessions, and no notice is deemed the same as no reasonable notice, the sessions are to adjourn, the appeal was considered to be obligatory; and that under that statute the sessions, in such a case, were not at liberty to dismiss the appeal, but were bound to adjourn it; and that the 41 Geo. 3, c. 23, s. 6, which had the effect of putting the parties interested in the same situation as regarded notice of appeal as the churchwardens and overseers of the poor was to be similarly construed (*h*); but if there be a notice of appeal in fact, it is for the sessions to exercise their judgment and discretion as to whether it is a reasonable notice, and if they adjudge it to be so, it is for them to exercise their discretion as to whether they will adjourn or dismiss the appeal (*i*). But it would be desirable if the justices in session would adopt the recommendation of Lord *Tenterden* in *R.* v. *Wilts* (*k*), and cause it to be understood, that an appeal against a poor's rate, in the speedy decision of which the public have a deep interest, will not be adjourned as a matter of course, but only on its appearing that the rate was made so late that due notice of appeal against it could not be given, *viz.*, for the first session after the publication, or that there is other reasonable ground for adjourning the trial, *e. g.*, the unavoidable absence of a material witness (*l*).

To what Sessions in Point of Time.

As to respiting appeals to quarter sessions.

(*c*) *R.* v. *Justices of Sussex*, 15 East, 206; *R.* v. *Hendon*, 2 D. & R. 249.
(*d*) *R.* v. *Justices of Sussex*, 7 T. R. 107.
(*e*) *R.* v. *Justices of Surrey*, 1 M. & S. 479.
(*f*) 17 Geo. 2, c. 38, s. 4. See *R.* v. *Justices of Gloucestershire*, Doug. 191; and *R.* v. *Justices of Shropshire*, 7 East, 549. See as to respiting appeals, *ante*, p. 681.
(*g*) *R.* v. *Justices of Wilts*, 8 B. & C. 380.
(*h*) *Reg.* v. *Eyre*, 6 E. & B. 992; 26 L. J., M. C. 14.
(*i*) *Ibid.*, 7 E. & B. 609; 26 L. J., M. C. 121.
(*k*) 8 B. & C. 380.
(*l*) See per Lord *Tenterden* in *R.* v. *Wilts*, 8 B. & C. 384, 385. The case in which, by 9 Geo. 1, c. 7, s. 8, the justices are to adjourn the appeal, is only by way of example: other cases may occur in which it may be equally fit to do so.

Section 3.

OF THE CONDITIONS OF APPEAL AGAINST POOR RATES—AS NOTICE, PARTIES TO THE APPEAL, &c.

Notice of appeal.

Although an appeal against a poor's rate may be received and adjourned (*viz.*, entered and respited) without the previous notice required by the sessions' practice, it cannot be *heard* and adjudicated on, except by consent of the parties, without proof of having duly served on the respondents such a notice for trial at the second sessions; and if it has once been previously respited, it may be altogether dismissed for that defect (*m*).

Form of notice.

The notice, by the express provisions of 41 Geo. 3, c. 23, s. 4, must be in writing, "signed by the person or persons giving the same, or his, her or their attorney, on his, her or their behalf; and must specify "particular causes or grounds of appeal," on which he proposes to rely. Thus, if the ground of appeal be that particular persons are omitted, they must be specified in it by name (*n*). So a rate cannot be quashed for a material defect apparent on the face of it, *e. g.*, for not describing the property in respect of which the party is rated, unless it be stated in the notice as a ground of appeal (*o*).

Notice by whom.

The notice must be given by the party "grieved by the rate or assessment, or having any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any persons therein" (*p*). Nothing prevents persons grieved by the same rate from joining in the same appeal, whether their grounds of appeal be the same or different (*q*). If the appellant show on the face of his notice of appeal a material objection to the rate, it is sufficient, though he does not in terms allege that he is a party grieved, or a rated inhabitant; but if on the trial of the appeal he appears to be a mere stranger, the sessions may refuse to hear him (*r*).

As to respondents.

The respondents in an appeal against a rate are the churchwardens and overseers of the parish, and the justices who allowed the rate (*s*).

By the 2nd section of the 27 & 28 Vict. c. 39, the assess-

(*m*) *Reg.* v. *Eyre*, 7 E. & B. 619; 26 L. J., M. C. 125; 41 Geo. 3, c. 23, s. 5.

(*n*) 1 Bott, 274; 41 Geo. 3, c. 23, s. 6.

(*o*) *R.* v. *Bromyard*, 8 B. & C. 240. See *R.* v. *Brooke*, *post*, p. 809: but the parties may consent to most other grounds of appeal. See 41 Geo. 3, c. 23, s. 6, *post*, pp. 808, 809.

(*p*) 17 Geo. 2, c. 38, s. 4.

(*q*) *R.* v. *Justices of Sussex*, 15 East, 206; *R.* v. *White*, 4 T. R. 771.

(*r*) So decided on an appeal against overseers' accounts given by the same words and section, 41 Geo. 3, c. 23, s. 4; *R.* v. *Justices of Somersetshire*, 7 B. & C. 681.

(*s*) 2 A. & E. 370.

Of the Notice of Appeal.

ment committee of a union formed under 4 & 5 Will. 4, c. 76, may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal, but in the name of the guardians of such union, in like manner, and with the same incidents, and subject to the same liabilities and entitled to the same remedies and rights, as in the case of persons other than the overseers to whom notice of appeal may be given.

Assessment committee may be respondents.

By 27 & 28 Vict. c. 39, it is enacted, in sect. 1, that "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for every parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: provided that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of and no subsequent list has been transmitted to them; and if they amend the same, shall give notice of such amendment to the overseers, who shall thereupon alter their current rate accordingly."

Notice of appeal to be given to the assessment committee.

It is made necessary, under this section, for appellants against each rate to go through the committee to the quarter sessions; and therefore, where appellants against a rate made in conformity with the valuation list then in force, having made their objections to the list to the committee, and having failed to obtain relief, appealed to the quarter sessions, who confirmed the rate subject to a case for the Court of Queen's Bench, and before the case was disposed of the parish made a fresh rate in conformity with the same list, which remained, so far as the appellants were concerned, unaltered, and the appellants gave notice of appeal to the quarter session against the latter rate to the committee, it was held that the quarter sessions ought not to have entered such appeal, as the appellants ought by the statute to have given a fresh notice of objection to the list in respect of the latter rate, and have failed to obtain relief on such objection from the assessment committee before appealing against such latter rate (*t*). The giving of the notice of objection to the assessment committee and the failure to obtain relief are conditions precedent to the hearing of an appeal by the ses-

Notice to the assessment committee must be against each rate.

Notice of objection condition precedent.

(*t*) *Reg.* v. *Great Western Railway Company*, 38 L. J., M. C. 89; L. R., 4 Q. B. 323.

Notice of Objection to be given to the Assessment Committee.

sions, where the appellants alleged that they were rated in respect of property in which they had no rateable interest, as being mere licensees to use the property, and not in the occupation of it so as to be rateable, and although the objection was not to any unfairness or incorrectness in the valuation, but to any valuation at all (*u*).

Next practicable sessions, what.

So where the assessment committee refused relief twenty-eight days before the next quarter sessions, and the appellants, a gas company, passed those sessions over and were allowed to enter and respite the appeal at the following sessions, on the ground that there was not sufficient interval between the refusal and relief and the last day for giving twenty-one days' notice of appeal to the assessment committee for the first sessions, under 27 & 28 Vict. c. 39, s. 1, to enable the gas company to determine whether they would appeal, and so the first sessions were not practicable, the Court of Common Pleas reviewed the decision of the court, and held that the first sessions were practicable, and the appeal should then have been entered, and granted a prohibition to the court against hearing the appeal (*x*).

Fourteen clear days' notice.

Under the 12 & 13 Vict. c. 45, in cases of appeals against poor rates to any court of general or quarter sessions, "fourteen clear days' notice to appeal at least shall be given, and such shall be sufficient notice, any act or acts, or any rule or practice of any court or courts to the contrary notwithstanding; and

Notice to be in writing and signed.

such notice of appeal shall be in writing, signed by the person or persons giving the same, or by his, her or their attorney on his, her or their behalf, and the grounds of appeal shall be specified in every such notice: provided always, that it shall not be lawful for the appellant or appellants on the trial of any such appeal to go into or give evidence of any other ground of appeal besides those set forth in such notice."

Service of notice.

The notice to the committee may, by sect. 42 of the Union Assessment Committee Act, 1862, be served upon the committee by being left at the office of the *clerk to the board of guardians* or sent through the post office, addressed to the committee at such clerk's office, or by being delivered personally to their clerk or at his usual place of abode.

This notice must be "delivered to or left at the places of abode of the churchwardens and overseers of the poor of the parish, township, vill, or place, or any two of them" (*y*); and if the appeal be brought, "because any other person or persons is or are rated or assessed in such rate or assessment, or is or are *omitted* to be rated or assessed therein, or is or are rated or assessed in any such rate or assessment at any greater or less sum or sums of money than the sum or sums at which he, she, or they ought to be rated or assessed therein, or for any

(*u*) *Reg.* v. *Justices of Lancashire*, 43 L. J., M. C. 116.
(*x*) *Liverpool Gas Company* v. *Overseers of Everton*, 40 L. J., M. C. 104; L. R., 6 C. P. 414.
(*y*) 41 Geo. 3, c. 23, s. 4.

other cause that may require any alteration to be made in any rate or assessment with respect to any other person or persons," then the person so appealing for the causes aforesaid, or any of them, shall give such notice of appeal in writing as hereinbefore mentioned, *not only* to the churchwardens or overseers of the poor, or any two or more of them, but also to the other person or persons so interested or concerned in the event of such appeal as aforesaid (*z*).

Of Service of Notice of Appeal.

This direction makes it imperative on an appellant to serve a proper notice of appeal on every party whom he contends to have been underrated, or improperly omitted from the rate (*a*), and they are the respondents. But if the ground of the complaint is that the appellant is overrated in respect of *all* the other parties rated, it is unnecessary to give notice to them, for the alteration sought is only the diminution of the assessment, and the rest of the rate remains entire (*b*).

But proof of the notice of appeal may be waived; for "with the consent of the overseers, signified by them or their attorney in open court, and with the consent of any other person interested therein, the said court of sessions may proceed to hear and decide upon such appeal, although no notice thereof shall have been given in writing, and with like consent may hear and decide on grounds of appeal not stated or mis-stated in such written notice, where any notice shall have been given in writing" (*c*); but, except in compliance with the provisions of the above statute, the service of notice will not, except on very clear grounds, be dispensed with (*d*). Again, if the appeal was respited at the instance of the respondents, the appellant cannot be afterwards called on to prove his notice of appeal (*e*); but a respite at the instance of the appellant would not alone waive the necessity of proof of the original notice (*f*); but whether the respondents, by consenting to the entry, respiting or adjournment of an appeal, do by that act alone waive the objection to the notice, may depend upon the circumstances under which the consent is given. The following is a

Waiver of notice of appeal.

Form of a Notice of Appeal against a Poor Rate (*g*).

To J. M. churchwarden, and to W. P. and J. H. the late overseers, and H. A. and W. P. the present overseers of the poor of the parish of C. in the county of N., and to each and every of them. To A., B., C. and D., I do hereby give you notice that I intend at the next general quarter ses-

(*z*) 41 Geo. 3, c. 23, s. 6.
(*a*) *Reg.* v. *Eyre*, 8 E. & B. 619; *ibid.* 609; *ibid.* 6 E. & B. 992; and see *ante*, p. 806. *R.* v. *Brooke*, 9 B. & C. 915; 4 M. & R. 719, overruling as to this point *R.* v. *Maddern*, 1 T. R. 627. See *R.* v. *Justices of Berks*, Douglas on Elections, 132; *R.* v. *Bromyard*, 8 B. & C. 240; *R.* v. *Justices of Suffolk*, 1 B. & A. 644, per *Bayley*, J.
(*b*) See *R.* v. *Justices of Suffolk*, 1 B. & A. 644.
(*c*) 41 Geo. 3, c. 23, s. 5.
(*d*) *R.* v. *Sheard*, 2 B. & C. 856.
(*e*) *R.* v. *Justices of Herts*, 4 B. & Ad. 561.
(*f*) *R.* v. *Justices of Yorkshire* (*West Riding*), 5 B. & Ad. 667.
(*g*) See this form, *R.* v. *Brooke*, 9 B. & C. 915.

Of Proof of Notice of Appeal.

sions of the peace to be holden in and for the county of N. at N., on Thursday, the 13th day of April instant, to enter and try an appeal [*or if the appeal has been already entered and respited,* "to try a certain appeal lodged and entered at the last general quarter sessions of the peace holden at N. aforesaid in and for the county aforesaid], against a certain rate or assessment intituled [*copy the title of the rate*], for the following (amongst other) particular causes and grounds of appeal:—

1st. Because the said rate or assessment has not been made, published and allowed in due course of law.

2nd. Because the rate is made for other purposes than for the relief of the poor.

3rd. Because I am assessed at too large a sum in an unfair proportion, in comparison with the sum and proportion assessed on A., B., C. and D., or one of them.

4th. Because I am assessed at a greater sum than I ought to be assessed at.

5th. Because the persons hereinbefore named, or some of them, are assessed at less sums than they ought to be assessed at.

6th. Because the said persons are not assessed at all for lands and houses which were in their occupation when the said rate was made.

7th. Because the said persons, or some of them, are not assessed to the full value of their local visible property within the said parish.

8th. Because I am assessed for property which was not in my occupation at the time of the making the said rate, and for other property which is not liable to be assessed to the relief of the poor.

9th. Because it does not sufficiently appear on the said rate what persons thereby assessed are charged.

10th. Because certain persons are assessed for parts of certain farms, houses and lands, but such parts are altogether uncertain and indefinite.

11th. Because it does not appear whether the persons assessed are charged as occupiers of land, &c., or as inhabitants.

12th. Because the profits of the property for which I am assessed are devoted to public purposes, and there is no beneficial occupier.

13th. Because I am not an occupier of any land, house, tithes impropriate, propriation of tithes, mine, rights of fowling, shooting, taking game or rabbits, or fishing, or land used as a plantation or wood, or valuable underwood in the said parish.

14th. Because it does not appear in and by the said rate or assessment in respect of what property the said rate is made and assessed on me, the appellant.

And, lastly, Because the rate and assessment is in other respects illegal, unequal, partial, oppressive and unjust.

And I hereby give you the said churchwardens and overseers notice, to produce at the hearing of the said appeal the said pretended rate or assessment, and all other rates and assessments made for the relief of the poor of the said parish for the twenty years last preceding the date hereof; likewise the valuation list for the said parish and certain valuations made by J. L., J. C. and T. B., some or one of them, and every other valuation made by the direction of any vestry or any churchwardens and overseers of the said parish; and that you, A., B., C. and D. respectively produce all deeds, leases, agreements, admissions and other documents respecting or concerning the premises, for which you, and each of you, are jointly or severally rated or assessed, or appear so to be, in and by the said rate or assessment, or omitted to be, therein rated or assessed.

Witness my hand this ——— day of March, ——.

R. B. B.

As to grounds of appeal against a poor rate. The general provisions of the 12 & 13 Vict. c. 45, s. 3 (*h*), curing defects in form in grounds of appeal, and giving power to amend the same,

(*h*) See Part III., Chap. I., *ante*, p. 672.

apply to grounds of appeal against a poor's rate; as also does sect. 4 (*i*), relating to the costs occasioned by frivolous grounds of appeal; and sect. 6 (*k*), making the decisions of sessions final on such matters. *As to Grounds of Appeal.*

If the rate is made in conformity with the valuation list, notice of objection to the valuation list must be given to the assessment committee in the first place, and there must be a failure to obtain relief from that committee. There must also be twenty-one days' notice of appeal to the assessment committee, as well as the notice of appeal to the parish officers, and, in cases within 41 Geo. 3, c. 23, to the persons interested.

Section 4.

OF THE GROUNDS OF APPEAL AGAINST POOR RATES.

The consideration of the grounds of appeal against poor rates necessarily involves the consideration of the whole law under which poor rates are made;—of the parties by whom they must be made; of the purposes for which they may be made; of the subject-matters in respect of which and the parties on whom the assessment of them must be imposed; of the proportions which should be observed in making them; and of the forms according to which they must be made, published and allowed.

Although the enforcement of contributions for the relief of the poor may be traced to very early times, the present system of rating is entirely governed by the 43 Eliz. c. 2, s. 1, which may, therefore, be regarded as the *test* to which all questions of rating must be referred. By that statute it is enacted, "that the churchwardens and overseers of the poor of every parish, or the greater part of them, shall, by and with the consent of two or more justices of the same county, whereof one to be of the quorum, dwelling in or near the same parish or division where the same parish doth lie, raise weekly or otherwise by taxation of every *inhabitant, parson, vicar,* and *other,* and of every *occupier* of *lands, houses, tithes impropriate, propriations of tithes, coal mines* [*or saleable underwoods*] *in the said parish,* in such competent sum and sums of money as they shall think fit, a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, to set the poor on work: and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work; and also for the putting out of such children to be apprentices—to be gathered out of the same parish, *according to the ability of the* 43 Eliz. c. 2, s. 1. Power to levy the poor rate.

(*i*) Part III., Chap. I., *ante,* p. 697.
(*k*) *Ante,* p. 673.

What Property rateable.

same parish, and to do and execute all other things, as well for disposing of the said stock as otherwise concerning the premises as to them shall seem convenient."

Saleable underwoods.

By 37 & 38 Vict. c. 54, s. 11, so much of the above act as relates to the taxation of an occupier of saleable underwoods is repealed, as from the coming into operation of that act: provided that this repeal shall not affect anything duly done or suffered before that date, or any right acquired or liability accrued before the said date, or any legal proceeding or remedy in respect of any such right or liability; and every such legal proceeding or remedy may be carried on and enforced in like manner as if this repeal had not been enacted. And by sect. 3, the act of Elizabeth and amending acts are to extend to—(1) Land used for a plantation or a wood, or for the growth of saleable underwood, and not subject to any rights of common; (2) To rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land; and (3) To mines of every kind not mentioned in the above act.

Land used as a plantation or wood.

Rights of fowling, shooting, &c.

Mines.

By whom the rate is to be made.

(1.) The first question which arises is, By whom the rate is to be made?

The rate can only be made by the churchwardens and overseers, or the major part of them. An assistant overseer appointed by justices' warrant under 59 Geo. 3, c. 12, and 7 & 8 Vict. c. 101, to perform all the duties of the overseer, may probably be reckoned as one to make up the majority (*l*). Upon them the duty is imperatively cast, and, if neglected, may be enforced by *mandamus* (*m*); peremptory in the first instance, for otherwise the poor might starve (*n*); and where one of two overseers refuse to concur in making a rate, the other may apply for a mandamus (*o*). By 43 Eliz. c. 2, this duty is confined to overseers of *parishes;* but inasmuch as there were many parishes of too great extent to be governed by one set of overseers, the 13 & 14 Car. 2, c. 12, s. 21, provided that in such cases the poor of every township or village of such parishes shall be maintained within it, and that for such place two or more overseers shall be annually appointed.

As to extra-parochial places.

By the 20 Vict. c. 19, s. 1, every place entered separately in the report of the registrar-general on the last census, which now is, or is reputed to be, extra-parochial, and wherein no rate is levied for the relief of the poor, the county police or borough rate, may be deemed a parish for such purposes, and be designated by the name which is assigned to it in such report.

By sect. 4, if the owner and occupiers respectively of the land comprised in any extra-parochial place owning and occu-

(*l*) *Baker* v. *Locke*, 34 L. J., C. P. 49; 18 C. B., N. S. 52.
(*m*) *R.* v. *Barnstaple*, 1 Barnard, 137; 1 Bott, 78; Stra. 1259.
(*n*) *R.* v. *Fisher*, Sayer, 160; *R.* v. *Edgbaston*, 1 N. & P. 20.
(*o*) *R.* v. *Gadsby*, 1 N. & P. 572.

By whom the Rate is to be made.

pying two-thirds in value at least of such lands shall express their desire in writing, signed by such major part, that such place be comprised in or annexed to any parish for the purposes aforesaid, and such parish shall consent thereto, such consent to be expressed by a resolution of the vestry after due notice, the justices of the peace in quarter sessions assembled, or the recorder of the borough, if such place be situated within a borough subject to the jurisdiction of a recorder, may make an order for the annexation of such place to such parish, and thenceforth the same shall be deemed to be part of the said parish for all such purposes.

As to extra-parochial places.

By 31 & 32 Vict. c. 122, s. 27, every extra-parochial place shall, from the 25th December, 1868, for all civil parochial purposes be annexed to and incorporated with the next adjoining parish with which it has the longest common boundary; and in case there shall be two or more parishes with which it shall have boundaries of equal extent, then with that parish which now (31st July, 1868) contains the lowest amount of rateable value.

This statute was meant to supplement the 20 Vict. c. 19.

Accretions from the sea, &c. to be incorporated in parishes.

And every accretion from the sea, whether natural or artificial, and the part of the sea-shore to the low-water mark, and the bank of every river to the middle of the stream, which, on the 25th December, 1868, has not been included within the boundaries of or annexed and incorporated with any parish, shall for the same purposes (*i. e.*, for all civil parochial purposes) be annexed to and incorporated with the parish to which such accretion part or bank adjoins in proportion to the extent of the common boundary (*p*).

An estuary or arm of the sea is *primâ facie* extra-parochial, but this presumption may be rebutted (*q*). And in the case of a navigable tidal river, the reclamation from the ooze or bed of the river and payment of poor rates upon such land has been held to outweigh the fact of perambulation of the parish, which seemed to show that the parish extended only to the line of high-water mark, and rebut the presumption arising from such perambulations (*r*).

The mode of obtaining the benefit of this act, in cases where it has not been brought into operation, is by procuring the appointment of overseers by magistrates of the division in which the township lies; which, if granted, may be questioned either by appeal to the sessions (*s*), or by the removal of the appointment into the Court of Queen's Bench by *certiorari*, on which the court will enter into the merits as disclosed by affidavit (*t*);

(*p*) 31 & 32 Vict. c. 122, s. 27.
(*q*) *Ipswich Dock Commissioners* v. *The Overseers, &c.*, 7 B. & S. 310.
(*r*) *Ibid.*
(*s*) *R.* v. *Morris*, 4 T. R. 550; *Reg.* v. *Spurrell*, 35 L. J., M. C. 74; L. R., 1 Q. B. 72.
(*t*) *R.* v. *Great Marlow*, 2 East, 244; *Reg.* v. *Cousins*, 33 L. J., M. C. 87.

By whom the Rate is to be made.

and, if refused, may be enforced by *mandamus*, on the rule for, or on the return to which, the propriety of the charge may be fully discussed and solemnly decided. This demand can, however, be made only in respect of a township or vill; and an appointment for a district having no claim to either of these titles, although recently peopled with a numerous population, will be quashed as invalid (*u*). A rate made by other than the churchwardens and overseers, or the major part of them, for whatever district, is wholly void, and cannot be enforced by *mandamus* or other legal process (*x*).

The next question is over what area the rate extends.

Area of rate.

A hamlet may have been detached from a township for ecclesiastical purposes and yet remain attached to it for civil purposes, as, for instance, rateability to the poor rate or highway rate. And there is no reason for saying that a hamlet or township could not have originally extended into two parishes and afterwards became detached and annexed to one parish for ecclesiastical purposes, and continue to form part of the other parish for civil purposes. Thus, where for more than a hundred years the inhabitants of the township of I. had been assessed to the poor rate and to the highway rate for the township of H., which maintained its own poor and highways separately, and together with another township formed the parish of H., whilst on the other hand the lands in I. from the earliest period were tithable to the adjacent parish of K., as being situate in that parish, and the occupiers of I. were rated to and paid church rates in the parish of K., and also Easter and other ecclesiastical dues, and never paid tithes, &c. to H.: it was held, that the usage of rating I. to the poor rate of township of H. might have had a legal origin, and ought not to be disturbed (*y*).

A township may be rateable which extends into two parishes.

Parish, what.

A well-established usage to rate to the poor rate an area which there is evidence to show constituted a reputed parish at the time of the passing of the 43 Eliz. c. 2, will not be disturbed upon the production of evidence to show that in fact the reputed parish was less or greater than the true parish.

In Dalton's Justice of the Peace (*z*), it is said, "If there be an ancient parish and an ancient village within that parish, which village had an ancient church, and those within that village have had parochial rights, are chosen churchwardens and overseers of the poor, and have been separately taxed ever since 43 Eliz. c. 2, for the relief of the poor within that village; this is a parish within 43 Eliz. c. 2, and taxes may be made and levied within themselves. And all this was resolved in a cause between *Hilton* and *Pawle* upon a special verdict between the parish of Hinckley, in the county of Leicester, and

(*u*) *R.* v. *Standard Hill*, 4 M. & S. 879.
(*x*) *R.* v. *Loxdale*, 1 Burr. 445.
(*y*) *Reg.* v. *Watson*, 37 L. J., M. C. 153; L. R., 3 Q. B. 762.
(*z*) Page 165, Ch. 73, ed. 1742.

the village of Stoke Goldingham within that parish (*a*). And the like was also resolved (*b*) between *Nichols* and *Walker* between the parish of Hatfield and the village of Tatridge" (*c*). Those were cases where the reputed parish was a smaller part of the true one, but there is no difference in principle between such a reputed parish and one where it consists of more than the real parish. And where it appeared that there were from very early times two churches, one called Mablethorpe St. Mary, and the other Mablethorpe St. Peter, but one poor rate had been made for the parish of Mablethorpe, and the poor of the alleged parishes of St. Mary and St. Peter were indiscriminately relieved out of such rate. And two overseers were appointed for the parish of M., who acted for the whole of Mablethorpe, and one constable had been appointed for the whole, and highways had been maintained by a rate made for the whole of M., but it also appeared that from very early times Mablethorpe St. Mary and Mablethorpe St. Peter were *de facto* two rectories and distinct parishes for ecclesiastical purposes: it was held, that there was evidence upon which the court could act that Mablethorpe, including the districts round the two churches, was reputed to be one parish at the time of the passing of 43 Eliz. c. 2, and as the confirmed usage had been to treat it since that time as one parish in respect of temporal purposes, there was no sufficient legal ground for disturbing a usage which had prevailed so long; "for," as Lord Campbell says, "the stat. 43 Eliz. c. 2, intended to cast the obligation of maintaining their poor on those districts then considered to be parishes, without throwing upon the inhabitants the necessity of antiquarian research to ascertain whether those districts really from time immemorial were parishes or not" (*d*). *Area of Rate.*

Boundaries of parish.

The boundary of a parish abutting on a navigable river, dividing it from another parish, *primâ facie* extends to the middle of river (*e*).

Boundary of township.

And where a river adjoining the boundary of a parish flows and ebbs, and there is no evidence of acts of ownership on the shore by the parochial authorities or any thing else to show that it has become part of the parish, the usual presumption must be followed, and the soil of the shore between high-water and low-water mark must be taken to belong to the crown, and therefore to be extra-parochial (*f*). But there is no presumption that in the case of a parish bordering upon the sea-shore

Between high and low-water mark.

(*a*) Cro. Car. 92.
(*b*) Trin. 10 Car. 1.
(*c*) 1 Jones, 355, and Cro. Car. 394.
(*d*) *Sharpley* v. *Churchwardens, &c. of Mablethorpe*, 3 E. & B. 906; 24 L. J., M. C. 35.
(*e*) *M'Cannon* v. *Sinclair*, 28 L. J., M. C. 247; 2 E. & E. 53.
(*f*) *Trustees of the Duke of Bridgwater* v. *Surveyors of Township of Bootle-cum-Linacre*, 35 L. J., Q. B. 41; L. R., 2 Q. B. 4.

Rating Area.

that the parish extends between high and low-water mark, for the soil of that portion of the shore is *primâ facie* in the crown and extra-parochial, and that being so it lies upon the parish to prove that it is within the parish (*g*). This is to be done by the usual perambulations, common reputation, known metes and divisions, and the like (*h*). In *Reg.* v. *Musson* (*i*), the occupier of the Wellington Pier at Great Yarmouth was held liable to the poor rate as respects the portion of the pier above high-water mark, but not rateable in respect of that below low-water mark, nor, in the absence of evidence to show that the parish included the shore between high and low-water mark, was he rateable in respect of the part of the pier between high and low-water mark.

And there is a presumption that where two districts is bounded by a highway, the highway is divided between them *ad medium filum viæ* (*k*). And in that case, as in *M'Cannon* v. *Sinclair* (*l*), the parish authorities in beating the boundaries walked on the pavement on one side of the road, and beat the doors and windows of the houses there instead of going along the middle of the road, but notwithstanding that circumstance the presumption of law was allowed to prevail (*m*).

(2.) *For what Purposes a Rate may be made and its Proceeds applied.*

For what purposes rate can be made.

A rate can only be made *in terms* for the relief of the poor; but various statutes have prescribed the manner in which its funds may be disposed, as in building and governing workhouses (*n*), and the payment of an assistant overseer (*o*); and some latitude in the construction of this purpose must be admitted. Thus, in practice, the expense of litigating questions of settlement, when sanctioned by the vestry, or by the responsible advice of the parishioners, has long been allowed, and would scarcely now be disputed (*p*).

Charges on poor rates.

The expenses of making any valuation and valuation list of

(*g*) *Reg.* v. *Musson*, 27 L. J., M. C. 100; 8 E. & B. 900.

(*h*) Hale de Jure Maris, 27.

(*i*) 27 L. J., M. C. 100; 8 E. & B. 900.

(*k*) *Reg.* v. *Board of Works for Strand District*, 33 L. J., M. C. 33, affirmed in Ex. Ch., 33 L. J., Q. B. 300; 4 B. & S. 526.

(*l*) 28 L. J., M. C. 247.

(*m*) *Ibid.*

(*n*) 9 Geo. 1, c. 7; 22 Geo. 3, c. 83; 59 Geo. 3, c. 12; 4 & 5 Will. 4, c. 76, ss. 21—25; 13 & 14 Vict. c. 101; 14 & 15 Vict. c. 105.

(*o*) 59 Geo. 3, c. 12, s. 7. See the other acts authorizing sums to be taken from this source, as collected in the "Instructions of the Poor Law Commissioners for Allowance of Overseers' Accounts," dated March 1, 1836; Burn's J., vol. iv. c. xiv. p. 1104 *et seq.*

(*p*) Per *Ashurst*, J., in *R.* v. *Essex*, 4 Term Rep. 495; *R.* v. *Micklefield*, Caldecot, 509; 1 Bott's P. L. 91, 113, and *post*, tit. "Appeal against Overseers' Accounts," and 4 & 5 Will. 4, c. 76, s. 82. See *R.* v. *Fowler*, 1 A. & E. 836.

any parish or any of such expenses, whether such valuation and valuation list be made by the overseers or by any person appointed by the committee, shall be charged upon the poor rates of such parish if the valuation made by direction of the committee shall exceed by one-sixth the amount of the valuation delivered to them by the overseers; but it is only when there has been a valuation made by the overseers, the sufficiency of which is questioned, that the committee can appoint a valuer to make a valuation, and charge the expenses against the parish under the 39th section.

In respect of what Purposes the Rate may be made.

Where an assessment committee appointed a valuer to make a valuation of a parish before the lapse of the time given to the overseers to bring in their valuation list, and after the lapse of such time the overseers brought in a list, and the valuer appointed by the committee subsequently sent in his valuation, which exceeded by more than one-sixth the valuation of the overseers, it was held that the assessment committee had no right to charge the parish with the expenses of the valuation (*o*).

Retrospective rate.

It was for a long time holden that a rate could not be made to reimburse overseers after the determination of their office for monies advanced, though for the relief of the poor, while in office; and, therefore, that an overseer removed from office during his year had no remedy for previous advances, but should have taken care before he expended money that he had made a rate to cover it (*p*). But it is now enacted, that if the overseers of the poor in any parish shall lawfully, by virtue of their office, contract any debt on account of the parish within three months prior to the termination of their year of office, and the same shall not have been discharged by them before their year of office shall have determined, such debt shall be payable by and recoverable from their immediate successors in office, and chargeable upon the poor rate of the said parish, in like manner as the same would have been payable and chargeable by such first-mentioned overseers during their year of office; and if any such debt shall have been contracted during their year of office, but more than three months prior to its termination, the same shall be payable by and recoverable from their immediate successors in office, if the ratepayers of the parish in vestry assembled and the Poor Law Commissioners shall consent, but not otherwise (*q*). And it is also provided, with respect to the costs of litigation, that "where any proceedings have been commenced or carried on for or on behalf of any parish in a court of law regarding any matter affecting the poor rates of such parish, it shall not be necessary that the bill of costs of the solicitor or attorney engaged therein shall be paid before the termination of the proceedings, but in any

Debts contracted by overseers within three months of the expiration of their office.

(*o*) *Reg.* v. *Richmond*, 34 L. J., M. C. 186; 6 B. & S. 541.
(*p*) *Tawney's case*, 2 Salk. 531.
(*q*) 11 & 12 Vict. c. 91, s. 1.

How far Rate may be retrospective.

As to bill of law costs.

such case the amount of the bill when duly taxed, if otherwise chargeable against the parish, shall be payable out of the poor rates within the space of one year next following the termination of the proceedings, but not afterwards, unless the Poor Law Commissioners shall by their order authorize the payment of the costs and expenses attending any such proceedings by annual instalments, not exceeding five, to commence from such termination (*r*). So, also, it was holden that an overseer, remaining in office for several years, could not in the last year make a rate to reimburse himself for monies expended in former years, but was bound to confine his accounts to the current year (*s*); but if he is in only for one year, it is a compliance with his duty if he at any time before he leaves his office make a rate sufficient to cover all the debts he has contracted, and if he hands over a portion of uncollected rate his successors are justified in considering the unforeseen debt of their predecessors as a charge on the rate so handed over by them (*t*). But by 41 Geo. 3, c. 23, which provides for the collection of rates during the pending of appeals, it is enacted (*u*), "that the churchwardens and overseers, or any of them, out of any money they shall collect in pursuance of any rate for the relief of the poor, may reimburse *the preceding* churchwardens and overseers, or guardians, such sums as they or any of them have *heretofore* advanced or expended for the relief or maintenance of the poor of such place, during the time that no rate or assessment for the relief thereof has been made, or during the time that any appeal has been depending which affected the whole of such rate or assessment, or upon hearing of which the whole might be quashed;" and a remedy is given to the applicants, in case of refusal, by application to the court of quarter sessions, who are empowered to make order for the payment on the existing churchwardens and overseers, which may be enforced by distress. The rate may be prospective, and for such period as practice has shown most convenient for meeting the expenses of the parish (*x*), as, for instance, for half-a-year, as in *Reg.* v. *Read* (*y*).

As to money expended during time when no rate was made or pending appeals.

There is no general rule of law which prohibits a retrospective rate; any such prohibition depends upon the terms of the acts respectively under which the rate is made (*z*).

3. *Of the Parties assessable to it.*

Who are assessable.

The poor rate is a tax on the person in respect of property locally situate or enjoyed within the parish. The statute, it will

(*r*) 11 & 12 Vict. c. 91, s. 2.
(*s*) *R.* v. *Goodcheap*, 6 T. R. 159.
(*t*) *Reg.* v. *Read*, 18 L. J., M. C. 164.
(*u*) Sect. 9.
(*x*) *Durrant* v. *Boys*, 6 T. R. 580.
(*y*) 18 L. J., M. C. 164.
(*z*) *Harrison* v. *Stickney*, 2 H. L. C. 108.

Who are assessable.

be observed, points out two classes of persons as liable to contribute—*inhabitants* and *occupiers* of certain property therein specified, according to the ability of the parish. In construing this act, the word "*inhabitant*" has been construed to mean *resident*, as all occupiers may, for certain purposes, be said to *inhabit*. A person who *resides*, therefore, may be liable to assessment in respect of other visible resources within the parish than those specified as the subjects of occupancy; but a person non-resident can only be charged as *occupier* of one of the descriptions of property set forth.

Inhabitants.

Occupiers.

Inhabitant, how rateable.

An inhabitant was formerly deemed rateable according to his ability, and his ability was ascertained by a reference not only to his enjoyment of permanent visible property locally situate in the parish, but to the profits which he might make in his trade or by other property. Stock in trade was first settled to be rateable in *R.* v. *Darlington* (*a*) and *R.* v. *White* (*b*), and this was supported by *R.* v. *Inhabitants of Ambleside* (*c*). Upon this principle an inhabitant of the port to which ships used by him in his trade belonged, was held rateable in respect of his ships (*d*); and subsequently the owners of the packet-boats employed in carrying the mails and passengers between Holyhead and Dublin were held rateable in respect of the profits made by the boats at Holyhead, where the owners resided. But parliament interfered to prevent this species of property from being subject to the rate, and the present act in force exempting it is 3 & 4 Vict. c. 89, passed in 1840 for a year, and continued by various statutes, and lastly by 37 & 38 Vict. c. 76. This enactment is, "that it shall not be lawful for the overseers of any parish, township or village to tax any inhabitant thereof, as such inhabitant, in respect of his ability, derived from the profits of stock in trade or any other property, for or towards the relief of the poor." And this exemption is preserved, notwithstanding such property may be included in a valuation list made under the Union Assessment Committee Act, 1862 (*e*), by the 36th section of that act.

Profits of trade formerly rateable;

now exempted.

Profits of a manor.

The variable profits of a manor by fines and customary payments (*f*), and the right of taking limestone from a quarry (*g*), have been holden not liable to be rated as incapable of occupancy, though the proprietor, being *resident*, and enjoying them within the parish, might, but for the 3 & 4 Vict. c. 89, as continued to the present time, be rateable in respect of *ability* for either. *Rents*, as such, are not rateable, because they are, in fact, rated as the value of the occupation in the hands of the

Rents.

(*a*) 6 T. R. 468.
(*b*) 4 T. R. 774.
(*c*) 16 East, 380.
(*d*) *R.* v. *White*, 4 T. R. 774.
(*e*) 25 & 26 Vict. c. 103.
(*f*) *R.* v. *Vandewall*, 2 Burr. 991.
(*g*) *R.* v. *The Trent and Mersey Navigation Company*, 4 B. & C. 57.

What is rateable as Land.

occupier; and, therefore, if the landlord was rated for them, the land would sustain a double burden.

4. *Of the Subjects of Rating.*

Lands and houses are the chief subjects of rating, and with respect to them we will consider,

1. What is rateable under the denomination "*land?*"
2. How must lands and houses be *occupied* to render them rateable?
3. On what principle, and in what matter, are lands and houses to be rated in respect of adjuncts or circumstances which increase their value to their possessor?

What is rateable under the denomination "land."

Everything is rateable under the denomination of *land*, which implies a possessory interest in the soil itself, but not mere easements or incorporeal hereditaments which are incapable of occupancy, unless they are connected with the enjoyment of land, and form part of its value. Thus, not only houses, but sheds, shops, barns, and all descriptions of buildings, are clearly rateable.

Electric telegraphs.

The posts, fastenings and wires of an electric telegraph company, erected under an agreement with a railway company, by which the former company erected and worked the posts, wires and apparatus on the railway company's lines and stations, subject to removal to another situation on notice by the railway company, were held rateable as land in the exclusive occupation of the electric telegraph company (*a*). This case of a telegraph was held analogous to the case, in which the corporation of Bath were held liable to be rated in respect not only of the water-pipes by which they were empowered to bring water into the city from certain springs outside, but also in respect of reservoirs constructed by them outside, the court holding that there was no distinction between electric fluid conveyed through a parish, and water, and that the company had a profitable occupation and not a mere easement (*b*); and road tramways are held rateable upon the same principle (*c*).

Water-pipes and waterworks.

Canals.

A canal is nothing but a road covered with water and is rateable as land, and may include a dry dock lined with masonry, as well as stone bridges (*d*), and also land bought for cuts as well as for wears, dams, and locks (*e*), and for towing-paths (*f*); but a company formed and authorized to make a river navigable, and for that purpose clear, cleanse and scour the river or deepen the channel, do not acquire an occupation

(*a*) *The Electric Telegraph Company* v. *Overseers of Salford*, 11 Exch. 181; 24 L. J., M. C. 146.

(*b*) *R.* v. *Corporation of Bath*, 14 East, 609.

(*c*) *Pimlico, &c. Tramways Company* v. *Assessment Committee of Greenwich Union*, 43 L. J., M. C. 29.

(*d*) *Reg.* v. *Neath Canal Navigation Company*, 40 L. J., M. C. 193; L. R., 6 Q. B. 707.

(*e*) *R.* v. *Mersey and Irwell Navigation Company*, 9 B. & C. 15; *R.* v. *Lower Milton*, 9 B. & C. 810.

(*f*) *Ibid.*; *Bruce* v. *Willis*, 11 A. & E. 463.

What is rateable as Land.

of the bed of the river or the soil of the channel, but have merely an easement over it or a right of making a passage, and the company is not rateable in respect of that bed or channel (*g*).

Navigation.

The case of *R.* v. *The Mersey and Irwell Navigation Company* (*h*) was distinguished in *The Electric Telegraph Company* v. *Salford* (*i*), and it was said, that in the former case persons were authorized to make a certain river navigable, and in consideration thereof to take tolls, and were held not to be rateable; but then the river was one navigable by all the subjects of the realm, and was not rendered the less navigable because a company which had got possession of it for certain purposes had a right to take a toll upon it. The company then had no right to exclude other persons from the river altogether, and consequently had no exclusive occupation.

Gas works, what includes.

Gas companies are occupiers of the land in which their gas pipes are laid (*k*). Gas retorts are so permanently attached and annexed to the freehold as to become part of it, and are not to be deemed moveable fixtures, and are therefore rateable as part of the freehold (*l*). And the purifiers, steam-engines, and gas holders are part of the works which are absolutely necessary for the manufacture of gas, and which are intended to remain permanently connected with the premises (*m*); and in determining what things are part of the premises or not, regard must be had to the degree of annexation and also to the object of the annexation—that is to say, whether the article was attached for the improvement of the inheritance or for the enjoyment only of the article itself. Thus articles may be attached to premises so as to be part of the premises for rateable purposes, though as between landlord and tenant and the heirs and executors there may be a right to remove them, as where the things are attached to the premises for the purpose of improving it, though still capable of removal. Thus the meters placed in private houses are not rateable as being still chattels (*n*).

Retorts.

Purifiers, &c.

Meters not.

Tolls.

Tolls, or dues in gross, unconnected with the enjoyment of the land by the person rated, are not rateable *per se* under 43 Eliz. c. 2, s. 1 (*o*), but if any tolls or dues can be so incorporated or connected with the use of the land as to be taken to increase

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(*g*) *Ibid.*; *R.* v. *Thomas*, 9 B. & C. 114; *R.* v. *Aire and Calder Navigation Company*, 9 B. & C. 820; *ibid.* 3 B. & Ad. 39; *New Shoreham Commissioners* v. *Lavering Churchwardens*, 39 L. J., M. C. 121; *R.* v. *Chelmer and Blackwater Navigation Company*, 2 B. & Ad. 14.

(*h*) 9 B. & C. 15, see *supra*.

(*i*) 24 L. J., M. C. 146; 11 Exch. 181, see *supra*.

(*k*) *R.* v. *Brighton Gas Company*, 5 B. & C. 466.

(*l*) *Reg.* v. *Lee* (*Inh.*), 35 L. J., M. C. 105; L. R., 1 Q. B. 241.

(*m*) *Ibid.*

(*n*) *Ibid.*

(*o*) *R.* v. *Nicholson*, 12 East, 330; *R.* v. *Milton*, 3 B. & A. 112; *R.* v. *Macdonald*, 12 East, 324; *Williams* v. *Jones*, 12 East, 346.

What is rateable as Land.

the value of the occupation, they may be taken into account in making the rate (*p*). Whether this be the case or no is a matter of evidence with respect to the origin and nature of the tolls or dues (*q*).

Toll traverse.

But a toll traverse taken by the lessee of the tolls, who was not the occupier of any part of the land in respect of which the toll arose, is not rateable (*r*), though the owner of land in respect of which the toll traverse is taken, who lets the tolls at a rent, is rateable (*s*).

Market tolls.

Market tolls for animals brought into the market for purposes of sale are not rateable, inasmuch as they are not paid in respect of the use of the soil, but for the market. They are distinguishable from stallage. The ground on which the distinction appears to rest is, that the animals brought into the market for sale merely occupy no particular spot in the market, and are not stationary, and there is therefore no occupation of land to which the tolls can be referred (*t*); but lessees of stallage are rateable, because that is a payment made to the owner of the soil in respect of the use of the soil and the liberty to erect stalls on the soil (*u*).

Stallage.

Tolls of ferry.

Ferry tolls cannot be rated as tolls unless they can be treated as appurtenant to the landing-place (*x*); nor could the tolls be indirectly rated by laying the rate upon the landing-place. On the other hand, the existence of the tolls cannot be wholly excluded from consideration, but the land should be rated, and the value should be taken, not as the value of land merely, but as the value of land as enhanced by being available for the purpose of earning the tolls, as it would be the rent which could be obtained, and which the company would have to pay for the land for the purpose for which it is available under the circumstances.

Rights of way.

A right of way without exclusive occupation is not rateable (*y*); and therefore the possession of running powers by one company over the line of another company confers an easement which is not rateable, and does not make the company exer-

Running powers do not

(*p*) *R.* v. *Macdonald, ubi sup.*; *R.* v. *Cardington*, 2 Cowp. 581.

(*q*) See *Lewis* v. *The Overseers of Swansea*, 5 E. & B. 508, where town dues and quayage were held not to be rateable; and *Reg.* v. *Earl of Durham*, 28 L. J., M. C. 232, where anchorage and beaconage dues were held not to be tolls in gross, but tolls connected with the occupation and use of the soil as dock dues, and were rateable upon a calculation of the number of ships paying the toll and coming into those parts of the port which were in the parish; *Reg.* v. *Earl of Durham*, 28 L. J., M. C. 232.

(*r*) *R.* v. *Snowdon*, 4 B. & Ad. 713.

(*s*) *Reg.* v. *Marquis of Salisbury*, 8 A. & E. 760.

(*t*) *Caswell* v. *The Overseers of the Borough of Wolverhampton*, 41 L. J., M. C. 108; *Mayor of London* v. *St. Sepulchre*, *id.* 109, note. See *Coleridge*, J., in *Lewis* v. *Overseers of Swansea*, 5 E. & B. 519.

(*u*) *Roberts* v. *Aylesbury*, 22 L. J., M. C. 34. See *R.* v. *Bell*, 5 M. & S. 221.

(*x*) *Reg.* v. *North and South Shields Ferry Company*, 1 E. & B. 140.

(*y*) *R.* v. *Jolliffe*, 2 T. R. 90. See *Pimlico, &c. Tramways Company* v. *Greenwich Union Assessment Committee*, 43 L. J., M. C. 31, per *Blackburn*, J.

cising the powers joint occupiers with the company subject to the power, so as to make both companies rateable (*z*). *What is rateable as Land.*

As to the rateable value of the company subject to the power, see *post*. confer occupation.

But if there be an exclusive occupation of the line of a road the occupier will be rateable (*a*).

A mere right of common, though the commoners may at a certain season exclude the owner from the freehold, is not rateable (*b*).

The only mines mentioned by the statute of Elizabeth are coal mines, and therefore before the 37 & 38 Vict. c. 54 (the Rating Act, 1874), ironstone mines were not rateable (*c*); nor, again, lead mines (*d*); but, as the act of Elizabeth is by that statute extended to mines of every kind, except those of which the royalty or dues are for the time being wholly reserved in kind, or to the owner or occupier thereof (*e*), those cases become now of no value. And before the statute, where the owner and occupier of iron mines was also the occupier of a portion of surface land, upon which pumping-engines, boilers and workshops had been built, and tramways made for bringing and conveying away the ore from the mines, he was held rateable in respect of the surface land at a rent calculated with reference to the value of such surface land to the occupier of the mines (*f*). And so, before this statute, when in the hands of lessees, the lessors reserved part of the ore itself as the consideration for the working of the mine, the lessors are rateable as occupiers of so much land (*g*), unless they stipulate for its being smelted (*h*). Mines.

Whether a given excavation be a mine or a quarry is a question of fact to be determined by the sessions after consideration of the mode in which its working is carried on (*i*); for that, and not the mineral nature of the produce, is the criterion by which to decide the point. Thus, clay (*k*), lime and salt (*l*) strata may be worked in so extensive a manner, at such a depth, and with such combinations of costly machinery, shafts, under- Mines, what. Quarries, what.

(*z*) *The Midland Railway Company* v. *Overseers, &c. of Badgworth*, 34 L. J., M. C. 25.

(*a*) *R.* v. *Bell*, 7 T. R. 90. See *Pimlico, &c. Tramways* v. *Greenwich Union Assessment Committee*, 43 L. J., M. C. 31.

(*b*) *R.* v. *Churchill*, 4 B. & C. 750.

(*c*) *R.* v. *Bilston*, 5 B. & C. 851; *Morgan* v. *Crawshay*, 40 L. J., M. C. 202; L. R., 6 Q. B. 581; 5 H. L. 304.

(*d*) *Talargoch Mining Company* v. *Guardians of St. Asaph*, 37 L. J., M. C. 149; L. R., 3 Q. B. 478.

(*e*) Sect. 13.

(*f*) *Guest* v. *Overseers of East Dean*, 40 L. J., M. C. 129.

(*g*) *R.* v. *Tremayne*, 4 B. & Ad. 162; *R.* v. *Crease*, 11 A. & E. 677; *Crease* v. *Sawle*, 20 L. J., M. C. 63; *R.* v. *Baptist Mill Company*, 1 M. & S. 612; *Rowls* v. *Gell*, Cowp. 451; *R.* v. *St. Austell*, 5 B. & A. 693; *Guest* v. *Overseers of East Dean*, 40 L. J., M. C. 129.

(*h*) *R.* v. *Pomfret*, 5 M. & S. 179.

(*i*) *R.* v. *Dunsford*, 2 A. & E. 568.

(*k*) *R.* v. *Brettel*, 3 B. & Ad. 424.

(*l*) *R.* v. *Sedgley*, 2 B. & Ad. 65.

What is rateable Property.

ground levels, &c. as to become mines in the usual acceptation of the word, and therefore no longer liable to the rate as quarries of the same matters or brickfields would be (*o*).

Mines, what.

And where the proprietors of a lead mine obtained, in consideration of annual payments, the right of diverting a natural spring upon the land of an adjoining proprietor, and of conveying the water over the land of intervening proprietors to iron pipes laid down near their own mine; it was held, that there was sufficient evidence to show that the mine owners were so far occupiers of the land covered by the pipes and watercourse as to be rateable in respect of it (*p*).

How lands and houses must be occupied to render them rateable.

To render any property liable to the rate, it must be occupied for the benefit or under the control of some individual or body of persons. If, therefore, a house be shut up and wholly unoccupied, the owner is not liable to be rated for it, though if he occasionally use any part, he will be liable to be rated for the whole (*q*).

Empty premises.

If premises are practically unletable they are not rateable; but if the owner does not choose to let them, but holds out for a higher rent, that will not prevent his being liable to be rated at what may be found to be the fair rent (*r*); and *Blackburn*, J., in the same case says, "When premises are to be let they are in practice considered as empty, and are not rateable. That may be a good rule of thumb, which works well in practice, but when the landlord retains possession, and actually has some beneficial occupation, he is rateable at least to the extent of that benefit." In that case the owner of a mill had ceased to work the mill, and kept possession of it until he could find a purchaser. The mill contained a quantity of machinery, and other things necessary for the manufacture of silk, and it was held, that though the premises were not rateable as a mill in working order, yet they were rateable at a value estimated on the footing of their being used as a warehouse for the machinery (*s*).

Under the Union Assessment Committee Act, 1862, s. 14, the overseers of each parish had to make a list of all the rateable hereditaments in such parishes; and houses newly erected on land within the parish, finished and ready for occupation, are deemed rateable property within the meaning of the act, 25 & 26 Vict. c. 103, sects. 14, 25, and must be inserted in the valuation list, though none of them have ever been let or occupied. And such houses ought to be inserted in the valuation

New and unoccupied houses.

(*o*) *Reg.* v. *Westbrook*, 10 Q. B. 178; as to lime quarries, 1 East, 534; slate quarries, 2 East, 16; and potters' clay pits, 8 East, 528.

(*p*) *Talargoch Mining Company* v. *Guardians of St. Asaph*, 37 L. J., M. C. 149; L. R., 3 Q. B. 478.

(*q*) *R.* v. *St. Mary-the-Less*, 4 T. R. 477.

(*r*) Per *Crompton*, J., in *Harter* v. *Overseers of Salford*, 34 L. J., M. C. 206.

(*s*) *Ibid.* See also *Staley* v. *Overseers of Castleton*, 33 L. J., M. C. 179; 5 B. & S. 505; see *Staunton* v. *Powell*, 1 Ir. R., C. L. 182.

Of the Occupation of Lands and Houses.

list of the parish at a fair and reasonable value (*t*). *Lush*, J., says, "'Rateable' means property in its nature liable to be rated, and whether it is occupied or not can make no difference. The word 'rateable' relates to the quality of the property, and not to the occupation." It seems that unoccupied houses had been held rateable to the county rate under 15 & 16 Vict. c. 81, sects. 2 and 6, as being rateable to the poor (*u*).

New houses.

A new house or building incomplete, or not fit for occupation, or not entered in valuation list at the time when the current rate was made, may be entered by the overseers in the rate-book, and the occupier required to pay a proper amount of the rate according to the circumstances (*x*).

Exclusive occupation of land, what.

Land in the occupation of a tenant from year to year, with a right reserved to the landlord to get minerals, and by the landlord let out to contractors to work coprolites out of the land, under an agreement by which they were to enter upon the land and dig for and wash the coprolites, and then to replace the earth and level it and restore it to its proper state, is rateable during the currency of the agreement, as in the exclusive occupation of the contractors under a demise, and not as being in the occupation of tenant of the land or the landlord (*y*); and this case is distinguishable from the case of a person who takes furnished lodgings, under an agreement by which he is to have the exclusive enjoyment of his rooms, but the occupation remains in the landlord of the house, who has to furnish the servants who are to look after the lodgings, light the fires, and clean the rooms, which requires their coming into and remaining in his rooms for such purposes (*z*). A person taking under an agreement a right to the growing grass of a field which would require the exclusive occupation to enjoy the right, would also probably take such an interest in the land as to make him the rateable occupier (*a*).

Occupiers.

If a person appears to be in the visible occupation of land, he would be rateable as occupier *de facto*, and it is not necessary to inquire into the title of the occupier. "If a disseisor obtain possession of land he is rateable as occupier of it" (*b*).

So, a *de facto* occupation of their mains by a gas company is sufficient without any legal or equitable estate in the land under an act of parliament (*c*).

(*t*) *Overseers of Malden* v. *Guardians of Kingston Union*, 38 L. J., M. C. 125; L. R., 4 Q. B. 326.

(*u*) *Reg.* v. *Hammersmith*, 33 L. T. 183.

(*x*) 31 & 32 Vict. c. 122, s. 38.

(*y*) *Roads* v. *Overseers of Trumpington*, 40 L. J., M. C. 35; L. R., 6 Q. B. 56.

(*z*) *Smith* v. *Overseers of St. Michael, Cambridge*, 3 E. & E. 383, sub nom. *Reg.* v. *Smith*, 30 L. J., M. C. 74. Per *Blackburn*, J., in *Roads* v. *Overseers of Trumpington, ubi sup.*, and *Watkins* v. *Assessment Committee of Gravesend*, 37 L. J., M. C. 77; L. R., 3 Q. B. 350.

(*a*) See *Roads* v. *Overseers of Trumpington, ubi sup.*, *Crosby* v. *Wadsworth*, 6 East, 602.

(*b*) Per Lord *Kenyon*, C. J., *R.* v. *Bell*, 7 T. R. 601.

(*c*) *Reg.* v. *West Middlesex Waterworks*, 28 L. J., M. C. 135, per Cur.

Occupation of Land, what.

The trustees of a school under a settlement, and subject to a scheme and order of chancery for carrying out those trusts, are rateable as occupiers in respect of the trust premises; but it cannot always be taken that those in whom the legal estate is vested are necessarily the occupiers (*d*).

Occupation by trustees of charity.

By promoters of an undertaking within Lands Clauses Act.

The promoters of an undertaking within the Lands Clauses Consolidation Act, 1845, who become possessed of lands liable to be assessed to the poor rate, are, until the works shall be completed, liable under the 133rd section to make good the deficiency in the assessment to the poor's rate by reason of such lands having been taken for the purposes of the works; but this section does not make them rateable to the poor's rate as owners and occupiers of the lands in the rate-books of the parish where the lands are situate (*e*); and if such an undertaking, say a railway, consists of several parts, extending into various parishes, and a portion in one parish is completed and in work, but the other portions are not completed, the company is not liable to be assessed to the poor rate as a railway in the parish where it is uncompleted until the whole is completed and open for traffic, and must until that time arrives make good the deficiency in the rates (*f*).

The Metropolitan Board of Works are promoters of an undertaking within the 133rd section of the Lands Clauses Act (*g*), when that act was incorporated with an act, under which they took lands for the purposes of making a new street, and were, therefore, liable to make good the deficiency in the rates caused by their rating land assessable to the poor rate for the purpose of the street, until the street was made (*h*).

Railway companies using joint station.

Where an agreement was made between the London and North-Western and the Eastern Counties Railway with respect to the use of the Peterborough station belonging to the Eastern Counties Railway, and the effect of the agreement was held to be simply to give the right to the use of the station to the North-Western Company, without taking the occupation out of the Eastern Counties Company, it was held, that the Eastern Counties Company were rightly rated as sole occupiers, but this depended upon the terms of the instrument (*i*).

When occupation does not amount to exclusive demise.

There must be such an exclusive occupation of land as to give an action of trespass in case of wrongful interference with

(*d*) *Reg.* v. *Inhabitants of Stapleton*, 33 L. J., M. C. 17; 4 B. & S. 629; see *post*, p. 831.

(*e*) *Mayor, &c. of London* v. *Churchwardens, &c. of St. Andrew's, Holborn*, 36 L. J., M. C. 95; L. R., 2 C. P. 574.

(*f*) *Reg.* v. *The Metropolitan District Railway Company*, 40 L. J., M. C. 113; L. R., 6 Q. B. 698; *Whitechurch and another* v. *The East London Railway Company*, 42 L. J., M. C. 18.

(*g*) 8 Vict. c. 18, s. 133.

(*h*) *Wheeler* v. *The Metropolitan Board of Works*, 38 L. J., Ex. 165; L. R., 4 Ex. 303.

(*i*) *Reg.* v. *Lord Sherard and another*, 33 L. J., M. C. 5. See *Allan* v. *Overseers of Liverpool*, L. R., 9 Q. B. 180; *Inman* v. *Overseers of Kirkdale*, *ibid.*

Mode of Occupation, what.

it. Thus, where an agreement between the Royal Commissioners for the Exhibition of 1862 and M., the effect of which was only to grant the right of selling refreshments, and not to give M. the exclusive occupation of the western section of the refreshment department, so as to have entitled him to turn off the commissioners and their friends if they had chosen to walk through the portion of the building set apart for that department, it was held, that there was no such occupation as would make M. rateable (*k*).

And so again, where the Oxford University boat club were rated in respect of the university barge, moored on the river at Oxford, to a district rate under 21 & 22 Vict. c. 55 (Local Government Act, 1858), under which a rate is to be made upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to the rate for the relief of the poor, it was held, that the proof of exclusive occupation of the land on which the posts were fixed to which the barge was attached and over which it floated, failed on the ground that there was nothing to show that the posts to which the barge was attached, and which were rated, were not in the occupation of the corporation of Oxford as owners of the soil. Nor did it appear that the persons rated had fixed the posts in the bed of the river, nor was there anything to show that if any other persons navigating the river, treated these posts as mere mooring-places, and interfered with what was assumed to be the occupation of the club, that there would be any remedy by action of trespass against them, and as such exclusive occupation was necessary, the rate was bad (*l*).

Occupier is liable notwithstanding he has granted an exclusive easement to another.

In the *Electric Telegraph Company* v. *Salford* (*m*), *Williams* v. *Jones* (*n*), was relied on, where the owner of a ferry was held not liable to be rated in respect of a post by which his ferry boats were secured, but there all the subjects of the crown had a right to use the post; but the exclusive occupation of a mere easement does not make the person enjoying the easement liable to the rate, but the occupier only is rateable, though he may have granted an exclusive easement to another person, if such grant does not amount to a demise. This was decided with reference to the moorings of a hulk, with proper apparatus for lifting and transferring coals from colliers to its own hold, and from its hold to any vessel which might be placed alongside it in the Thames, and had been attached to the same moorings for five years, and the moorings to which the hulk was secured were permanently fixed in the bed and soil of the river by and were the property of the conservators of the Thames,

Moorings for a hulk in the Thames.

(*k*) *Reg.* v. *Morrish*, 32 L. J., M. C. 245.
(*l*) *Grant* v. *Local Board for the District of Oxford*, 38 L. J., M. C. 39; L. R., 4 Q. B. 9.
(*m*) 11 Exch. 181; 24 L. J., M. C. 146.
(*n*) 12 East, 346.

Of the Mode of Occupation.

who by an agreement granted liberty and licence to W. W. to keep his hulk fastened to the moorings until either party should give a month's notice to end the licence, the court holding that the agreement did not amount to a demise of the moorings to W. W., but only to give him an easement, though exclusive, whilst the occupation remained in the conservators of the Thames. It seemed to have been assumed in that case that the moorings occupied the soil, and that the conservators were the occupiers, and it was suggested that the measure of the value of the occupancy would in ordinary cases be the money they gained by allowing the appellant to moor his hulk to those moorings (*o*).

Floating pier.

The soil of a river may be occupied by means of a floating pier, where the floating pier has acquired a permanent and fixed locality (*p*). This case, therefore, comes much nearer *The Queen* v. *Leith* (*q*) than to *The Queen* v. *Morrison* (*r*), on which the appellants mainly relied. "In the case now before us, there is a permanent and profitable occupation of the soil within the parish of the respondents, who are, therefore, entitled to our judgment" (*s*). But where the owners of a coal derrick were rated, which rode afloat on the River Thames, but was retained at the spot where it floated by two single fluke anchors on the side next to the shore, and by two stones on the channel side, and by two steam anchors, one at the head and the other at the stem; the anchors and stones being dropped into the river, but a place being made for them by removing some ballast, so that they could be hauled on board again; and though it had been anchored in the same place for some years, it changed its position slightly with the ebb and flow of the tide, and had been removed from another part of the river, bringing with it anchor and stones: it was held not rateable, as having no occupation of the soil, but was only as a loiterer on the way (*t*).

Floating dock.

Though a floating dock is not rateable *per se* under the stat. 43 Eliz. c. 2, inasmuch as it cannot be said to give any such occupation of land as would be capable of being rated, it resembles a ship at anchor, which occasionally grounds when the tide ebbs, and which may be approached by a boat. It may be sometimes in one parish and sometimes in another (*u*). Nor can it be included in the rateable value of a ship-building yard in the occupation of the proprietor of the dock, and used in connection with it, and the decisions respecting machinery

(*o*) *Wathins* v. *Assessment Committee of Gravesend Union*, 37 L. J., M. C. 73; L. R., 3 Q. B. 350.
(*p*) *Reg.* v. *Forrest and another*, 8 E. & B. 890; 27 L. J., M. C. 96.
(*q*) 1 E. & B. 121; 21 L. J., M. C. 119.
(*r*) 1 E. & B. 150; 22 L. J., M. C. 14.
(*s*) *Ibid.*
(*t*) *Cory* v. *Overseers of Greenwich*, 41 L. J., M. C. 142; L. R., 7 C. P. 499.
(*u*) *Reg.* v. *Morrison*, 1 E. & B. 150.

and other fixtures have been held to have no application in such a case (*x*). *Mode of Occupation of Land.*

So the National Rifle Association were held not to be rateable as occupiers of the rifle-shooting ground and place of encampment on Wimbledon Common for the annual rifle meeting (*y*).

The occupier of tithes is rateable under the statute of Elizabeth in respect of them, whether being parson or vicar, or lay impropriator, he retains them in his own hands or lets them without deed under seal (*z*), or if, being immediate lessee of the tithe owner, he holds by deed under seal or by statute (*a*). Sub-lessees of tithe are not rateable (*b*). If tithes are extinguished by statute and a corn rent is given instead, the rector is rateable for it, but is entitled to the deduction of land tax and ecclesiastical dues (*c*). As to tithes.

But where by an act of a like nature the tithes were not extinguished but transferred to the occupiers, who were directed to pay an annual rent instead, they were held rateable for them (*d*).

Sometimes such a corn rent is made "free from taxes and deductions," and thereby from tithe (*e*). Rent-charges payable in lieu of tithe, under the new Tithe Commutation Act, are subject to all parochial rates and assessments in like manner as the tithes so commuted were theretofore subject to them (*f*).

Rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land, are now rateable (*g*). As to rights of fowling, shooting, killing game or rabbits, of fishing.

(1.) Where any right of fowling, or of shooting, or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting), is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross or rateable value of the land shall be estimated as if the said right were not severed: and in such case, if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase;

(*x*) *Ibid.*

(*y*) *Mildmay* v. *Overseers, &c. of Wimbledon*, 41 L. J., M. C. 133.

(*z*) 16 Viner, 627; *Chanter* v. *Glubb*, 9 B. & C. 479; *Bird* v. *Higginson*, 2 A. & E. 160, 696.

(*a*) *Ibid.*

(*b*) *R.* v. *Lambeth*, Stra. 524; *R.* v. *Wilson*, 5 N. & M. 119, per *Patteson*, J.

(*c*) *R.* v. *Joddrell*, 1 B. & Ad. 403; *R.* v. *Boldero*, 4 B. & C. 467; *R.* v. *Wiston*, 5 A. & E. 250; *R.* v. *Nockolds*, 1 A. & E. 245.

(*d*) *R.* v. *Great Hambleton*, 1 A. & E. 145.

(*e*) *Mitchell* v. *Fordham*, 6 B. & C. 274; *Chatfield* v. *Ruston*, 3 B. & C. 863.

(*f*) 6 & 7 Will. 4, c. 71, ss. 69, 70.

(*g*) 37 & 38 Vict. c. 54, s. 3.

Of Rights of Sporting.

and every assessment committee, on the application of the occupier, shall certify, in the valuation list or otherwise, the fact and amount of such increase.

Who rateable for right of sporting.

(2.) Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

(3.) Subject to the foregoing provisions of this section, the owner of any right of sporting when severed from the occupation of the land may be rated as the occupier thereof.

(4.) For the purposes of this section the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right.

Who not rateable occupiers.

The crown not being named in the statute of Elizabeth is not bound by it, and consequently the overseers cannot impose a rate on the sovereign in respect of lands occupied by her Majesty, nor on those occupied by servants for her Majesty. The exemption depends entirely on the occupier and not on the title to the property.

Crown or crown servants occupiers not rateable.

Crown tenants rateable.

The tenants of crown property, paying rent for it, are rateable like all other occupiers; and it has even been determined that where apartments in Hampton Court, a royal palace, were gratuitously assigned to a subject who occupied them by permission of the sovereign, but for the subject's benefit, the subject was rateable in respect of her occupation of this royal property (*h*).

On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the sovereign or her servants in her behalf, the occupation being that of her Majesty, no rate can be imposed (*i*).

The university of Edinburgh.

A university (*e. g.*, of Edinburgh), a great public and national institution, is not crown property, although it be subject to the visitorial authority of the crown, and is therefore liable to be rated to the poor (*k*). But the members of the Royal Academy have been held to be exempt, as occupying crown property, as the servants or agents of the crown (*l*). And so, also, the Museum of Practical Geology, being part of the hereditary property of the crown, and no one but a housekeeper living on the premises, it was held not rateable (*m*); whilst Kneller Hall, where a normal and model school was purchased by the lords of the treasury on behalf of the lords of the council of the education board, for the training of masters of schools for pauper and criminal children, was held to be rateable (*n*);

The Royal Academy.

The Museum of Geology.

The Kneller Hall.

(*h*) *Reg.* v. *Lady Emily Ponsonby*, 3 Q. B. 14.
(*i*) *Lord Amherst* v. *Lord Somers*, 2 Term R. 372.
(*k*) *Greig* v. *The University of Edinburgh*, L. R., 1 Sc. App. 348.
(*l*) *Reg.* v. *Shee*, 4 Q. B. 2; 12 L. J., M. C. 53.
(*m*) *De la Beche* v. *St. James, Westminster*, 4 E. & B. 385; 24 L. J., M. C. 74.
(*n*) *Reg.* v. *Temple*, 22 L. J., M. C. 120, 129; 2 E. & B. 160.

but in the latter case the premises were not crown property, and there was a beneficial occupation of persons residing there, and part of the pasturage was let at a rent.

Of Property occupied for Public Purposes.

So the master of a free school in a parish was held rateable for the premises which he occupied, together with a garden and some pasture land, for the purpose of teaching ten poor boys of the parish, inasmuch as he was the beneficial occupier of the house, though it was appropriated to charitable purposes (*o*).

The Baptist Missionary Society, which occupied a portion of premises for religious and charitable purposes, other religious societies occupying portions of the same premises, and contributing to the expenses of lighting, firing and cleaning, but not so as to give a profit, and which sold works upon the premises under cost price, and devoted the proceeds to the general purposes of the society, was held rateable (*p*). And the Licensed Victuallers School, which was for the benefit of the children of licensed victuallers, was also held rateable (*q*).

Property occupied for the purposes of the government of the country.

The exemption of the crown, by reason of its not being named in the statute of Elizabeth, has been carried a good deal further, and applied to many cases in which it can scarcely be said that the sovereign or the servants of the sovereign are in occupation. A long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of state, such as the post office (*r*), the horse guards (*s*), or the admiralty (*t*), in all which cases the occupiers might strictly be called the servants of the crown; but also to property occupied by local police (*u*), to county buildings occupied by the assizes, and for the judges' lodgings (*v*); or occupied as a county court (*x*); or for a gaol (*y*). In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the sovereign, so as to make the occupation that of her Majesty; but the purposes are all public purposes of that kind which, by the constitution of this country,

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(*o*) *R.* v. *Catt*, 6 T. R. 332; *Reg.* v. *Stapleton*, 33 L. J., M. C. 17; 4 B. & S. 629.

(*p*) *Reg.* v. *The Baptist Missionary Society*, 10 Q. B. 884; 18 L. J., M. C. 194.

(*q*) *Reg.* v. *The Licensed Victuallers Society*, 30 L. J., M. C. 131.

(*r*) *Smith* v. *Birmingham*, 7 E. & B. 483; 26 L. J., M. C. 105.

(*s*) *Lord Amherst* v. *Lord Sommers*, 2 T. R. 372.

(*t*) *The Queen* v. *Stewart*, 8 E. & B. 360; 27 L. J., M. C. 81.

(*u*) *The Justices of Lancashire* v. *Stretford*, E. B. & E. 230; sub nom. *Reg.* v. *Justices of Lancashire*, 27 L. J., M. C. 209.

(*v*) *Hodgson* v. *The Local Board of Health of Carlisle*, 8 E. & B. 116.

(*x*) *The Queen* v. *The Township of Manchester*, 3 E. & B. 336; 23 L. J., M. C. 48.

(*y*) *The Queen* v. *Shepherd*, 1 Q. B. 170.

Of Property occupied for Public Purposes.

fall within the province of government and are committed to the sovereign, so that the occupiers, though not perhaps strictly servants of the sovereign, might be considered *in consimili casu* (*z*).

Hospitals.

Bethlehem Hospital, for the reception and cure of poor lunatics, in the hands of the mayor and corporation of London as trustees; and, again, Bridewell Hospital, for harbouring and correcting vagabonds, where they were maintained at the charge of the hospital and taught useful trades, raw materials being bought and worked up by the inmates, such as were not consumed in the hospital being sold, and the proceeds forming part of a general fund for the purchase of other materials to be manufactured and no profit being made by the sale, were held to be occupied for public purposes only, and not rateable in the hands of the trustees as occupiers (*a*).

Prisons.

A prison is not rateable, and so a house and garden and dwellings of the governor and the officers of the prison were not rateable so far as the enjoyment of them was necessary for the performance of their duties, but a coach-house and part of the stabling was found to be in excess of what was necessary for the governor, and he was therefore held rateable in respect of that. A grocer's residence in a part of the building, who supplied the establishment and others who dealt with him, was held rateable as well as the canteen, and so were residences of officers outside the walls of the prison, in respect of some of which they paid rent, and in others an allowance was made in deduction of their salaries. And a farm taken as an adjunct to the prison for the purpose of employing the convict labour, inasmuch as no duty was cast upon the directors of the prison by statute or otherwise to take such farm, was held rateable (*b*).

In estimating the amount of occupation, the fact of the officer being a married man is to be considered (*c*).

So the storekeeper at the Old Gun Wharf at the Arsenal at Portsmouth, living in a crown house within the walls of the wharf, with a garden, and with more accommodation than he, as a single man, required, but he was without any option as to the house assigned to him, was held rateable in respect of the excess of accommodation beyond what he required for his personal use in the necessary discharge of his duty (*d*). And the same was held with respect to the porter at the same wharf who lives in a lodge there (*e*).

A similar principle was affirmed in the case of Lieutenant-

(*z*) *Jones* v. *Mersey Docks and Harbour Company*, 35 L. J., M. C. 1, per *Blackburn*, J.; 11 H. L. Cas. 443.

(*a*) *Reg.* v. *St. George the Martyr, Southwark, Bethlehem Hospital and Bridewell Hospital*, 10 Q. B. 852; 16 L. J., M. C. 129.

(*b*) *Gambier* v. *Overseers of Lydford*, 3 E. & B. 346; *Smith* v. *Overseers of Birmingham*, 7 E. & B. 483; 26 L. J., M. C. 105.

(*c*) *Ibid.*; *Reg.* v. *Fuller*, 8 E. & B. 365, note.

(*d*) *Reg.* v. *Stewart*, 8 E. & B. 360; 27 L. J., M. C. 81.

(*e*) *Reg.* v. *Stainsby*, 8 E. & B. 370.

Governor of Portsmouth and Commanding Officer of South West District of England stationed at Portsmouth (*f*), and in the case of the Commanding Royal Engineer stationed at Portsmouth (*g*). *Of rateable Occupation of Property.*

Houses situated outside the prison walls, but adjoining to the gate of the gaol, and occupied by warders of a gaol for the purpose of their duties inside the gaol, are free from rates (*h*). Gaols.

The Postmaster-General is the occupier of premises used exclusively for the purposes of the post office, and occupies as an officer of the crown. The selling of stamps at the office in obedience to positive injunctions, by the deputy postmaster, whose remuneration was in part from a commission on such sales, and payments made by private persons for the use of private boxes there for their letters, which payments were appropriated to the public revenue—such sales and delivery of letters, clearly being within the scope of the duty of the post office, were held not to take the post office out of the rule which exempted from rates property occupied for public purposes (*i*). Post office.

But the exemption in respect of occupation by crown servants for public purposes does not extend to premises occupied by a subject who, by an agreement with servants of the crown, *e. g.*, the Commissioners of the Inland Revenue, not amounting to a demise, gives them exclusive possession for such purposes of a portion only of the premises, in consideration of a money payment made to include not only the rent, but the expenses of gas, wood, coals, and of a person to reside on and keep clean the premises (*k*). Occupation for public purposes.

Upon the like principle, Chelsea Bridge, and its approaches in the hands of the Commissioners of Woods and Forests, were held to be exempt, and not rateable to a poor's rate in respect of the tolls taken (*l*).

And upon the same principle, it has been held, that the justices of the county of Leicester were not rateable in respect of Leicester Castle (*m*), on the ground that the castle was crown property in the hands of Lord Berners, for the purposes of the general government of the country, though by him permitted to be used for other local public purposes (*n*). Leicester Castle.

A reformatory school established under the repealed statutes, Reformatory school.

(*f*) *Reg.* v. *Breton*, 8 E. & B. 375; 27 L. J., M. C. 81.
(*g*) *Reg.* v. *Foster*, 8 E. & B. 380; 27 L. J., M. C. 81.
(*h*) *Justices of Beds.* v. *St. Paul, Bedford*, 7 Exch. 650.
(*i*) *Smith* v. *Guardians of Birmingham*, 7 E. & B. 483; 26 L. J., M. C. 105.
(*k*) *Smith* v. *The Overseers of St. Michael, Cambridge*, 3 E. & E. 383; 30 L. J., M. C. 74.
(*l*) *Reg.* v. *M'Cann*, 37 L. J., M. C. 25; *ib.* Ex. Ch. 123; L. R., 3 Q. B. 141—677.
(*m*) *Reg.* v. *The Township of Castle View, Leicester* (*Inh.*), 36 L. J., M. C. 192; L. R., 2 Q. B. 493.
(*n*) *Ibid.*

Of Property occupied for Public Purposes.

17 & 18 Vict. c. 86, 18 & 19 Vict. c. 87, and 20 & 21 Vict. c. 55, was held not to be rateable, on the ground that it was within the category of prisons, and, therefore, came within the exemption which excepted the crown from the operation of the statute of Elizabeth (*o*). Those statutes have now been repealed by the Reformatory Schools Act, 1866 (*p*), which consolidated the law relating to such schools, but the reasoning of the court in the above case would seem to apply to a school within the operation of that act.

County chief constable's house.

Upon the same principle, a rate assessed upon the chief constable of the county of Leicester in respect of premises occupied by him for the police purposes of the county, and upon an inspector of police of the same county in respect of other premises occupied by him for similar purposes, was quashed (*q*). In that case the premises were considered exempt from the rate on the ground that they were so completely brought within the control of the Home Office that they may fairly be said to be used for public purposes, that is, purposes connected with the public government of the country, and *Cockburn*, C. J., guarded himself from expressing an opinion as to whether they would be rateable if they had been occupied merely for the purposes of the local police.

The reservation of his opinion by *Cockburn*, C. J., in *The Queen* v. *The Inhabitants of St. Martin, Leicester* (*r*), as to the rateability of premises occupied merely for local police purposes since the case of *Jones* v. *Mersey Docks and Harbour Company* (*s*) seemed to throw a doubt upon the decision in *The Justices of Lancashire* v. *The Overseers of Stretford* (*t*). In that case a station-house provided for the county constabulary under 3 & 4 Vict. c. 88, and occupied by a serjeant of police and his wife and two constables, who were stationed there for the sole purposes of the county constabulary, was rated. The accommodation was such as was suitable to the purposes for which they were placed there, and a deduction as a charge for rent was made from the wages payable, as well to the serjeant as to the constables, the deductions from wages were only applicable, and went only in aid of the police rate of the district. It was in that case held, that the station-house was exempt on the principle which exempted courts of justice, and *Erle*, J., considered that the premises were held for public purposes, as the administration of the police is a matter in which the public have an interest. And *Crompton*, J., ob-

County constabulary station-house.

(*o*) *Sheppard and others* v. *Churchwardens, &c. of Bradford*, 33 L. J., M. C. 182; 16 C. B., N. S. 369.
(*p*) 29 & 30 Vict. c. 117.
(*q*) *The Queen* v. *The Parish of St. Martin, Leicester* (*Inh.*), 36 L. J., M. C. 99; L. R., 2 Q. B. 493.
(*r*) 36 L. J., M. C. 100; L. R., 2 Q. B. 493.
(*s*) 35 L. J., M. C. 1; 11 H. of L. Cas. 443.
(*t*) E. B. & E. 225.

served that the preservation of the peace at Manchester benefited Liverpool (*u*).

Of rateable Occupation of Property.

But the county justices of Lancashire were held rateable in respect of the assize courts, judges' lodgings, &c., at Manchester, which under a power in the local act under the authority of which the courts, &c., were built, they permitted the corporation of the city of Manchester to use for the purposes of the city quarter sessions and the city court of record for the sums of 600*l.* per annum, and 300*l.* per annum for incidental expenses, notwithstanding that all the sums received in respect of such use were applied by the justices towards the expenses of keeping up the courts, &c., and in aid of the special rate which they were empowered to make for the expense of the courts (*x*).

Assize court.

Since *Jones* v. *Mersey Dock* (*y*), it must be taken that property in boroughs in the occupation of municipal corporations are no longer exempt from rateability, by reason that the income arising therefrom is applicable to public purposes only, but this is controlled by the operation of the proviso contained in 4 & 5 Vict. c. 48, s. 1 (extended to all corporations by 16 & 17 Vict. c. 79), which enacts as follow: "Provided always, that where such property lies in any parish which is situate wholly within the boundaries and limits of a city or borough named in the said schedules, and in which city or borough the poor are relieved by one entire poor rate, or in which city or borough the poor within the boundaries or limits thereof as existing for municipal purposes at the time of the passing of the said act, was then relieved by one entire poor rate, the exemption of such property from rateability shall continue as if this act had not passed." And therefore the property of a municipal corporation is exempted from liability to a poor rate where this property is in a parish wholly within a borough, the poor of which are relieved by one entire rate (*z*).

Property in boroughs occupied for municipal purposes.

Exemption of municipal corporate property.

Where the occupation is for public purposes, and the occupier, whether corporation or individual, represents the public or occupies for the public and stands on the same footing, the same occupation may be in both characters, public and private, and so make the occupier rateable as to part and leave him exempt as to part; and upon this principle, in the case of the Oxford rate, the court having taken judicial notice that the University of Oxford was a national institution for the purposes of the advancement of religion and learning, held that the Bodleian Library and the schools, and the Convocation House, the University Galleries, the Clarendon Buildings, the Botanic Gardens, the Taylor

Exemption of the universities, how far.

(*u*) E. B. & E. 225.
(*x*) *Lancashire Justices* v. *Cheetham Overseers*, 37 L. J., M. C. 12; L. R., 3 Q. B. 14.
(*y*) 11 H. of L. C. 443; 35 L. J., M. C. 1.
(*z*) *Reg.* v. *Mayor, &c. of Oldham*, 37 L. J., M. C. 169; L. R., 3 Q. B. 474.

Of rateable Occupation of Property.

Institution, the Old Convocation House, and the Law Schools and the Sheldonian Theatre, were occupied by the university solely for public purposes and not rateable; and that it made no difference that the university occasionally allowed the use of the theatre to persons giving concerts for their own benefit. But a cellar of the theatre in which the university allowed a publisher constantly to keep some of his books was held rateable, although he paid no rent; and a part of the Ashmolean Museum, which was occupied as the residence of a professor, it not appearing that such residence was essential to the discharge of the professor's duties, was held rateable, as were the residences and land attached to the Botanic Gardens, occupied by the professor of botany and the gardener; but the colleges of the university were not recognized as public institutions in the sense in which the university itself is so recognized; and therefore the college libraries and chapels, though used exclusively for the purposes of collegiate instruction, discipline and worship, were held rateable (*a*).

Of the universities.

What are not public purposes.

The Northumberland Docks.

The Tyne Improvement Commissioners were held rateable in respect of the Northumberland Docks in the river Tyne; because the rates and tolls raised by them were by the local acts to be applied in the first place in the payment of the working expenses, then of interest on borrowed money, and lastly, in putting by a certain sum towards a sinking fund to pay off debt, and in case of any surplus in the meantime, the rates and dues were to be lowered to the extent of the surplus, and as only a particular section of the public used the docks, they could not be said to be held for public purposes (*b*). These cases were approved of and supported in *Jones* v. *The Mersey Docks and Harbour Board* (*c*).

The Huddersfield Waterworks.

Liverpool Waterworks.

Manchester Waterworks.

So, the commissioners of the Huddersfield Waterworks were held rateable, though their occupation, restricted as it was by act of parliament, was of no benefit to themselves, and the inhabitants of the town were benefited, as consumers, by a cheap supply of water from the works (*d*); and the corporation of Liverpool, in whom waterworks were vested for the purpose of supplying water to the inhabitants particularly and the town generally, and who by their act were restrained from making any profit out of the water supply, were in like manner held rateable (*e*). And the corporation of Manchester were held rateable in respect of waterworks of a company acquired and carried on by them under a local act, by which they were empowered to levy water rates on

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(*a*) *Case of the Oxford Poor Rate*, 8 E. & B. 184; 27 L. J., M. C. 33.

(*b*) *Tyne Improvement Commissioners* v. *Overseers of Chirton*, 1 E. & E. 516; sub nom. *R.* v. *Overseers of Chirton*, 28 L. J., M. C. 131; following *The Birkenhead Dock Trustees* v. *Birkenhead Overseers*, 2 E. & B. 148.

(*c*) 35 L. J., M. C. 1 (H. of L.); 11 H. of L. Cas. 443.

(*d*) *Reg.* v. *Overseers of Longwood*, 18 Q. B. 116; 21 L. J., M. C. 215.

(*e*) *Mayor of Liverpool* v. *Overseers of West Derby*, 6 E. & B. 704; 25 L. J., M. C. 112.

Of rateable Occupation of Property.

the inhabitants of the borough, though all the sums received from water rates and from the works were absorbed by the annual payments required to be made by the act to the water company, as the price of their works (*f*). *Erle*, J., suggesting that the poor rates might be deemed an expense incurred in the supply of water might be included in the next rate. And so the Birkenhead Dock trustees were held rateable for the Birkenhead Docks, though all the receipts were to be applied to the purposes of the act, and they had power to raise and lower the tolls accordingly, on the ground that there was in their local act no such positive prohibition against paying the rates as to amount to an expression of an intention that they should be exempt (*g*).

Birkenhead Docks.

A local board of health do not occupy for public purposes under Public Health Act.

The local board of health of a borough, constituted a district under the Public Health Act, occupied a yard in a parish, partly within and partly without the district, solely for storing materials used by them as surveyors of the highways (under 11 & 12 Vict. c. 63, s. 117) within the district, were held rateable for the yard, as occupied by them for the inhabitants of the district and not for the public at large, so as to make it held for public purposes (*h*).

Exemption of Sunday and ragged schools.

Sunday and ragged schools are exempted from rating by 32 & 33 Vict. c. 40, by which it is enacted, "that every authority having power to impose or levy any rate upon the occupier of any building or part of a building used exclusively as a Sunday school or ragged school may exempt such building or part of a building from any rate for any purpose whatever which such authority has power to impose or levy: provided that nothing in this act contained shall prejudice or affect the right of exemption from rating of Sunday or infant schools or for the charitable education of the poor in any churches, district churches, chapels, meeting-houses or other premises, or any vestry-rooms belonging thereto or any part thereof, by virtue of 3 & 4 Will. 4, c. 30.

A Sunday school within the above enactment means any school used for giving religious education gratuitously to children and young persons on Sunday and on week days, for the holding of classes and meetings in furtherance of the same object, and without pecuniary profit being derived therefrom.

A ragged school means any school used for the gratuitous education of children and young persons of the poorest classes, and for the holding of classes and meetings in furtherance of the same object, and without any pecuniary benefit being derived therefrom except to the teacher or teachers employed.

Where there is no beneficial occupation at all.

The Metropolitan Board of Works are not rateable for their sewers, because there is no beneficial occupation of them; *i. e.*, an occupation capable of yielding profit to a tenant; but

(*f*) *Reg.* v. *Mayor, &c. of Manchester*, 21 L. J., M. C. 160.

(*g*) *Birkenhead Dock Trustees* v. *Overseers of Birkenhead*, 2 E. & B. 148; 21 L. J., M. C. 209.

(*h*) *Reg.* v. *Justices of Hull*, 4 E. & B. 29; sub nom. *Reg.* v. *Cooper*, 23 L. J., M. C. 183.

Of rateable Occupation of Property.

they are rateable for their pumping-station, engine-house, &c. (*i*).

Where no beneficial occupation at all.

Where land was purchased by drainage commissioners and converted by them into a drain, but no part of the lands adjoining thereto were benefited thereby, which was for the benefit of proprietors of low lands at a distance, the commissioners received no pecuniary benefit, and were therefore held not to be rateable (*j*); but where money is expended in improvements on land, or in building, the property is at once rateable on the improved value, though the expense of the improvements may never be recouped (*k*).

Land attached to a church.

The commissioners for building churches are not liable to be rated for land attached to a church (*l*).

The question in all cases is, whether there is any beneficial occupation; that is to say, an occupation yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain the property in a state to command such rent; it is by no means necessary that the occupation should be beneficial to the occupier (*m*); if so, the owner or occupier is liable to be rated in respect of that occupation, whatever may be the general use of the land or building in which he has an interest; if no such person can be found, no rate can be imposed on the premises.

And no person is any longer to be rated to church or poor rates or cesses for any church, district church, chapel, meeting-house, or premises, or for such part thereof, as shall be exclusively appropriated to public religious worship, and which, if not of the established church, are duly certified for the performance of religious worship according to the acts in force (*n*).

Owners, when rateable.

Small tenements.

The Small Tenements Act (*o*), with respect to the rating of small tenements, and all local statutes, so far as they relate to the rating of owners instead of occupiers, are repealed by "The Poor Rate Assessment and Collection Act, 1869" (*p*). By sect. 3 of the latter act, when the rateable value of any hereditament, which includes a dwelling-house, does not exceed in the metropolis 20*l.*, in Liverpool 13*l.*, in Manchester or Birmingham 10*l.*, and elsewhere 8*l.*, and the owner is willing

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(*i*) *Reg.* v. *Metropolitan Board of Works*, 38 L. J., M. C. 24; L. R., 4 Q. B. 15; *Metropolitan Board of Works* v. *Churchwardens, &c. of West Ham*, 40 L. J., M. C. 30; L. R., 6 Q. B. 193.

(*j*) *R.* v. *Sculcoates;* so in *Reg.* v. *The Metropolitan Board of Works*, 38 L. J., M. C. 24; L. R., 4 Q. B. 15.

(*k*) *R.* v. *Mart*, 6 T. R. 154; *R.* v. *Atwood*, 6 B. & C. 277.

(*l*) *Angell* v. *Vestry of Paddington*, 40 L. J., M. C. 171.

(*m*) *Jones* v. *Mersey Docks and Harbour Board*, 11 H. of L. C. 443; 35 L. J., M. C. 1; *Reg.* v. *Mayor of Manchester*, 21 L. J., M. C. 160.

(*n*) 3 & 4 Will. 4, c. 30, s. 1. Any parts of such premises, &c. which are not so exclusively appropriated, and from which rent or profit is received, are still rateable, *ib.*, unless they or any vestry rooms, &c. be used for Sunday or infant schools, or for the charitable education of the poor, *id.* s. 2.

(*o*) 13 & 14 Vict. c. 99.

(*p*) 32 & 33 Vict. c. 41.

Of rateable Occupation of Property.

to enter into an agreement in writing with the overseers to become liable to them for the poor rates for not less than a year, and to pay the poor rates whether the premises are occupied or not; and by sect. 4, where the vestry of any parish has ordered that the owners of such hereditaments shall be rated instead of the occupiers, the overseers are to rate the owners; and, by sect. 13, every owner of any hereditament, for the rates of which he has become liable under sections 3 and 4 (*q*), is to have the same right of appeal (subject to the same conditions and consequences) against the valuation lists and the poor rates as if he were the occupier thereof.

Compound tenements.

Appeal.

Where, under the repealed statute of 13 & 14 Vict. c. 99, the inhabitants of a parish met in vestry and drew up the following document, "A meeting was held this day at A. for the purpose of carrying out the provisions in the 13 & 14 Vict. c. 99, for the better assessing and collecting the poor rates upon small tenements situate within the parish, and it was agreed that the same should be carried out," it was held that it was a valid order, under the 13 & 14 Vict. c. 99, s. 1, for the adoption of the act (*r*).

Small tenements.

The owner of a house, all the separate rooms of which are let out to separate tenants, who used the street door, passages, &c. in common, the owner himself occupying no part of it, and being rated at the time of the passing of the 30 & 31 Vict. c. 102, to the poor rate in respect of the whole house, as the owner instead of the occupier, under the Small Tenements Act, 13 & 14 Vict. c. 99, was held to be within the exception to the 30 & 31 Vict. c. 102, s. 7, which provides that, in boroughs, when the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner . . . shall be rated . . . to the poor rate, and was held rateable instead of the occupiers (*s*).

As to the mode of arriving at the net annual value of small tenements, see *Reg.* v. *Overseers of Bilston* (*t*).

Exemption of lands, houses, &c. occupied for the purposes of science, literature, or the fine arts.

Lands, houses or buildings belonging to any society instituted for the purposes of science, literature, or the fine arts exclusively, and occupied by it for the transaction of its business, and for carrying into effect its purposes, are exempted from local rates and taxes; provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money between any of its members; and provided that such society shall obtain the certificate of the barrister-at-law for the time being appointed to certify the rules of friendly societies (*u*).

(*q*) *Cross* v. *Alsop*, 40 L. J., C. P. 5; L. R., 6 C. P. 315.

(*r*) *Bavin* v. *Hutchinson and others*, 31 L. J., M. C. 229.

(*s*) *Stamper* v. *Churchwardens and Overseers of the Poor of the Parish of Sunderland-near-the-Sea*, 37 L. J., M. C. 137; L. R., 3 C. P. 388.

(*t*) 35 L. J., M. C. 97, *post*, p. 845.

(*u*) 6 & 7 Vict. c. 36.

Of rateable Occupation of Property.

The barrister is to give his certificate on each of three copies of the laws, rules and regulations for the management of the society, that the society is entitled to the benefit of this act, or shall state in writing the grounds on which such certificate is withheld.

As to the certificate of the barrister that the society is entitled to the benefit of the act.

If the certificate is granted, one of such copies is then to be returned to the society, another is to be retained by the certifying barrister, and the third is to be transmitted to the clerk of the peace of the county or borough, as the case may be, and shall be by him laid before the next sessions or sitting of the recorder after the transmission to him, and the recorder or sessions are required to allow the same without motion, and order the same to be filed (*x*). In case of alteration of any of the rules so certified they are to be submitted again to the barrister for a fresh certificate or refusal (*y*).

Allowance of certificate by quarter sessions.

In case of refusal to certify the laws, rules, &c., of the society, together with the reasons for the refusal, may be submitted to the sessions or recorder, who are at liberty to cause them to be filed, and such filing is to have the same effect as a certificate (*z*).

Appeal lies against the certificate to quarter sessions.

By 6 & 7 Vict. c. 36, s. 6, any person or persons assessed to any rate from which any society shall be exempted by this act, may appeal from the decision of the barrister in granting such certificate to the quarter sessions, within four calendar months next after the first assessment of such rate made, after such certificate shall have been filed as aforesaid, or within four calendar months next after the first assessment of such rate made after such exemption shall have been claimed by such society.

To what sessions.

Of notice and grounds of appeal against the barrister's certificate and recognizance.

Such appellant first giving to the clerk or secretary of the society in question, twenty-one days previously to the sitting of the said court, notice in writing of his intention to bring such appeal, together with a statement in writing of the grounds thereof, and within four days after such notice entering into a recognizance before some justice, with two sufficient sureties, to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the recorder or justices at such quarter sessions; and at such quarter sessions such recorder or justices shall, on its being proved that such notice and statement have been given as aforesaid, proceed to hear such appeal according to the grounds set forth in such statement, and not otherwise, and if the certificate of the said barrister shall appear to him or them to have been granted contrary to the provisions of this act, shall and may annul the same, and shall and may, according to their discretion, award such costs to the party appealing or appealed against, as he or they may think proper, and his or their determination concerning the premises shall be

(*x*) 6 & 7 Vict. c. 36, s. 2.
(*y*) *Ibid.* sect. 3.
(*z*) *Ibid.* sect. 5.

conclusive and binding on all parties to all intents and purposes whatsoever (*a*).

Of rateable Occupation of Property.

Notwithstanding a certificate granted by the barrister to a society, and the appeal clause, it is still open to the parish authorities to rate a building belonging to the society which does not, in fact, come within the benefit of the act, and enforce the rate, for the certificate whilst made a condition precedent to the claim of exemption is not conclusive proof of a right thereto (*b*).

Exemption of scientific, literary and fine arts societies.

The appeal is in time if made within four months after the exemption shall have been claimed, though there was an assessment made after the certificate was filed, which was more than four months before the appeal (*c*).

The Birmingham News-Room (*d*), the Manchester Concert Hall (*e*), the Portico at Manchester, established as a library and news-room (*f*), the Manchester Athenæum, where a chess and gymnastic club were of the purposes (*g*), were none of them exempted, but the Royal Manchester Institution was held exempt (*h*). The Birmingham Library (*i*), and the London Library (*k*), were also held exempt as societies for literary purposes exclusively, and supported by voluntary contributions, whilst the United Service Institution was held rateable, on the ground, that the institution was founded for the advancement of the profession of arms, which enables it to be used for other purposes than those of science (*l*). In the case of the Linnean Society, the society was admitted to be instituted exclusively for scientific purposes, and the main objection urged to the exemption was that the subscriptions were not voluntary (*m*). So the Bradford Library and Literary Society (*n*), and the Liverpool Library, were also exempted (*o*).

What places within the exemption.

The Working Men's Educational Union, established in St. Martin's-in-the-Fields, was held not to come within the statutable definition, inasmuch as some of the purposes for which it was instituted could not be connected with science,

What places not within the exemption.

(*a*) 6 & 7 Vict. c. 36, s. 6.
(*b*) *Reg.* v. *Phillips*, 8 Q. B. 745; 17 L. J., M. C. 83.
(*c*) *Reg.* v. *Pocock*, 8 Q. B. 729; 15 L. J., M. C. 132.
(*d*) *Reg.* v. *Phillips*, 8 Q. B. 745.
(*e*) *Reg.* v. *Brandt*, 20 L. J., M. C. 119; 16 Q. B. 462.
(*f*) *Reg.* v. *Gaskell*, 16 Q. B. 472; 21 L. J., M. C. 29.
(*g*) *R.* v. *Ogden*, 18 L. T. 74.
(*h*) *Reg.* v. *Manchester Overseers*, 20 L. J., M. C. 113.
(*i*) *Birmingham Churchwardens* v. *Shaw*, 10 Q. B. 868; sub nom. *Ex parte Overseers of Birmingham; In re Birmingham New Library*, 18 L. J., M. C. 89.
(*k*) *Earl of Clarendon* v. *St. James, Westminster*, 20 L. J., M. C. 213; 10 C. B. 806.
(*l*) *Reg.* v. *St. Martin's-in-the-Fields*, 21 L. J., M. C. 53; 17 Q. B. 149.
(*m*) *Churchwardens of St. Anne* v. *Linnean Society*, 3 E. & B. 793; 23 L. J., M. C. 148.
(*n*) *Reg.* v. *Bradford Library*, 28 L. J., M. C. 73, sub nom. *Bradford Literary Society* v. *Bradford Churchwardens*, 1 E. & E. 88.
(*o*) *Liverpool Library* v. *The Mayor of Liverpool*, 29 L. J., M. C 221.

Of rateable Occupation of Property.

literature, or the fine arts, the direct and immediate object being "the elevation of the working classes" (*p*).

What societies not exempt as scientific, literary or fine arts societies.

The Religious Tract Society, instituted for the diffusion of religious principles and sentiments, though by literary means, is not within the exemption (*q*); and the British and Foreign School Society, instituted for the purposes of education, is not entitled to the exemption, though the object is to be gained by scientific and literary means (*r*). The Zoological Society (*s*), the Russell Institution, Bloomsbury (*t*), and the Cambridge Philosophical Society, were also held rateable (*u*).

A society otherwise within the exemption will lose its exemption if its rooms be let out for public meetings and exhibitions unconnected with the objects of the society, though the funds arising therefrom be used for the purposes of the society, and even if part of the premises be sublet to other societies also within the exemption (*x*); but the accidental use of the rooms for a concert for a charitable object will not affect the right to exempt (*y*).

Such society must be supported wholly or in part by voluntary contributions, and this is satisfied by annual contributions commenced of the subscriber's own choice, and continued and withdrawn at pleasure, that is, without subjecting the party to any legal liability or forfeiture beyond that of foregoing a participation in the pleasure or profit, scientific, literary or artistic, in respect of which they have been made, and it is not further necessary that it should be gratuitous, and bring no return of any kind to the contributor (*z*).

And the society by its laws may not make any dividend, gift, division or bonus in money unto or between any of its members, a rule by which every subscriber had the power of transferring his property in the library by any of the methods "by which personal property is usually transferred to any person who shall submit to the laws of the society" is no contravention of the enactment, and the act does not apply to a division of the common stock on the dissolution of the society, but speaks of laws which are to operate on the society as a continuing body (*a*). But it is not sufficient, in the absence of any law

(*p*) *Scott* v. *The Overseers of St. Martin's-in-the-Fields*, 5 E. & B. 558; 25 L. J., M. C. 42.

(*q*) *Reg.* v. *Jones*, 8 Q. B. 719; 15 L. J., M. C. 129.

(*r*) *Reg.* v. *Pocock*, 8 Q. B. 729; 15 L. J., M. C. 132.

(*s*) *Vestrymen of St. Marylebone* v. *The Zoological Society*, 3 E. & B. 807; 23 L. J., M. C. 139.

(*t*) *Governors of Russell Institution* v. *Vestrymen of St. Giles*, 3 E. & B. 416; 23 L. J., M. C. 65.

(*u*) *Purchas* v. *Holy Sepulchre, Cambridge*, 4 E. & B. 156; 24 L. J., M. C. 9.

(*x*) *Purvis* v. *Traill*, 3 Exch. 344; 18 L. J., M. C. 57.

(*y*) *Reg.* v. *Brandt*, 20 L. J., M. C. 119.

(*z*) *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868; sub nom. *Re The Birmingham New Library*, 18 L. J., M. C. 89; *Earl of Clarendon* v. *St. James, Westminster*, 20 L. J., M. C. 213; 10 C. B. 806.

(*a*) *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868; sub nom. *Ex parte Overseers of Birmingham*, 18 L. J., M. C. 89.

prohibiting the making of any dividend or bonus, that no dividend has in fact ever been made, or that the making it would be altogether hostile to the constitution and spirit of the society (*b*), and semble, the Religious Tract Society is not exempt from rating under the act (*c*). *Of rateable Occupation of Property.*

5. *Principles upon which the Rateable Value may be estimated.*

The 43 Eliz. c. 2, s. 1, requires the overseers of every parish to raise, "by taxation of every inhabitant," &c., and "of every occupier of" various kinds of real property, and, *inter alia*, of "lands in the parish in such competent sum as they shall think fit," a stock for setting the poor of the parish to work, and for the relief of the poor of the parish. Though the words of this enactment might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal and in proportion to the value of their respective means. From Dalton's County Justice (*d*), this was determined very shortly after the statute passed. It has always been so held, and the legislature, by the Parochial Assessment Act (*e*), has affirmed this principle by enacting, that "no rate shall be valid unless made upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might *reasonably be expected to let* from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and *deducting* therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." Of the principles of valuation. Parochial Assessment Act.

The principle of assessment laid down in the Parochial Assessment Act was not created by that statute, but is found in the original statute of Elizabeth, as had been established by decisions on that statute (*f*), and affirmed by the Union Assessment Committee Act, 1862 (*g*).

The standard of value adopted by the legislature is the value of the property to the owner, whether it remains in his own occupation or is let to a tenant. Where the property is actually let, the actual rent is the best criterion of value, unless it can be clearly shown that that is too small, as, for instance, that the letting had been a number of years ago, and that the profits to be made had very materially increased or diminished since (*h*).

(*b*) *Reg.* v. *Jones*, 8 Q. B. 719; 15 L. J., M. C. 129.
(*c*) *Ibid.*
(*d*) Page 148 (Ed. 1697).
(*e*) 6 & 7 Will. 4, c. 96.
(*f*) *Reg.* v. *Lumsdaine*, 10 A. & E. 157; 8 L. J., M. C. 69; *Reg.* v. *London and South Western Railway Company*, 11 L. J., M. C. (N. S.) 101; *R.* v. *Kingswinford*, 7 B. & C. 236.
(*g*) 25 & 26 Vict. c. 103, s. 15.
(*h*) *R.* v. *Chaplin*, 1 B. & Ad. 926.

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In order, therefore, that a valid rate may be imposed, it is essential that the occupation be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the average annual expense of maintenance, would leave no overplus, there is nothing to rate (*h*).

Unproductive land.

So, where the occupation of land is subject to rights of *profit à prendre* which exhaust the whole value of or interest in the land, there is no occupation of a rateable value. Thus, where the corporation of Lincoln were rated in respect of Holmes Common as lords of the manor of the city of Lincoln in whom the soil was vested; and the resident freemen of the city of Lincoln, before and since the Municipal Corporation Act, were entitled to stock the common with two head of cattle each, and the entire value of the common was exhausted by these rights, and the corporation which appointed a commons warden, and had the right to inflict certain fees for illegal stocking were losers by reason of the expenses attaching to the exercise of such manorial rights, and had not any fund out of which to pay these poor rates, for the borough fund was not raised for that purpose, it was considered that the corporation had practically no interest in the land which could be rated (*i*).

That case was distinguished by the Lord Chief Justice from *Jones* v. *The Mersey Docks* (*k*), because, in the latter case, it was held that the trustees might be liable if they did not take even sixpence of profit to themselves, because they could stop the amount of the rates out of the money in their hands, and that when there is such an occupation as would produce to the tenant such a profit as that an actual tenant would pay a rent in respect of it, the tenement may be assessed to the poor rate. The rate must be based on the estimates of the rent which would be paid and received whether the profits be handed over to a charity or kept by the occupier or used for some other purpose; but there must be some rent which the hypothetical tenant would be willing to pay, and here the corporation are the occupiers of the land, but the benefit of the occupation is solely derived from the grass which the freemen have the right of feeding their cattle upon.

The Corporation of Lincoln v. *Overseers of Holmes Common* was also distinguished from *Reg.* v. *The Rhymney Railway Company* (*l*), on the ground that, in the latter case, the land for which the railway company were rated was of large rateable value; but by arrangements between the company and the trustees of the Bute Docks the latter were enabled

(*h*) *Jones* v. *Mersey Docks and Harbour Board*, 35 L. J., M. C. 97; per *Blackburn*, J. See also per Lord *Westbury*, *ibid.*

(*i*) *The Corporation of the City of Lincoln* v. *The Overseers of Holmes Common*, 36 L. J., M. C. 73; L. R., 2 Q. B. 482.

(*k*) 35 L. J., M. C. 1; 11 H. of L. Cas. 443.

(*l*) 38 L. J., M. C. 75; L. R., 4 Q. B. 276.

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to receive a considerable part of the profits arising from the occupation.

When tenant does the repairs.

If houses and other buildings, either with or without land, are let to a tenant, and the tenant agrees to take upon himself, either wholly or in part, the repairs and other expenses to which the section refers and which ordinarily fall upon the landlord, no allowance in respect of such repairs and expenses is to be made from the rent, because it is necessary to consider these expenses as added to the rent which then has to be deducted by the landlord, thus leaving the rent actually paid by the tenant as the amount on which the rate ought to be assessed (*m*).

Furnished house.

To ascertain the rateable value of a furnished house it must be ascertained what is the rent for the house, and what is the rent for the furniture and fixtures; what is paid for the use of the furniture and those things which form no part of the rateable premises must be deducted, and the remainder will be the rent for which the house is rateable (*n*).

Small tenements in composition.

Amount deducible for rates and taxes.

By the 32 & 33 Vict. c. 41, a commission of 25 per cent. may be allowed the owner of small tenements on becoming liable for the rates; and by sect. 4, a deduction or abatement of 15 per cent. is allowed, and by that act all local acts relating to the rating of owners instead of occupiers are repealed, but in estimating the net annual value the full amount of the rate should be allowed. When by a local act the owners of small tenements were empowered to compound for the poor rate in respect of such tenements by the payment of one half of such rate only; and it was contended that in estimating the amount of the deduction to be made from the gross estimated rental for rates and taxes only one-half the sum ordinarily allowed for that deduction in houses not in composition should be allowed, that is say, where one-fifth of the gross rental was ordinarily deducted only one tenth should be deducted where the tenement was in composition. It was held, that in estimating the annual value the full usual allowance should be made, and that the landlord claiming to pay a composition ought not to be an element in ascertaining the rateable value (*o*).

Necessary expense to be deducted—water rate.

A payment made by a landlord to a waterworks company for the supply of water to a tenement occupied by his tenant, where it was optional with the owner or the tenant to get the supply from other sources, is not a tenant's rate or an expense necessary to maintain the premises in a state to command the probable annual rent, and must not be deducted from the gross estimated rental of the premises in order to ascertain the net annual value (*p*). This expense was classed by the court in that case with the cost of food or light, or of candles or gas.

(*m*) *Reg.* v. *Wells*, 36 L. J., M. C. 109; L. R., 2 Q. B. 542.

(*n*) Per *Blackburn*, J., *Reg.* v. *Lee* (*Inh.*), 35 L. J., M. C. 105; L. R., 1 Q. B. 241.

(*o*) *Reg.* v. *Overseers of Bilston*, 35 L. J., M. C. 97.

(*p*) *Reg.* v. *Churchwardens, &c. of Bilston*, 35 L. J., M. C. 73; L. R., 1 Q. B. 18.

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A general sewer's rate imposed by commissioners of sewers is a tenant's tax, and so to be deducted in estimating the value of the land rated. And so likewise is an annual tax for the maintenance and cleansing of sewers. And the annual average cost of the maintenance of a sluice and floodgate, by which the land was benefited, and of the maintenance of a sea-wall, which the owner was bound to keep up under a presentment of a court of sewers, may be deducted as expenses necessary to maintain the land in a position to command the rent (*r*).

Sewer's rate may be deducted.

Allowance for renewal of farm buildings or machinery.

An allowance ought to be made in respect of any contingent or future renewal of farm buildings or machinery, inasmuch as they are, by the effects of the weather and of wear and tear, reducible to a state which will render them unworthy of repair, and necessitates their reconstruction, so that a provision made for a future liability to reconstruct them, involving, as it ought to do, a prudential parsimony as respects all but temporary and indispensable repairs, is an expense which may properly be included among the expenses necessary to maintain an hereditament, consisting in part of subjects perishable, in a state fit to command the rent which it does in fact, while standing and in use, command. There seems also no distinction in principle between a sum annually laid by to make good, when it shall become necessary, an inevitable loss by the destructive agency of time, and a fund laid by for an indemnity against loss by fire, storm or other peril insured against (*s*). Allowances upon this principle are made in the case of railways (*t*).

Machinery in water corn mills.

Mills not in use rateable as warehouse for machinery, when.

If a mill, containing machinery and other things incidental to the business, such as a cotton mill, silk mill, &c., is stopped or is discontinued to be worked, either from stress of trade and temporarily to await a revival of trade, or upon the retirement from the business of the owner, or by reason of the cesser of the term of the tenant, and ceases to be worked, but is idle only until a fresh tenant or purchaser can be found, the machinery being kept in order and ready for use, it may be rateable as a warehouse or storehouse for the machinery that is in it (*u*).

Chemical works.

Increased value by reason of moveable fixtures.

In assessing chemical works, an increased value is to be put on them by reason of certain chambers used for the manufacture of sulphuric acid, as part of the chemical works, being used as fixed machinery of the works attached to the other buildings, and necessarily so, although capable perhaps of being removed without injury to the buildings, and not of the nature of moveable utensils or machinery, or of furniture in a dwelling-house (*x*). The question whether the chambers were or were

(*r*) *Reg.* v. *Hall Dare*, 34 L. J., M. C. 17; 5 B. & S. 785.
(*s*) *Reg.* v. *Wells*, 36 L. J., M. C. 109; L. R., 2 Q. B. 542.
(*t*) *Great Eastern Railway Company* v. *Haughley*, 35 L. J., M. C. 229; L. R., 1 Q. B. 166.
(*u*) *Staley* v. *Overseers, &c. of Castleton*, 33 L. J., M. C. 178; 5 B. & S. 505; *Harter* v. *Overseers of Salford*, 34 L. J., M. C. 206; 6 B. & S. 591.
(*x*) *Reg.* v. *Haslam*, 17 Q. B. 220.

not annexed to the freehold is a question of fact for the sessions. In *R.* v. *The Proprietors of the Liverpool Exchange* (*y*), the court, after citing several previous decisions, say, "These cases establish the principle that the advantages attendant upon a building, either in respect of its situation or the mode of its occupation, are to be taken into the account in estimating its rateable annual value wherever those advantages would enable the owner of the building to let it at a higher rent than it would otherwise fetch." And again, in *Reg.* v. *Guest* (*z*), the court state the general principle to be, that real property ought to be rated according to its actual value as combined with the machinery attached to it, without considering whether the machinery be real or personal property, so as to be liable to distress or seizure under a *fi. fa.*, or whether it would descend to the heir or executor, or belong at the expiration of a lease to landlord or tenant; and the court referred to *R.* v. *Birmingham and Staffordshire Gaslight Company* (*a*), where the same principle was laid down. All these cases were brought before the court in *Reg.* v. *Southampton Dock Company* (*b*).

Of the Principles of Valuation of Property for Rating.

Buildings with machinery attached.

A steamboat company who became occupiers under a lease of a ground floor and cellars thereunder of premises abutting on the river Thames, near Westminster Bridge, and afterwards they constructed a pier or landing-place in the Thames, opposite the said premises, the pier or landing-place consisting of three floating barges boarded over and kept in their places by iron chain cables fastened to iron anchors sunk in the bed of the river, the barges being connected by three wooden bridges, the first of which, at the land end, being fastened to a platform which rested upon an abutment attached to or made fast to the wall of the premises by iron bolts let into the wall, the two latter bridges resting on the barges and rising and falling with the barges and the tide—the ground floor being the pay place for passengers embarking at the pier—they are rateable for "a tenement, land, landing-place, and premises," of an increased value by reason of the pier and landing-stage as accessory to the land, for the pier brings passengers for landing on and embarking from the land, which is of itself subject to be rated (*c*).

Pier and landing-stage of steamboat company rateable as land, when.

A brewery is increased in rateable value by the increased rent a tenant would be willing to pay for the brewery in respect of the goodwill and trade of a number of public-houses whose tenants are under an engagement to purchase all their liquors at the brewery (*d*), and holding the contract by which the public-house tenants were bound to be a mere personal

Brewery with tied public-houses.

(*y*) 1 A. & E. 465.
(*z*) 7 A. & E. 956.
(*a*) 6 A. & E. 634.
(*b*) 14 Q. B. 587; 20 L. J., M. C. 155.
(*c*) *Reg.* v. *Leith*, 1 E. & B. 121, per Lord *Campbell;* 21 L. J., M. C. 119.
(*d*) *Allison* v. *Overseers of Monkwearmouth Shore*, 4 E. & B. 13; 23 L. J., M. C. 177, *Erle*, J., dissenting.

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contract collateral to and independent of the interest of the tenant in the brewery. But subsequently, in *Overseers of Sunderland Parish* v. *Guardians and Assessment Committee of Sunderland Union* (*e*), in the Common Pleas, *Erle*, J., who had then become *Erle*, C. J., with *M. Smith*, J., decided in accordance with his opinion in *Allison* v. *Overseers of Monkwearmouth*, whilst *Byles*, J., dissented and agreed with the last-mentioned case.

Lunatic asylums.

Under the 16 & 17 Vict. c. 97, s. 35, no lands or buildings, already or to be hereafter purchased or acquired, under the provisions of this or any former act, for the purposes of any asylum (with or without any additional building erected or to be erected thereon) shall, while used for such purposes, be assessed to any parochial or other local rates at a higher value or more improved rent than the value or rent at which the same were assessed at the time of such purchase or acquisition.

County asylum.

A county asylum is within the above enactment, though under the 43rd section of the same act it takes in foreign paupers and private patients, and a profit is made of land under cultivation by the patients, assisted by gardeners, as a garden and farm, the primary object being to afford employment to the patients, and was therefore only rateable at the value of the land at which the same was assessed when it was purchased for the erection of the asylum (*f*). The lands or buildings must, however, not only be purchased for the purposes of the asylum, to be assessable at the lower value, but must also be used for such purposes.

Chaplain's residence.

Thus, the chaplain's residence, built on a portion at the extreme boundary of the land, and a garden; the chaplain not being required by any act of parliament to be resident at the asylum, though he was required by the committee of visitors to reside thereon, was held rateable at the full value, though the resident medical superintendent's residence, built on another portion of the land originally purchased, and a garden, about three-quarters of an acre of land, part being a flower-garden and the rest kitchen-garden, the medical officer being required to be resident in the asylum; by sect. 55 of the Lunatic Asylum Act, 1853, it was held to be rateable only at the value of the land when purchased. And it was held that the flower-garden and other accommodation, in this case, was no more than a gentleman of education had a right to expect; but it was said that any excess in such accommodation would be rateable at the improved value, and that the principle of *Reg.* v. *Stewart* (*g*), applied, namely, that the residence must be such as is reasonable for a person and his family in the

Medical superintendent's residence.

(*e*) 34 L. J., M. C. 121; 18 C. B., N. S. 531.

(*f*) *Reg.* v. *Overseers of Fulbourn*, 34 L. J., M. C. 106; 6 B. & S. 451.

(*g*) 27 L. J., M. C. 81; 8 E. & B. 360.

condition of life in which such an officer would be expected to be (*h*).

Of the Principles of Valuation of Property for Rating.

The principle upon which a railway is to be assessed is laid down in *Reg.* v. *Great Western Railway Company* (*i*), upon the authority of *Reg.* v. *South Western Railway Company* (*k*) and *Reg.* v. *Grand Junction Railway Company* (*l*), to be, that although the profits of the trade carried on by the occupier upon the land cannot be made directly the subject of the rate assessed in respect of such occupation, and the value of the occupation is alone the proper subject, yet in that value is to be included whatever at the time forms part of it, whether permanently or not, and from whatever source derived, and therefore of course not less so, although derived in any proportion from the fact of the trade being so carried on upon it. Further, that although the sum to be sought is that which, after all due deductions made, a tenant might be found to give by way of rent from year to year, in order to be placed as occupier in the same position as the party rated, yet this was to be sought not by duly considering what rent would be given for so many miles of railway as happened to be in the rating parish, apart from all the actually co-existing circumstances, but by including in the consideration all such as would necessarily attend upon the occupation under the demise, and influence the tenant's mind as to the amount of rent which he would give. In the application of these principles, the practical difficulty for those who assess the rate in cases of such complication as railways often present will be to distinguish accurately between that which is referable to the trade alone and that increase of value which the carrying on of the trade upon the land gives to the occupation of it (*m*).

Rateable value, railways.

Profits of trade as carriers not directly rateable.

And where land forming one entire property runs into several parishes, such as a canal, though the profits may be earned in different proportions and with a different rate of outgoings in each, the value which the land occupied in each parish produces, after the due allowances, is that upon which the occupier is to be rated in each, and in its broad principles the occupation of a railway company does not differ from that of a canal company (*n*).

Application of the parochial principle to railways, &c.

Of the outgoings some are general, having no more connection with or influence on one part of the whole line than on any other; incurred for the sake of the whole line, and contributing to the profits everywhere. Of course these must be

General outgoings of the whole line.

(*h*) *Congreve* v. *Overseers of Upton*, 33 L. J., M. C. 83; 4 B. & S. 857.
(*i*) 6 Q. B. 201.
(*k*) 1 Q. B. 558.
(*l*) 4 Q. B. 18.
(*m*) *Reg.* v. *Great Western Railway Company*, 6 Q. B. 202; 15 L. J., M. C. 80.
(*n*) *Reg.* v. *London, Brighton and South Coast Railway Company*, 15 Q. B. 313. See also *Reg.* v. *Overseers of Mile End Old Town*, 10 Q. B. 222; 16 L. J., M. C. 184, *post*, pp. 854, 860, 861.

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distributed; and to every mile there must be apportioned some share, on whatever principle the apportionment is to be settled.

Some, again, seem purely local—a tunnel here, an inclined plane there—yet even these are contributing to the earnings everywhere; without these the traffic on either side could have no existence. It would be wrong to set these wholly and exclusively against the receipts earned in the same part of the line.

Local outgoings.

General charges.

The deductions from total gross revenue which constitute the difference between it and the total net rateable value must be apportioned on the parochial principle. This principle does not preclude a consideration of charges and expenses wherever arising locally which are necessary for keeping the subject of assessment at the value which is made the measure of that assessment; and wherever it is found that such charges and expenses do in fact apply equally to every mile of a railway, it is a convenient mode to arrive by a mileage division at the proportional part to be assigned to the miles in any particular parish, e. g., central superintendence (*o*).

Branch line.

A branch, worked as part of the entire railway, must not be considered as a distinct whole for the purposes of rating (*p*).

Contributive value, by acting as a feeder.

In estimating the rateable value of a portion of a line, whether a branch or part of the main line in a parish, its value is not to be deemed enhanced in respect of its acting as a feeder to the main line, in the case of a branch or in the case of a part of the main line, in respect of any part of the profit earned upon other portions of the line by the same traffic; that is to say, the value of the traffic or profits earned by the traffic on other parts of the line outside the parish must be disregarded in fixing the value of the part of the line in the parish (*q*). In *The Great Eastern Railway Company* v. *Haughley* (*r*), the main line ran through the parish, with a branch leading to B. and another to N.; there was a station in the parish, and the main portion of the traffic was that passing between B. and London, and that between N. and London and between B. and N. With respect to the through traffic between N. and London, there was a great accession to the traffic on the London side of the parish, and the effect of the additional traffic was said to be to reduce the expenditure per head of the passengers; that is to say, a carriage might contain only one passenger upon passing through the parish, but between the parish and London the same carriage would be full of passengers, and in that case the expense of the carriage would be so much less per head during the latter part of the journey, and therefore the profits earned the

(*o*) *Reg.* v. *London, Brighton and South Coast Railway*, 15 Q. B. 313; but see as to the central office expenses of a cemetery company, *post*, p. 862.

(*p*) *Ibid.* 15 Q. B. 313, 1094.

(*q*) *The Great Eastern Railway Company* v. *Haughley*, 35 L. J., M. C. 229; L. R., 1 Q. B. 166; *The Great Western Railway Company* v. *Assessment Committee of the Pontypridd Union*, 38 L. J., M. C. 93.

(*r*) *Ubi sup.*

larger. In other words, it was sought to ascertain the deduction from gross receipts by a reference to the cost of conveying each individual passenger, and not of conveying the whole of the passengers as one. The parish claimed to have the value of the part of the line of the company estimated with regard to the contribution of that part of the line to the increased profits of the other part; but the court decided against that contention, and said that the value of the line there must depend upon the earnings of the railway within the parish, deducting the expenses which properly belong to that part of the line, after taking the expense of carriages and working the line from one end to the other at uniformly the same rate. In *The Great Western Railway Company* v. *The Assessment Committee of Pontypridd Union* (*s*), the company were rated in respect of a line with branches passing through the parish and forming a junction outside the parish with the main line, to which it acted as a feeder. The company rented the line and its branches at a large sum as a feeder. The parish sought to increase the value of the line with branches by taking into consideration its increased value as a feeder to the main line; but the court held that that could not be done, and that the value of the line must depend upon the actual earnings of the railway within the parish, deducting the expenses which properly belonged to that part of the line. And the court said, that the rent paid for the feeder was no criterion of its real value, because the rent which would be paid by the hypothetical tenant, and not that which is paid by some particular tenant, must decide the value. And *Mellor*, J., there says, "For my own part, I adhere to the opinion which I expressed in *The Great Eastern Railway Company* v. *Haughley*. With regard to the observations attributed to the court in *The London and North Western Railway Company* v. *Cannock* (*t*), I think that the Lord Chief Justice must be taken to have reconsidered them in *The Great Eastern Railway Company* v. *Haughley*."

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Value of branches as feeders.

In consequence of these cases, *The South Eastern Railway Company* v. *The Overseers of Dorking* (*u*) must be held to be departed from, for in that case the Reading, Guildford, &c. line was at one time rented by and afterwards amalgamated with the Great Western Railway on terms which amounted to a rent paid by the Great Western Railway for the former line, in respect of traffic brought by the Reading, Guildford, &c. line on to the main line of the Great Western Railway, and its value thereby as a feeder; and it was held, *Erle*, J., dissenting, that the increased value, in consequence of the competition in the market for the Reading and Guildford line as a feeder, might be taken into account in estimating its rateable value in the parish of Dorking, which it ran through

(*s*) 38 L. J., M. C. 93.
(*t*) 9 Law Times, 325.
(*u*) 3 E. & B. 491; 23 L. J., M. C. 84.

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to L. But the *Dorking case* seems again to have been rather set up in *Reg.* v. *London and North Western Railway Company* (*v*), where it was held, that, in estimating the value of an independent line communicating with three larger lines, the terms upon which each of those lines would be willing to acquire, it ought to be taken into consideration as an element in fixing the rateable value.

As to loss on branch lines.

The claim of deduction for loss on two branch lines cannot be allowed. If the rate in question had been imposed on land forming any part of the branch lines themselves, it is clear that the circumstance of the receipts not equalling the rent—in other words, that the line was worked at a loss, could not have affected the rate; the occupation would still have been beneficial in the sense in which that word is used for the purpose of assessing the rate, and the rent which, from whatever motive the appellants found it worth their while to give, would have regulated the amount. This expenditure is more like money laid out in the way of improvement, for which no deduction should be made (*x*).

Rent of leased line, how far to be taken as a criterion of rateable value.

It was formerly considered that rent paid under a lease of a line was *primâ facie* evidence of the value of the line, and might be taken as a criterion upon which the rateable value of the portion in the parish could be fixed, and, in the absence of anything to set against it, might be taken as conclusive evidence (*y*).

But where the line leased at a rent, or the portion of it sought to be assessed is, in fact, worked at a loss, there the rateable value must be ascertained by other indicia than the rent (*z*).

Where a line, in fact, worked at a loss *per se* is leased at a rent, the chief element probably of that rent was the value attached to it by the lessee as a feeder in respect of the profit the lessee would derive from the traffic brought by the feeder and worked by the lessee profitably elsewhere. And in the earlier cases, it was held, that this element of value of the land of the feeding line should be considered, in such a case, inasmuch as the value of the land in the parish was increased and enhanced by its being useful, as increasing the profit that might be made in another place, and in this manner the rent paid by the lessee, as strong evidence of the value to that particular lessee was taken to be strong evidence of the rateable value of the occupation as an integral part of the main line (*a*); but since the case of the *Great Western Railway Company*

(*v*) L. R., 9 Q. B. 134; 43 L. J., M. C. 81.
(*x*) *Reg.* v. *Great Western Railway Company*, 6 Q. B. 179; 15 L. J., M. C. 80.
(*y*) *South Eastern Railway Company* v. *Churchwardens and Overseers of Dorking*, 3 E. & B. 491; 23 L. J., M. C. 84.
(*z*) *Ibid.*
(*a*) *South Eastern Railway Company* v. *Overseers of Dorking*, *ubi sup.*; *North Western Railway Company* v. *Overseers of Cannock*, 9 Law Times, 325.

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v. *Assessment Committee of Pontypridd Union* (*b*), it would seem that the rate must be confined to the net profit derived by the occupiers from the traffic arising out of or passing through the parish, that is to say, the actual earnings within the parish, deducting the expenses which properly belonged to that part of the line; and, therefore, the rent paid by the particular tenant is no longer any criterion of its real value to the hypothetical tenant called into play for the purposes of parochial assessment. This is also supported by the judgment of the court in the *Great Eastern Railway Company* v. *Overseers of Haughley* (*c*).

Running powers.

The value of running powers over another line out of the rating parish should be taken into consideration in fixing the value of the line in the parish (*d*).

Exchange toll or rent earned in kind.

By agreement between the South Eastern Railway Company and London, Brighton and South Coast Railway Company the carriages and trains of the former company were to be allowed to pass to and from the junction of London, Brighton and South Coast Railway with the London and Croydon Railway over the portion of London, Brighton and South Coast Railway, which should connect such junction with the South Eastern Railway without payment of any tolls or compensation to the London, Brighton and South Coast Railway in respect of such passage, and in consideration thereof all the traffic of the London, Brighton and South Coast Railway should be allowed to pass over the portion of the London and Brighton Railway, which should be transferred to the South Eastern Railway without payment of any tolls or compensation to the South Eastern Railway in respect of such passage. Two miles odd of the London, Brighton and South Coast Railway Company's portion of the line lay in the parish of Croydon. This exchange toll was regarded as rent earned in kind, and was treated exactly as if so many tickets were issued daily without money to the South Eastern Railway in return for so many received from them, the tickets so mutually transferred representing so much money earned, and such earnings were held to be subject to the same deductions as if they were received in money (*e*).

Payments by way of toll.

In calculating the gross profits of a railway company for the purposes of a rate, a payment necessarily made by the railway company by way of toll, or otherwise, must not form any part of the calculation of the profits which is to determine the rent which the hypothetical tenant would pay (*f*).

(*b*) 38 L. J., M. C. 93, *ante*, p. 851.

(*c*) 35 L. J., M. C. 229, see *ante*, p. 850.

(*d*) *Great Western Railway Company* v. *Badgworth*, 36 L. J., M. C. 33; L. R., 2 Q. B. 251.

(*e*) *Reg.* v. *London, Brighton and South Coast Railway Company*, 15 Q. B. 313.

(*f*) *Reg.* v. *Vestry and Churchwardens of St. Pancras*, 32 L. J., M. C. 146.

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Amount of guarantee.

A sum guaranteed to be paid by a railway company to the railway company rated in respect of their line, to make up the dividend of the latter company to a certain amount in case of deficiency, and paid accordingly, is not to be taken into account as part of the gross receipts of the railway company so receiving. Thus, where a company was worked at a loss in the rating parish, the amount of the guarantee money, as not being rent, or money paid in the nature of rent, but a payment arising from an independent contract of guarantie, was not allowed to be taken into account so as to make out a profitable occupation (*g*), for such sum was no part of the profits of the land.

Railway stations.

Stations within the parish.

The station in a parish must be treated as indirectly contributing to the profits of the line, and consequently rateable as lands and buildings whose value is to some extent enhanced by their capacity of being employed in connection with the line (*h*). The station is usually rated separately from the permanent way (*i*). And the rateable value is to be ascertained by calculating its value to the company over and after charging all the station expenses against the receipts.

Stations without the parish.

With respect to stations in other parishes than the subject of the rate, a sum is to be allowed in respect of the rental or rateable value of all such stations as have contributed to the earning of the receipts in such parish, and the amount of such rent must be treated as part of the general expenses of the line (*j*).

According to *Reg.* v. *Mile End Old Town* (*k*), the first step is to divide the rateable subject into two portions, the line or permanent way and its expenditure and receipts, and the stations, warehouses, &c., and their expenditure and receipts. Having valued the land, with the stations, buildings and warehouses thereon, the amount of rate so ascertained should be deducted from the sum of rateable value, and distributed to the districts in which the parts of this portion are situate. Then the next step is to apportion the residue of the rateable value among the districts in which the profit arises from transit on the line according to mileage.

The sessions ought to avail themselves of the latest informa-

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(*g*) *Newmarket Railway Company* v. *St. Andrew-the-Less, Cambridge*, 3 E. & B. 94. Per *Coleridge*, J., and *Erle*, J., Lord *Campbell*, C. J., dissenting.

(*h*) *Reg.* v. *Eastern Counties Railway Company*, 32 L. J., M. C. 174. Per *Blackburn*, J., in delivering judgment. See also *Reg.* v. *Mile End Old Town*, 10 Q. B. 208; 16 L. J., M. C. 184; *Reg.* v. *West Middlesex Waterworks*, 28 L. J., M. C. 135; 1 E. & E. 716.

(*i*) See *Reg.* v. *Grand Junction Railway Company*, 4 Q. B. 18; 13 L. J., M. C. 94; *Reg.* v. *Great Western Railway Company*, 15 Q. B. 1085; 21 L. J., M. C. 84; *Reg.* v. *Eastern Counties Railway Company*, 4 B. & S. 58; 32 L. J., M. C. 174; *Great Eastern Railway Company* v. *Churchwardens and Overseers of Haughley*, 35 L. J., M. C. 229.

(*j*) *Reg.* v. *Great Western Railway Company*, 6 Q. B. 179; 15 L. J., M. C. 80.

(*k*) 10 Q. B. 219.

tion, antecedent to the actual making of the rate, that is supplied to them, notwithstanding it may be subsequent to the latest published accounts of the company (*l*).

The per centage amount to be allowed for interest on capital and tenant's profits is to be calculated on the actual value of the stock at the time when the rate is made, and not on the original value or cost price of the stock (*m*).

Railway deductions.

A claim or interest on the sum expended in forming the company cannot be allowed, for these expenses might have been incurred and no railway made. They neither add to the value of the occupation, nor are any way necessary to the making it up (*n*). Any payment by way of income tax, if made in respect of the subject-matter of the rate and of the occupation of the tenant and paid by the tenant, as distinguished from the tax payable upon the net income of the tenant after paying the rent of the premises by which his profits are earned, should be allowed (*o*).

Per centage on value of rolling stock.

Claim for interest on sum expended in forming company disallowed.

Income-tax.

A deduction from the rateable value, in order to countervail the depreciation which takes place in the value of the permanent way, and to maintain it in a state to command the supposed rent which is the measure of the assessment, is allowable. In *Reg.* v. *Great Western Railway Company* (*p*), it was said, that such an expense, as distinct from mere annual repair, fell under the same principle, and was an unobjectionable head of deduction, when it should either be actually incurred or provided for. If the depreciation be certain and capable of an annual average, though not proper to be in fact repaired annually, it should be met by laying by a certain sum annually. And so, though the company have not set apart a fund, they would be entitled in respect of it, because they ought to, for when the time shall come for making the actual restoration, they will be estopped from claiming more than that annual deduction which they had before insisted on, exactly as a landlord could not claim to deduct the expense of restoration made by him of a house (*q*).

Deduction for depreciation of permanent way established.

And this deduction for renewal of permanent way and moveable stock beyond annual repairs was approved of in *Reg.* v. *Great Western Railway Company* (*r*).

In rating a railway, one of the deductions allowed from the gross earnings is the amount of a proportionate part of a fund for the renewal of depreciated stock when it would naturally be

Deduction in respect of a fund for the renewal of rolling-stock.

(*l*) *Reg.* v. *London, Brighton and South Coast Railway Company*, 15 Q. B. 367.

(*m*) *Reg.* v. *North Staffordshire Railway Company*, 30 L. J., M. C. 68; *Reg.* v. *Great Western Railway Company*, 6 Q. B. 179; 15 L. J., M. C. 80.

(*n*) 6 Q. B. 205.

(*o*) *Ibid.*; *Reg.* v. *Southampton Dock Company*, 14 Q. B. 587; 20 L. J., M. C. 155, *post*, p. 858.

(*p*) 6 Q. B. 179, 203.

(*q*) *Reg.* v. *London, Brighton and South Coast Railway Company*, 15 Q. B. 364.

(*r*) 15 Q. B. 379, 1085.

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worn out (*s*). In that case, in the items for locomotive expenses and carriage expenses, a full allowance was made for the annual repairs of the rolling-stock, taken upon an average of several years, and an item was also allowed as the proportionate part of a fund for the renewal of the stock worn out. And the court held that the arbitrator who allowed that item, and found as a fact that the hypothetical tenant would make that deduction an element in fixing the rent he would give, was not bound to come to any other conclusion, and was not bound to deal with the case on the assumption that the deductions were to be made by finding the difference in value of the stock at the beginning and the end of the year of tenancy (*t*). The same principle was acted upon with respect to the deductions allowable in the case of farm buildings with machinery, and in water and corn mills (*u*).

Railways.

Station furniture.

A deduction is to be allowed in respect of things moveable, being things necessary for carrying on the business of the company, such as office and station furniture, telegraph wires and electrifying machines, and moveable weighing machines (*x*).

Cranes, fixed engines and machinery.

With respect to things which, though capable of being removed, are yet so far attached as that it is intended that they shall remain permanently connected with the railway or the premises used with it, and remain permanent appendages to it, as essential to its working, and are so attached to the freehold as to become part of it, such as cranes, steam-engines, and other like ponderous machinery, no deduction should be allowed (*y*).

Terminal expenses.

In estimating the earnings in a parish, the terminal expenses are not to be deducted as terminal earnings of the stations alone, but are to be treated as part of the general earnings of the line. Where part of a line between the termini A. and B. ran through parish C., in which parish was a station, and the gross parochial earnings was 6,036*l.*, but the terminal charges, calculated upon the clearing house system, in respect of the traffic which earned such sum amounted to 2,829*l.*, it was held that the company were not entitled to deduct the latter sum from the amount of the parochial earnings, but that the amount of the terminal earnings and expenses was to be considered part of the general earnings and general expenses of the line, and to be treated in the same way as any other part of the gross receipts and out-

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(*s*) *Great Eastern Railway Company* v. *Haughley*, 35 L. J., M. C. 229; L. R., 1 Q. B. 166.

(*t*) *Ibid.*

(*u*) *Reg.* v. *Wells*, 36 L. J., M. C. 109; L. R., 2 Q. B. 542, *ante*, p. 846.

(*x*) *Reg.* v. *North Staffordshire Railway Company*, 30 L. J., M. C. 68.

(*y*) *Reg.* v. *North Eastern Railway Company*, 30 L. J., M. C. 68; *Rex* v. *Birmingham and Staffordshire Gas Company*, 6 A. & E. 634; 6 L. J., M. C. 92; *Reg.* v. *Lee* (*Inh.*), 35 L. J., M. C. 105; L. R., 1 Q. B. 241. See *Climie* v. *Wood*, 38 L. J., Ex. 223; L. R., 4 Ex. 328; *Longbottom* v. *Berry*, 39 L. J., Q. B. 37.

goings (*z*). The principle of rating in respect of tunnels and such like works on a railway or locks on a canal is similar. *Principles of Valuation for Rating.*

By the clearing house system the gross charge for conveyance from A. to B., two sums would be deducted in respect of the accommodation afforded at A. and B. After deducting those charges, the residue would be apportioned according to the distance traversed, but the terminals themselves would be divided between A. and B., on the ground that W. had not afforded any of the accommodation to which terminals apply.

The expense of maintaining a tunnel or an inclined plane or such like important special works on a railway, constructed for the benefit of the whole line, are not local expenses, but are to be deducted by distribution on the mileage principle over the whole line (*a*). Railway tunnels.

The deductions made from the gross earnings may be summed up thus :— Deductions summed up.

1. Maintenance of way.
2. Locomotive expenses. (This item is arrived at by taking the locomotive expenses on the whole line, and then giving to the parish the same proportion as the number of miles run by trains through the parish bear to the number of train miles run over the whole system.)
3. Carriage and waggon expenses. (This item is arrived at in a similar manner, the difference being that the number of carriages and waggons in each train must be taken into account.)
4. Miscellaneous expenses. (By taking gross amount applicable to the whole line, and then taking the proportion which the gross receipts in the parish bear to the gross receipts over the whole line.)

Income tax.
Tithe rent-charge.
Rental of stations in other parts of the line.
Rates and taxes.
Fund for renewal of way.
Fund for depreciation of stock.
Risks and casualties.
Interest and tenants' profits on capital employed (*b*).

In estimating the rateable value of a canal, the expense of repairing a tunnel is to be taken as like to the expense of repairing important special works constructed necessarily for the use of the whole of a canal, such as the annual expense of repairing the locks on the canal or an aqueduct carrying the canal across a valley which is distributable on the mileage Canals.

(*z*) *Reg.* v. *Eastern Counties Railway Company*, 32 L. J., M. C. 174; 4 B. & S. 58.

(*a*) *Reg.* v. *Great Western Railway Company*, 15 Q. B. 379, 1085; 21 L. J., M. C. 84; *Reg.* v. *The Company of Proprietors of the Coventry Canal*, 1 E. & E. 572; 28 L. J., M. C. 102.

(*b*) *Great Eastern Railway Company* v. *Haughley*, 35 L. J., M. C. 229; L. R., 1 Q. B. 166.

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principle over the whole canal (*c*), but the expense of repairing the banks of the canal is a local expense, and to be deducted from the earnings in the parish (*d*).

Expense of repairs.

Guarantee by a railway company to make up a deficiency.

A rent or sum of money paid by a railway company to a canal company under a guarantee in a lease to make up a deficiency in the earnings of the canal company, is not to be taken into account in determining the rateable value of the canal (*e*).

Docks.

With respect to the rateability of docks communicating with one another, forming one concern and constituting one source of profit, but extending into more parishes than one, and where a ship having once paid the dues might go into any of the docks, all the docks being virtually one dock, it was held, that inasmuch as it was impossible to apply the parochial principle of apportioning the actual receipts of the part in the parish to that parish, it was the proper course to apportion the receipts according to the area, according to the proportion which the area of the docks within that parish bore to the entire area of the docks (*f*).

Expense of steam-tug.

The expenses of a steam-tug for the purpose of towing vessels in and out of dock, as part of the floating capital used in carrying on the concern, were allowed in deduction from the gross receipts, as its earnings were allowed to increase them (*g*).

Expenses of direction, &c.

The expenses also of direction were allowed as a remuneration proper to a lessee of the docks (*g*); but where the Nunhead Cemetery and the Highgate Cemetery belonged to one company, and had one board of direction and offices in London, a proportionate part of the expense was not allowed to be deducted from rateable value of Nunhead (*h*).

Cranes, steam-engines and other like ponderous machines attached to the freehold are to be assessed according to their existing value as combined with the machinery (*i*).

Income tax.

Income tax, in respect of the profits of a supposed tenant of the docks, not being a tax in respect of the subject-matter rated or operating directly in diminution of the rent, is not an item to be considered as a deduction (*k*).

Mode of making deductions for rates and taxes.

In rating a dock the net rateable value of the dock is to be ascertained by taking the annual receipts, less the amount of the disbursements and several deductions, amongst which is an allowance for rates and taxes. The balance being struck, the amount of the rates and taxes upon the net rateable value were

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(*c*) *Reg.* v. *Company of Proprietors of the Coventry Canal*, 1 E. & E. 572; 28 L. J., M. C. 102.

(*d*) *Rex* v. *Oxford Canal Company*, 10 B. & C. 176.

(*e*) *Reg.* v. *Lapley Overseers, &c.*, 9 B. & S. 568. See as to railways, *Newmarket, &c. Railway Company* v. *St. Andrew-the-Less, Cambridge*, 3 E. & B. 94.

(*f*) *Reg.* v. *Dock Company of Kingston-upon-Hull*, 15 Q. B. 325.

(*g*) *Reg.* v. *Southampton Dock Company*, 14 Q. B. 587; 20 L. J., M. C. 155, see *ante*, p. 855.

(*h*) *Reg.* v. *St. Giles, Camberwell*, 14 Q. B. 571.

(*i*) *Ibid.*, 14 Q. B. 587; and see *ante*, p. 59.

(*k*) *Reg.* v. *Southampton Dock Company*, 14 Q. B. 611.

to be deducted, and the rates and taxes to be calculated on that value, and not merely on the balance of profits (*l*).

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The principle of rating a gas company may be best illustrated by the following case (*m*):—A gas company was rated to the poor in respect of property lying in five townships. It consisted of lands and buildings, with retorts and furnaces and pipes attached, used for the making and manufacturing of gas, of buildings used as storehouses, of buildings used as offices, and of land occupied by mains and pipes for conveying the gas to the company's customers. The first, second and third descriptions of property were in the rating township and another township, but the mains and pipes extended into the five townships. The mains and pipes were partly laid in land belonging to the company and partly in pursuance of the provisions of the company's act of parliament under the streets and highways of the town. Some of the mains were used to convey the gas from the works to the streets, where it was distributed, and the rest of the mains and pipes for distributing the gas through the streets. The former of these two sets of mains might, if expedient, be laid in other places. The township ascertained the net annual rateable value of the property in their township by the following process. The rateable value of the whole of the works lying in all the townships was first determined by taking from the company's printed accounts last previously published for the information of the shareholders the sum of the annual gross receipts for the sale of gas, and of the residuary products from the materials after the gas has been made, and for the hire of gas meters and fittings, and work done, and deducting therefrom the gross expenditure for the same year incurred in producing such receipts. The following deductions were made: first, a sum for tenants' profits and interest on capital; secondly, a sum on account of tenants' rates and taxes, and the annual average cost of the repairs and renewal and insurance of the buildings of the stations, and of plant as necessary to maintain them in a state to insure the above receipts; thirdly, a sum on account of the renewal of the mains; and the sum remaining was taken to be the true estimate of the net annual value of the works in the hands of the company. From this value was then deducted a sum on account of the net rateable value of the stations, works and building lying in the rating township alone, and as contributing indirectly to the profits rateable only to the poor within the township where they lie. The remainder after this deduction was distributed among the several townships into which the mains extended, by apportioning to each of them so much as represented the extent of the mains they contained. The amount thus apportioned was added to the rateable value

Gas company.

Gasworks.

(*l*) *Tyne Improvement Commissioners* v. *Churchwardens, &c. of Chirton*, 32 L. J., M. C. 192.

(*m*) *Reg.* v. *Sheffield United Gas Company*, 32 L. J., M. C. 169; 4 B. & S. 135.

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Gasworks.

of the stations and lands, and the total of these two sums was taken to be the net annual value of the works within the rating township. And the court said, "as to the mode in which the township has arrived at the value of the entire subject, it seems to us that if the proper allowance for expenses and for tenants' profits and interest on capital has been made, and the proper value has been put on the stations, works and buildings, &c., a proper mode has been adopted for obtaining the rateable value of the remaining property, for we think that what is left after these allowances is the rent which the hypothetical tenant—to adopt the phrase used in *The Queen* v. *The West Middlesex Waterworks Company* (*n*)—would give for the rest of the apparatus. . . . The principle on which the stations, works and buildings, &c. are to be valued, as laid down in *The Queen* v. *Mile End Old Town* (*o*) and *The Queen* v. *West Middlesex Waterworks Company* (*p*), is, that they are to be valued as fixed property deriving some additional value from their capacity of being used as part of the gasworks. But as to the mode in which the entire subject-matter is to be apportioned among the several townships we think the mode adopted is not correct. It is very true that the mode they propose of dividing according to the extent of the portion in each township has the great advantage of simplicity, and when applied to such a homogeneous subject as the present it probably brings out a result not far from the true one, but we cannot say it is the rule given by the Parochial Assessment Act. The subject-matter which the township has apportioned amongst the five townships consists of mains and pipes, part of which, according to *The Queen* v. *The West Middlesex Waterworks Company* (*q*), must be considered as directly and part as only indirectly contributing to the profits, yet the respondents have made no distinction between them. We think we must refer to the judgment in the case of *The Queen* v. *The West Middlesex Waterworks Company* (*r*), and require the parties to apply the rule as there laid down as well as they can."

Waterworks.

The principle on which a waterworks company is to be rated in respect of the plant, engine-houses, cottages, buildings, wharfs, mains, land, and premises in a parish where no direct profit is earned, but without the buildings in such parish the company could not convey the water raised from the river there to their mains and by their mains to their reservoir in another parish, from whence it was conveyed, by means of mains and service-pipes, to the parishes and places which they were authorized to serve, is that it is to be rated as for "mere land and buildings, with fixtures and machinery attached, and deriving

(*n*) 28 L. J., M. C. 135; 1 E. & E. 716.
(*o*) 10 Q. B. 210; 16 L. J., M. C. 184.
(*p*) 28 L. J., M. C. 135; 1 E. & E. 716.
(*q*) *Ibid.*
(*r*) 1 E. & E. 716; 28 L. J., M. C. 135.

some additional value from their capacity of being applied to such purposes as that of a water company." And such additional value is derived from an increase of demand beyond supply, according to the principle regulating exchangeable value and not by reference to receipts earned in another parish, beyond assuming that they are sufficient to pay for all outgoings including profits on capital (*s*).

Where an apparatus belonging to one occupier has several parts in several parishes, each parish must rate the part within it upon an estimate of the rent which that part would yield after proper deductions. An hypothetical tenant must be assumed and the terms of such a tenancy must be assumed upon the hypothesis that some necessary incidents are also assumed to be involved. First, each part of the apparatus is to continue in joint co-operation: no one tenant of an essential part being able to stop his part: secondly, that the title to the required land is permanent, so that there is no risk of being compelled to move fixed capital: thirdly, that there is land in the required quantity and capital to be invested therein and occupants ready to take and work parts yielding profits as tenants at rack-rent, and parts not yielding profit as contractors for remuneration; provided any greater profit can be obtained than is ordinary in such relations. Supposing then the apparatus to be apportioned to several tenants, according to the parts in several parishes, the tenants of the parts directly earning net profits in a parish would be rated by that parish for all the profits earned therein. But the tenants of the parts directly earning no profit would not be liable to be rated in respect of any rent in the ordinary sense—which is profit remaining after all the deductions have been taken from the receipts. But as these parts of the apparatus directly earning nothing, but indirectly conducing to such earnings elsewhere, are assumed to continue in operation, the company, to whose interest such continued operation is essential, must be assumed to pay adequate remuneration to a contractor for land and fixed capital vested therein, together with the labour and skill requisite for the effective continuance of such operation; and this contractor with the company would stand in the relation of occupying tenant to the parish, and the part within the parish would be the rateable subject, and the local rateable value would be such sum as would pay the rent of the land and the profit on fixed capital therein (*t*). So the spring which indirectly contributes to the ultimate profit by water rate was held rateable in the parish were it was situate (*u*).

The Chelsea Waterworks Company having drawn their water

(*s*) *Reg.* v. *West Middlesex Waterworks Company*, 28 L. J., M. C. 135; *The Mile End Old Town Case*, 10 Q. B. 210; 16 L. J., M. C. 184.

(*t*) *Reg.* v. *West Middlesex Waterworks Company*, 28 L. J., M. C. 135; *The Mile End Old Town Case*, 10 Q. B. 210; 16 L. J., M. C. 184.

(*u*) *R.* v. *New River Company*, 1 M. & S. 503.

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Waterworks.

from the Thames in the parish of K. into reservoirs and filter beds there, pumped the water from these through pipes laid down in K. and in P. to reservoirs in P., and thence in other pipes in P. to the parish of F., and thence into the company's district where it was distributed. The pumping-engines, pipes and reservoirs were all essential parts of the same apparatus. The rateable value of the portion of the apparatus in P., after the proper deductions had been ascertained by first taking the rateable value of the whole apparatus, then subdividing the amount among the several parishes according to the quantity of land occupied by the apparatus in each parish; but it was held that a wrong principle had been adopted, inasmuch as under it every square foot of land occupied was to be rated at the same rate, without regard to the situation or nature of the land, whether it was originally part of a barren heath or of a market garden, whether it was merely land under a highway, or upon which expensive buildings had been erected for the purpose of converting it into filtering beds or reservoirs (*x*).

Bridge tolls.

Where a bridge reaches from one parish into another, the tolls on passing which are paid on one side only, the proprietors are rateable in both parishes as occupiers of land in both (*y*). The approaches stand in the same relation to the bridge as stations and warehouses to railways, reservoirs and wharfs to canals, aqueducts and mains to water supplies, gasometers and mains to gas burners (*z*). And the principle for dividing the direct from the indirect sources of profit for rating the indirect sources, and for apportioning the residuary net rateable value among the districts in which the direct source was situate was explained in *Reg.* v. *Mile End Old Town* (*a*).

Lighthouse—passing tolls.

The owner of a lighthouse being rated as occupier in such an annual sum as, with the tolls, it was worth to be rented by a third person, it was held, where the owner did not reside in the parish where it stood, and the tolls paid by vessels passing it were not received in the parish or paid in respect of vessels coming within it, that as the tolls did not arise from the building, or from anything connected with it, the rate ought to be reduced to the value of the building if let by itself (*b*).

Cemetery company's general expenses.

The general expenses, such as direction and central office expenses of a company which had established two cemeteries, one at H. and the other at N., may not be deducted proportionally from the receipts at N., in estimating the rateable value of the cemetery at N., as such expenses were deemed to

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(*x*) *Reg.* v. *Overseers of Putney*, 3 E. & E. 108; 29 L. J., M. C. 236.

(*y*) *Reg.* v. *Hammersmith Bridge Company*, 15 Q. B. 369, 378; 18 L. J., M. C. 85.

(*z*) *R.* v. *Barnes*, 1 B. & Ad. 113.

(*a*) 10 Q. B. 208; 16 L. J., M. C. 184. See *R.* v. *Marquis of Salisbury*, 8 A. & E. 716.

(*b*) *R.* v. *Fowke*, 5 B. & C. 814; *R.* v. *Coke*, 5 B. & C. 797. See *Reg.* v. *Earl of Durham*, 28 L. J., M. C. 232.

be modes of expending the revenue when derived and forming no part of the means necessary to acquire them (*c*). *Principles of Valuation of Property for Rating.*

With respect to tithes, where land was subject to a corn-rent in lieu of tithes, directed by a local statute to be paid to the vicar "clear of all parochial taxes, rates, dues and assessments whatever," it was held, that the occupiers of the land charged with the payment of the corn-rent were not entitled to have the amount of the corn-rent deducted in estimating the net annual value of the property (*d*). Corn-rent in lieu of vicarial tithes.

The amount receivable in respect of the tithe commutation rent-charge is rateable under the Parochial Assessment Act, but as the language of the act is literally applicable in all its particulars only to corporeal hereditaments, it is necessary to proceed by analogy, which analogy must be as large and liberal as is necessary to effectuate substantial equality in the assessment, and at the same time compatible with the maintenance of the principle (*e*). The deductions, therefore, from the amount include the expenses of collecting the rent-charge, with law expenses, to enforce payment, and losses by ultimate non-payment. The poor rate also is a tenant's rate, and such rate and the general rate, under the Metropolis Local Management Act (*f*), and the lighting rate, under the same act and section, are to be deducted, but the sewer's rate, imposed by the same section of the same act, is not payable by the owner of the charge, and, therefore, not to be deducted by reason of the exemption clause in sect. 164. So the land-tax, not being a usual tenant's rate or tax, is not to be deducted. The tenant's property tax and the tenths may also be deducted, but as first fruits and tenths are calculated on the whole *annui proventus*, and not on the tithes only, the allowance in respect of the rate on the rent-charge must only be in the proportion which this bears to the whole *annui proventus*. The interest on a sum of money borrowed from Queen Anne's Bounty, for the purpose of rebuilding the parsonage-house, and charged on the rent-charge by way of mortgage, cannot be deducted; and it seems to be left as a question of fact for the sessions, whether a lessee, under the circumstances of each case of the rent-charge, would require any and what inducement to take in the shape of profit beyond the expenses of collecting, with law expenses, and sum to cover loss by bad debts (*g*).

Tithe commutation rent-charge.

Deductions from amount of rent-charge.

Poor's rate.

Lighting rate.

Sewer's rate.

Land tax.

Property tax.

Queen Anne's Bounty.

The rateable value of tithes, or a rent-charge in lieu of tithes, is not to be affected by the mode in which the incumbent disposes of them. Its value, therefore, is not to be reduced because he applies a portion to the stipends of his curates, whether the

Tithes.

No deduction for the employment and payment of curates.

(*c*) *Reg.* v. *St. Giles, Camberwell (Inh.)*, 19 L. J., M. C. 122; but see as such expenses of railway company, *ante*, p. 850.

(*d*) *Hackett* v. *Churchwardens, &c. of Long Bennington*, 33 L. J., M. C. 137.

(*e*) *Goodchild* v. *Hackney Trustees*, E. B. & E. 41; 27 L. J., M. C. 233.

(*f*) 18 & 19 Vict. c. 120, s. 161.

(*g*) *Goodchild* v. *The Trustees, &c. of Hackney*, E. B. & E. 2, 62; 27 L. J., M. C. 233. See also *Reg.* v. *Shaw*, 12 Q. B. 419; 17 L. J., M. C. 137.

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employment of such curates be necessary to the adequate discharge of his pastoral duties or not (*h*). The case of *The Queen* v. *Goodchild* (*i*) had been a decision to the contrary; but in *Reg.* v. *Inhabitants of Sherford* (*k*), the court held that that case had been overruled by the decision of *Jones* v. *Mersey Docks Company*, in the House of Lords (*l*). So, again, the rector of a parish, who, under the New Parishes Acts (*m*), has voluntarily charged the tithe rent-charge with the perpetual payment of an annual sum towards the stipend of the incumbent for the time being of a new ecclesiastical district, formed under the statutes on that behalf, partly of a part of the parish, is not entitled to have the sum so charged deducted in assessing the tithe rent-charge to the poor rate (*n*); and a lessee of a rent-charge charged under similar circumstances stands in the same position (*o*). This latter case, and *Reg.* v. *Inhabitants of Sherford* (*p*), were referred to and approved of by the court in *Reg.* v. *Rhymney Railway Company* (*q*). The case of *Williams* v. *Overseers of Llanglinwen* (*r*), and *The Overseers of Scriven-with-Tentergate* v. *Fawcett* (*s*), must also be taken to have fallen with *Reg.* v. *Goodchild* (*t*), and to be overruled by *Jones* v. *Mersey Dock Company* (*u*). In *Wheeler* v. *Overseers of Burnington* (*x*), *Reg.* v. *Goodchild* had previously been reflected upon, but was distinguished in that case, and the deduction not allowed on another ground.

Tithe commutation rent-charge.

Where a rector granted to the incumbent and his successors of a newly-formed parish by way of endowment, with the sanction of the ecclesiastical commissioners, a rent-charge upon the rectory, and the glebe lands and tithes, or tithe commutation rent-charge with a power of entry and distress; it was held, that the grantee was not assessable to the poor rates so long as the amount was paid without an actual entry, for the deed did not amount to an assignment of the tithes or tithe rent-charge, but was merely an annuity (*y*).

Mines.

Coal mines, which were the only class mentioned in the statute of Elizabeth (*ante*, p. 811), are rateable at such sum as they would let for and upon the amount of royalty on the coal pro-

(*h*) *Reg.* v. *Sherford* (*Inh.*), 36 L. J., M. C. 113; 38 L. J., M. C. 78.
(*i*) E. B. & E. 1; 27 L. J., M. C. 233.
(*k*) *Ubi supra.*
(*l*) 1 H. L. Ca. 443; 35 L. J., M. C. 1.
(*m*) 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; and 6 & 7 Vict. c. 37.
(*n*) *Lawrence*, app., *The Overseers of Tolleshunt Knights*, resp., 31 L. J., M. C. 149.
(*o*) *Reg.* v. *Groves*, 29 L. J., M. C. 179.
(*p*) *Ubi supra.*
(*q*) 38 L. J., M. C. 75—78; L. R., 4 Q. B. 276.
(*r*) 31 L. J., M. C. 54.
(*s*) 32 L. J., M. C. 161.
(*t*) E. B. & E. 2; 27 L. J., M. C. 233.
(*u*) *Ubi supra.*
(*x*) 31 L. J., M. C. 57.
(*y*) *Frend* v. *Tolleshunt Knights*, 28 L. J., M. C. 169; 1 E. & E. 753.

duced, and are rateable as soon as set to work and producing coals, though it may be long before the expense of planting the mine be recouped (*z*). *Of Mines.*

By 37 & 38 Vict. c. 54, s. 7, where a tin, lead or copper mine is occupied under a lease or leases granted without fine, on a reservation wholly or partly of dues or rent, the gross value of the mine shall be taken to be the annual amount of the whole of the dues payable in respect thereof during the year ending on the 31st day of December preceding the date at which the valuation list is made, in addition to the annual amount of any fixed rent reserved for the same, which may not be paid or satisfied by such dues. The rateable annual value of such mine shall be the same as the gross value thereof, except that where the person receiving the dues or rent is liable for repairs, insurance or other expenses necessary to maintain the mine in a state to command the annual amount of dues or rent; the average annual cost of the repairs, insurance and other expenses for which he is so liable shall be deducted from the gross value for the purpose of calculating the rateable value.

Tin, lead or copper mines; gross value, how ascertained.

Rateable annual value, what.

In the following cases, viz.:—

(1.) When any such mine is occupied under a lease granted wholly or partly on a fine; and

(2.) Where any such mine is occupied and worked by the owner; and

(3.) In the case of any other such mine which is not excepted from the provision of this act and to which the foregoing provisions of this section do not apply:

the gross and annual rateable value of the mine shall be taken to be the annual amount of the dues, or dues and rent at which the mine might be reasonably expected to let without fine on a lease of the ordinary duration, according to the usage of the country, if the tenant undertook to pay all tenants' rates and taxes, and tithe rent-charge, and also the repairs, insurance and other expenses necessary to maintain the mine in a state to command such annual amount of dues or dues and rent.

The purser, secretary and chief managing agent for the time being of any tin, lead or copper mine, or any of them, may, if the overseers or other rating authority think fit, be rated as the occupier thereof.

Purser, secretary, &c., to be rated as occupier.

In this section,

The term "mine," when a mine is occupied under a lease, includes the underground workings and the engines, machinery, workshops, tramways, and other plant, buildings (not being dwelling-houses), and works and surface of land occupied in connexion with and for the purposes of the mine, and situate within the boundaries of the land comprised in the lease or

What "mine" includes.

(*z*) *R.* v. *Attwood*, 6 B. & C. 277. See *R.* v. *Mast*, 6 T. R. 154.

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leases under which the dues or dues and rent are payable or reserved.

"Dues," what.

The term "dues" means dues, royalty or toll, either in money or partly in money and partly in kind, and the amount of dues which are reserved in kind means the value of such dues.

"Lease," what.

The term "lease" means lease or sett, or licence to work, or agreement for a lease or sett, or licence to work.

"Fine," what.

The term "fine" means fine, premium or foregifts, or other payment or consideration in the nature thereof.

By 37 & 38 Vict. c. 54, s. 8, where any poor or other local rate which at the commencement of this act any lessee, licensee or grantee of a mine is exempt from being rated to in respect of such mine becomes payable by him in respect of such mine during the continuance of his lease, grant or licence, or before the arrival of the period at which the amount of the rent, royalty or dues is liable to revision or readjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty or dues payable by him one-half of any such rate paid by him: provided, that he shall not deduct any sum exceeding what one-half of the rate in the pound of such poor or other local rate would amount to if calculated upon the rent, royalty or dues so payable by him.

Lessee, &c. may deduct one-half of rate from his rent, when.

Sect. 9. Where any occupier, lessee, licensee, grantee or other person is authorized by this act to deduct any rate or sum in respect of a rate from any rent, royalty or dues payable by him, then (1) Any payment so authorized to be deducted shall be a good discharge for such amount of rent, royalty or dues as is equal to the amount of such payment, and shall be allowed accordingly; (2) Any payment so authorized to be deducted may be recovered as an ordinary debt from the person to whom the rent, royalty or dues may be payable; (3) The person receiving the rent, royalty or dues shall have the same right of appeal and objection with reference to the rate, and to the valuation of the hereditament in respect of which the rate is payable, as he would have if he were the occupier of such hereditament.

Right of appeal to owner.

Artificial watercourse conveying by pipes water for the purpose of working a lead mine.

Before the above statute, where an artificial watercourse passed over a considerable extent of land conveying water in pipes, or partly in pipes and partly in the open, for the purpose of working an hydraulic pumping-engine in a mine, the value of the land covered by the watercourse was considered to be enhanced by reason of its neighbourhood to the mine apart from the mine; therefore, the rent which the mining company would pay for the use of the water is the proper measure of the rate (*z*); and so a portion of the surface land upon which pumping-engines, boilers and workshops had been built, and

(*z*) *The Talargoch Mining Company* v. *The Guardians of St. Asaph Union*, 37 L. J., M. C. 149; L. R., 3 Q. B. 478.

Of Rights of Sporting.

tramways made for conveying the ore to and from an iron mine was held to be rateable, apart from the mine, at the amount of a rent calculated with reference to the value of such surface land to the occupier of the mine (*a*).

A brick-field.

A brick-field may be assessed at the sum per acre which a tenant would be willing to pay for it on taking a lease with liberty to consume the soil and clay or brick earth (and without any liability to pay any royalty in respect of the number of bricks made), the royalty being treated as a portion of the rent (*b*).

Rights of sporting.

By 37 & 38 Vict. c. 54, s. 6, where any right of fowling or of shooting, or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting), is severed from the occupation of the land, and *is not let*, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list or otherwise, the fact and amount of such increase.

Where the right is not let.

Where the right is let.

(2) Where any right of sporting when severed from the occupation of the land *is let*, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

(3) Subject to the foregoing provisions of this section, the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

(4) For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right.

This section, therefore, nullifies the effect of the decisions in *The Overseers of Hilton* v. *Overseers of Bowes* (*c*), and *Reg.* v. *Inhabitants of Thurlstone* (*d*), to the effect that a right of shooting in gross severed from the land was not rateable, but leaves an occupier of land, who has let out the right of shooting over it, liable to be rated as he was decided to be by *Reg.* v. *Union of Battle* (*e*).

(*a*) *Guest* v. *The Overseers of East Dean*, 41 L. J., M. C. 129.
(*b*) *Reg.* v. *Westbrook*, 10 Q. B. 178; *Reg.* v. *Everist*, *ib*; *Daniel* v. *Gracie*, 6 Q. B. 145.
(*c*) 35 L. J., M. C. 137; L. R., 1 Q. B. 359.
(*d*) 28 L. J., M. C. 106; 1 E. & E. 502.
(*e*) 36 L. J., M. C. 1; L. R., 2 Q. B. 8; *Reg.* v. *Williams*, 23 L. T. 76.

Principles of Valuation for rating of Land used for Plantation or Wood or saleable Underwood.

Saleable underwoods.

Saleable underwoods were specified in 43 Eliz. c. 2, as rateable property, but by 37 & 38 Vict. c. 54, s. 14, so much of the first-mentioned statute is repealed as from the date at which the latter act comes into operation, with respect to the taxation of occupiers of land used for the growth of saleable underwood: provided that such repeal shall not affect anything duly done or suffered before the said date, or any right acquired or liability accrued before the said date, or any legal proceeding or remedy in respect of any such right or liability; and every such legal proceeding or remedy may be carried on and enforced in like manner as if this repeal had not been enacted.

By sect. 11, this act, for the purposes of enabling any hereditament to be included in, or omitted from, or valued for the purposes of a valuation list, or a supplemental or provisional valuation list, which will come into force after the 6th of April, 1875, is to come into operation on the passing thereof, but otherwise on the 6th April, 1875.

Land used for plantation or wood or saleable underwood.

The mode of estimating the value, gross and rateable, of land used for a plantation or wood, or for the growth of saleable underwood, is prescribed by that statute.

(*a*) If the land is used only for a plantation or a wood, the value shall be estimated as if the land instead of being a plantation or a wood were let and occupied in its natural and unimproved state.

(*b*) If the land is used for the growth of saleable underwood, the value shall be estimated as if the land were let for that purpose.

(*c*) If the land is used both for a plantation or a wood, and for the growth of saleable underwood, the value shall be estimated either as if the land were used only for a plantation or a wood, or as if the land were used only for the growth of the saleable underwood growing thereon, as the assessment committee may determine (*f*).

When occupier may deduct rate from his rent.

And where the rateable value of any land used for a plantation or a wood, or both for a plantation or wood, and for the growth of saleable underwood, is increased by reason of the same being estimated in accordance with this act, the occupier of that land, under any lease or agreement made before the commencement of this act, may, during the continuance of the lease or agreement, deduct from his rent any poor or other local rate, or any portion thereof, which is paid by him in respect of such increase of rateable value; and every assessment committee, on the application of such occupier, shall certify in the valuation list or otherwise the fact and amount of such increase (*g*).

The word saleable in the old act meant destined for sale,

(*f*) 37 & 38 Vict. c. 54, s. 4.
(*g*) *Ibid.* sect. 5.

and does not mean in a fit state for sale, referring to the time when they are cut (*h*).

Manner of making the Poor Rate.

The nature and quality of the wood are not to determine what constitutes saleable underwoods, but the mode of cultivation and management, as by being cut down for sale at regular and calculable periods. Thus, if regular crops of stems and shoots are produced, though at long intervals, as ten, fifteen or thirty years, and from wood deemed timber, either at common law or by local custom, such wood is rateable as underwood (*i*); and the occupier of underwoods was rateable at all times in respect of them, although they and the rate must be got at by distributing the profits over that number of years (*k*).

Saleable underwoods, what.

6. *Of the manner in which Poor's Rates must be made, allowed, and published.*

We have seen that the rate can be made only for the relief of the poor, and for necessary legal expenses relating to that relief. The power of making it is vested entirely in the churchwardens and overseers, or the major part of them, so that no concurrence of the inhabitants is requisite (*l*). Before the Parochial Assessment Act (6 & 7 Will. 4, c. 96), in making the rate the name of the occupier, and the description of the property in respect of which he votes, ought to have been correctly set forth, in order that the rights which he may acquire by payment of rates, such as that of the elective franchise, might not suffer. And before the 6 Geo. 4, c. 57, s. 2, indeed, it had been holden, that where the name of the precedent tenant had continued on the rate, and the actual occupier who succeeded him had paid, this was a rating sufficient to confer a settlement (*m*). But by the 6 & 7 Will. 4, c. 96, s. 2, every rate shall, in addition to any other particular required, contain an account of every particular set forth at the head of the respective columns in the form given in the schedule to that act. The orders of the Poor Law Board, now called the Local Government Board, now prescribe the form of the rate book. By the Union Assessment Act 1862 (25 & 26 Vict. c. 103), s. 28, no poor rate shall be of any force in any parish where a valuation list has been approved and delivered to the overseers, unless the hereditaments included in such rate be rated according to the annual rateable value as appearing in the valuation list, except where property has become subdivided and separately rateable, or when the poor rate is made by a vestry, trustees, &c., under some local act (sect. 29). A rate may be

Of the manner in which rates must be made.

Form of the rate.

(*h*) *R.* v. *Mirfield* (*Inh.*), 10 East, 223.
(*i*) *Lord Fitzhardinge* v. *Pritchett*, 36 L. J., M. C. 49; L. R., 2 Q. B. 135; *Reg.* v. *Narberth North*, 9 A. & E. 815.
(*k*) *R.* v. *Mirfield, ubi sup.*
(*l*) Per *Holt*, C. J., in *Tawney's case*, 2 Ld. Raym. 1013; and see *ante*, p. 812.
(*m*) *R.* v. *Hackmondwick*, Dougl. 564.

What the Rate should show on its Face.

made prospectively, but a standing rate is bad (*n*). The rate need not show on the face of it more than the purpose for which it is made, and, therefore, if made under a statute in pursuance of orders or precepts of certain authorities, the rate need not set out such order or precept, or trace the authority under which it is made from its source (*o*), but it must show the purpose for which it is made, or it is void (*p*).

Standing rate is bad.

Form of the rate.

The overseers of every parish, when they make a poor rate, are now required to set forth in the title of the rate the period for which the same is estimated; and if the same is payable by instalments, the amount of each instalment, and the date at which each instalment is payable (*q*).

Allowance.

The rate must be allowed by two justices; but that is only a ministerial act, testifying no approbation or sanction, and which they may be compelled by *mandamus* to perform (*r*); but before the rate is allowed by the justices, a declaration must be signed by the overseers that the rate is in conformity with the valuation list in the form given in the schedule to the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103, s. 28).

Where the justices signed their allowance upon the end of a page in the middle of the rate book, instead of at the end of the whole rate, and the allowance was in these words, "We do hereby consent to and allow the foregoing rate and assessment," this was held to be no allowance of that part of the rate which followed the signature (*s*). That was the case of a highway rate, but the fact of the mere signature being in the wrong place, if it had affected to authenticate the whole rate, would not have made the allowance bad (*t*).

A poor rate shall be deemed to be made on the day when it is allowed by the justices, and if the justices sever in their allowance, then on the day of the last allowance (*u*).

Evidence of the rate.

The production of the book purporting to contain a poor rate, with the allowance of the rate by the justices, shall, if the rate is made in the form prescribed by law, be *primâ facie* evidence of the due making and publication of such rate (*v*).

Publication of the rate.

By 17 Geo. 2, c. 3, s. 1, notice of the rate must be given by the parish officers in the church, on a Sunday after the allowance, or it will be void; and, therefore, where the publication was deferred till the third Sunday after allowance, this was holden to be a radical defect which nothing could cure (*x*); but

(*n*) *Durrant* v. *Boyes*, 6 T. R. 580; *R.* v. *Audley*, Salk. 556; see *ante*, p. 818.
(*o*) *Christie* v. *St. Luke's, Chelsea*, 8 E. & B. 992; 27 L. J., M. C. 153.
(*p*) *Reg.* v. *Eastern Counties Railway Company*, 5 E. & B. 974; 25 L. J., M. C. 49, *ante*, p. 802.
(*q*) 32 & 33 Vict. c. 41, s. 14.
(*r*) *R.* v. *Edwards*, 1 Bla. Rep. 637.
(*s*) *Re Justices of North Staffordshire*, 23 L. J., M. C. 17.
(*t*) *Ibid.*
(*u*) 32 & 33 Vict. c. 41, s. 17.
(*v*) *Ibid.* sect. 18.
(*x*) *R.* v. *Newcombe*, 4 T. R. 368.

Manner of making the Poor Rate.

since 7 Will. 4 & 1 Vict. c. 45, notice is to be affixed to the church doors of all the churches and chapels of the place, *i. e.*, the principal door of the church, &c., and the *de facto* church is sufficient (*y*). For such defect, therefore, it must be quashed on appeal: but notice that a rate would be collected forthwith is good (*z*).

Notice of allowance.

Under 17 Geo. 2, c. 3, notice of publication of every rate allowed by the justices is required to be given, but the statute does not require that the notice should state that the rate has been allowed (*a*). It must have been, in fact, allowed, or the publication would be useless (*b*).

Notice that a rate is about to be collected, *ex necessitate*, implies that it has been allowed (*c*).

Section 5.

Of the Trial of Appeals against Poor Rates, and the Judgment of the Sessions thereon—and herein of Amending Rates.

On the trial of an appeal against a poor's rate, the first proceeding is proof by the appellant of service of his notice or notices of appeal, where more than one are required, as, for instance, to the assessment committee as well as to the parish officers, unless (as we have seen it may be) it is admitted (*d*). The notice is then read, and any objections arising on the face of it are argued; when these are disposed of, the court will hear and dispose of any motion for adjournment which may be made; but the more ordinary course is to proceed to try the merits. If the ground of appeal be, that the appellant has no rateable property in the parish, the respondent should begin and support the assessment, by showing that the appellant had some property in respect of which he was liable to be rated (*e*); but if the objection is to the amount of the rate only the appellant begins (*f*).

Where the appellant raises other objections to the rate, as to its relative proportions of the assessments on himself and others, these being grounds of appeal, may, if stated in the notice, be well proved by the appellants before the respondents are heard in support of the rate (*g*).

(*y*) *Ormerod* v. *Chadwick*, 16 M. & W. 367.
(*z*) *Bennett* v. *Edwards*, 7 B. & C. 586.
(*a*) *Ibid.*; *Paynter* v. *The Queen*, 10 Q. B. 908.
(*b*) *Bennett* v. *Edwards*, per *Bayley*, J., 7 B. & C. 592.
(*c*) *Ibid.*
(*d*) As to service and waiver of notice, see *ante*, Sect. 3 of this Chapter, *ante*, p. 806.
(*e*) *R.* v. *Newbury* (*Inh.*), 4 T. R. 475.
(*f*) Archbold's Poor Law Practice, 9th ed. 252.
(*g*) 2 Nolan, 4th ed. 540.

Of the hearing of Appeals against a Poor Rate.

Before appealing against a rate made in conformity with the valuation list, notice of objection to the valuation list must now be given to the assessment committee, under the 27 & 28 Vict. c. 39, s. 1. And this preliminary step must be taken with respect to each several rate made; and, therefore, where an appeal had been made to the sessions against a rate after failure to obtain relief from the assessment committee, and on such appeal the rate is confirmed subject to a case for the Court of Queen's Bench, it is necessary before appealing against a second rate, made upon the same basis before the judgment of the Court of Queen's Bench on the former case stated has been given, to make a fresh application for relief to the assessment committee, although the list upon which the second rate is made contains precisely the same valuation of the appellant's property as that in the list which has been previously objected to (*g*).

Notice of objection to the valuation list must be given to the assessment committee.

Proof of the making, etc., of the rate.

When the respondents begin they open their case by putting in the rate from the custody of the parish officers, and proving its allowance and publication, unless these last are admitted either expressly or virtually, by not being included in the notice as grounds of appeal (*h*). The appellant should give notice to the parish officers to produce the rate, so as to enable them to give secondary evidence of its contents by proving them by oral testimony, or by an examined copy, and such notice need not be served till after the sessions commenced (*i*). To enable parties interested to object to a poor's rate on the ground of overrating, every person rated to the relief of the poor of the parish, in respect of which any rate shall be made, may at all seasonable times take copies thereof, or extracts therefrom, without paying anything for the same, any act to the contrary notwithstanding, under penalty of 5*l.* on a person having custody of the rate and refusing to suffer the taking of such copy or extract (*j*).

Valuation list to be produced on appeals.

By sect. 23 of the Union Assessment Committee Act, 1862 (*k*), every valuation list, or a copy (*l*), when approved by the committee, shall be delivered to the overseers of the parish to which the same relates, and shall be preserved at the like place and in the like custody, and be subject to the like resort thereto, and be delivered over from time to time in like manner as the books are, wherein rates and assessments for the relief of the poor for the same parish are entered, and shall be produced by the overseers before the justices upon application for the allowance of rates, and at the special or general or quarter sessions

(*g*) *Reg.* v. *Great Western Railway Company*, 38 L. J., M. C. 89; L. R., 4 Q. B. 323. See *ante*, p. 807.

(*h*) 2 Nolan, 4th ed. 540. As to evidence of the rate, see *ante*, p. 870.

(*i*) *Id.* 541, citing *R.* v. *St. Helen's in Abingdon*, 1 Bott, 266.

(*j*) 6 & 7 Will. 4, c. 96, s. 5, repealing 17 Geo. 2, c. 3, ss. 2, 3, *quoad* the payment to parish officers for inspecting and copying from a poor's rate.

(*k*) 25 & 26 Vict. c. 103.

(*l*) 31 & 32 Vict. c. 122, s. 31.

when any appeal is to be heard, and also at such times and places as the committee may from time to time direct.

Power to amend the Rate.

If the rate is good on its face, but a misapplication to unauthorized, as, for instance, to past purposes is intended, but that does not appear on the face of the rate, the objection must be made to the accounts after the misapplication, and not to the rate (*m*).

Judgment of the court on the appeal

No inhabitant or person, either rated or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part sustained or supported thereby, or executing or holding any office thereof or therein, shall, before any court, or person or persons whatsoever, be deemed and taken to be by reason thereof an incompetent witness for or against such district, &c., in any matter relating to such rates or cesses, any law, usage, statute or custom to the contrary notwithstanding (*n*).

The trial of an appeal against a rate proceeds in other respects in the course pointed out in Chap. I, Part III., for the general hearing of appeals. But the decision of the court of quarter sessions, on an appeal against a poor rate, may differ from that required in every other case; as they are not bound either to dismiss the appeal or quash the rate, but are required to amend it where they see just cause, or to give relief in any manner which they think necessary for that object. But if they are of opinion that it is necessary for the purpose of giving relief to the appellant that it should be wholly quashed, they may quash it (*o*).

Order to make a new rate upon quashing of the rate made.

An order of quarter sessions made on appeal against a poor rate to quash the rate need not go on to direct the overseers to make a new rate under 17 Geo. 3, c. 38, s. 6. The sessions may well do that in another order (*p*). They were indeed allowed to amend in some respects under 43 Eliz. and 17 Geo. 2; as in cases of mere obvious errors of form only, or by reducing the rate of the appellant, where he was individually overcharged (*q*).

Amending the rate.

Where on appeal an assessment of a rate is reduced, no order of sessions is necessary to enable the overseers to refund to the appellant any sums paid by him in respect of the rate in excess of the sum at which he was properly assessable, under 41 Geo. 3, c. 23, s. 1 (*r*). But they had no power to amend by inserting the names of any persons improperly omitted, or extending

(*m*) *R.* v. *Sillifant*, 4 A. & E. 355; *R.* v. *Mayor of Gloucester*, 5 T. R. 346. See as to appeals against overseers' accounts, *post*, Chap. VII, Sect. 2.

(*n*) 54 Geo. 3, c. 170, s. 9. See *R.* v. *Proser*, 4 T. R. 17, decided before this act, and *Meredith* v. *Griffin*, 6 Pri. 146.

(*o*) 41 Geo. 3, c. 23, s. 1, but nevertheless the sum rated is to be paid, and such payment to be deemed on account of the next rate.

(*p*) *Reg.* v. *Justices of Hampshire*, 33 L. J., M. C. 104.

(*q*) *R.* v. *Cheshunt*, 2 T. R. 623.

(*r*) *Reg.* v. *Vacher*, 7 E. & B. 155; 26 L. J., M. C. 199.

Hearing of Appeals against Poor Rates.

the rating of persons named, for this obvious reason, that if the justices could so amend, they might affect the rights of parties who were strangers to the appeal, and had not had an opportunity of being heard. The enactment (*s*), therefore, which

Of amending the rate.

enables the court to amend, by altering the ratings of third persons, requires that notice should be given to all persons interested in the event, and gives them the opportunity of appearing and being heard at the trial of the appeal. If such notices have been given, the court may now, therefore, in their discretion, amend the rate as to the rating of such parties, as well as to that of the appellant; or they may quash it.

Whether, therefore, the bench shall amend or quash a rate, is a question for their discretion; in general, where the errors affect only the individual ratings, they will amend (*t*); but where they affect the general principle or proportion of the rate, as if a given description of property existing within the district, &c. and producing profit, is not rated, *e. g.*, a tract of land (*u*), or ships belonging to various inhabitants (*x*), &c., they ought to quash; for the burden of proving the extent to which each party interested should be rated is not to be cast on the appellant, as it might entail on him a much greater difficulty than in cases of single omission; and the session has no power to make a new rate in the room of that which is the subject of appeal.

Costs of assessment committee on appeal.

By 27 & 28 Vict. c. 39, s. 3, "the costs which the committee may incur in consequence of becoming respondents to such appeal or of having received notice thereof shall, if not recovered from the appellants, as well as any costs the committee may be ordered to pay to the appellants, be paid by the guardians and charged to the common fund of the union, unless the court before whom such appeal is heard shall direct that such costs or any part thereof shall be charged to the parish the rate of which is appealed against."

Power to order a valuation of a parish upon hearing an appeal.

On an appeal by overseers against a valuation list, power is given to order a survey or valuation of the parish appealed against. By sect. 33 of the Union Assessment Committee Act, 1862 (*y*), "it shall be lawful for the court of quarter sessions upon any such appeal, instead of hearing the said appeal to adjourn the same, and to order, upon the application of the appellant or respondent in such appeal, a survey or valuation of any of the parishes in respect of which such appeal shall be made, and to fix the next or some subsequent sessions for receiving such survey or valuation and for hearing and determining such appeal; and such court shall also thereupon ap-

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(*s*) 41 Geo. 3, c. 23, s. 6.

(*t*) *R.* v. *Ambleside*, 16 East, 380, where the objection was applicable to one person only.

(*u*) *R.* v. *Aberavon*, 5 East, 452.

(*x*) *R.* v. *Hull Dock Company*, 3 B. & C. 516.

(*y*) 25 & 26 Vict. c. 103.

point a proper person to make such survey or valuation, and the person so appointed shall have power, with or without assistants, to enter upon and survey, measure and value all the hereditaments liable to be assessed to the rates for the relief of the poor within the parish or parishes mentioned in such order; and such survey and valuation shall be reported to the quarter sessions on adjournment fixed as aforesaid for receiving the same, and the court then and there assembled shall hear and determine the said appeal in the manner hereinbefore set forth."

Costs of Appeals against Poor Rates.

Costs of appeals against a valuation list are to include the cost of a survey and valuation, if ordered, for by the 34th section of the Union Assessment Committee Act, 1862 (*z*), it is enacted, "that the charges and expenses of any such survey (*i.e.*, the survey mentioned in sect. 33, *ante*, p. 874) and valuation so ordered shall be deemed costs in such appeal, and abide the event thereof, and the court before which any such appeal is heard and determined may order the costs in and about the appeal to be paid by either the appellant or the respondent party, as they in their discretion may think fit; but where any appeal is made on the ground that the rateable hereditaments of any parish comprised in the valuation list of such parish are valued beyond the annual rateable value thereof, if the court on such appeal determine in favour of the appellants, such court shall ascertain the costs and charges incurred by such appellants in and about such appeal, and shall order the board of guardians of the union in which such parish is situate to pay the same to the appellants out of the money raised for the common fund for the several parishes in such union."

Costs of valuation if ordered by the court.

An order for the payment of the costs of an appeal against a poor rate, under 17 Geo. 2, c. 38, s. 4, is valid, though it directs the costs to be paid directly to the appellants, notwithstanding 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27 (*a*).

Where appeals are brought at the same time against the poor rates of several parishes which may appear to involve some common principle, it shall be lawful for the overseers or other authorities therein, with the consent of the respective vestries of such parishes, to enter into an agreement, to be approved of by the Poor Law Commissioners, mutually to bear the costs which may be properly incurred in and about the trial of such appeals on the part of the several respondents as well as the costs of the appellants, if any, which may be awarded against the respondents, in such proportions as shall be fixed and determined with reference to the amount of interest of the several parishes in the question, or otherwise as shall appear just; and the said agreement shall continue binding on the

Combination of parishes to bear costs of appeals.

(*z*) 25 & 26 Vict. c. 103.
(*a*) *Reg.* v. *Huntley*, 3 E. & B. 172; 23 L. J., M. C. 106.

Costs of Appeals against Poor Rates.

several parishes and their respective overseers in succession until the several appeals shall be finally determined (*b*).

Combination of guardians of unions to bear costs of appeals.

Where an appeal is brought against the poor rate of a parish in a union, and may appear to involve a principle in which some neighbouring parish has a common interest, it shall be lawful for the guardians of the unions comprising such parishes to enter into an agreement mutually to bear the costs which may be properly incurred in and about the trial of such appeals on the part of the several respondents as well as the costs of the appellants, if any, which may be awarded against the respondents, in such proportions as shall be fixed and determined with reference to the amount of interest of the several unions in the question or otherwise, as shall appear just; and the said agreement shall continue binding upon the several boards of guardians and their respective successors in succession until the several appeals shall have been finally determined (*c*).

(*b*) 11 & 12 Vict. c. 91, s. 11.
(*c*) 31 & 32 Vict. c. 122, s. 29.

CHAPTER V.

OF APPEALS AGAINST ORDERS OF REMOVAL.

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Section 1.

OF THE ORDER OF REMOVAL.

Power to remove paupers, how given.

The power of removing paupers was given by 13 & 14 Car. 2, c. 12, which enacts, by sect. 1, "That it shall be lawful, upon complaint made by the churchwardens or overseers of the poor of any parish to any justice of the peace, within forty days after any such person coming (*i. e.* a poor person coming from one parish to another) to settle in any tenement under the yearly value of 10*l.*, for any two justices of the peace, whereof one is of the quorum of the division where any person or persons that are [likely to be] chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person to such parish where he was last legally settled, either as a native householder, sojourner, apprentice or servant, for the space of forty days at the least, unless he shall give sufficient security for the discharge of the parish, to be allowed by the said justices;" subject to an appeal by any parties thinking themselves aggrieved, to the next quarter sessions for the

Of the Order of Removal of Poor Persons.

county (*a*). The complaint need not be in writing (*b*), nor on oath (*c*), but must be by a majority of churchwardens and overseers (*d*); but the removal of paupers relieved in unions formed under the Poor Law Amendment Act, 1834, and settled in any parish situated in another union, or subject to a board of guardians, may be obtained by the guardians of the union to which such pauper shall be chargeable, and the order may be addressed to the guardians of the union or parish, or the overseers of the parish, as the case may require, in which such pauper shall be settled. And the guardians of such last-mentioned union or parish shall receive such pauper (*e*). And again, by 30 & 31 Vict. c. 106, s. 24, when an order of removal is obtained by the guardians of any union not formed under the Poor Law Amendment Act, 1834, or by the guardians or overseers of any parish not included in any union so formed in respect of a pauper alleged to be settled in some parish included in a union so formed, such order shall be addressed to the guardians of such union, and shall be dealt with in all respects as provided by the Union Chargeability Act, 1865.

Order, how obtained.

By whom.

Where pauper settled in parish in a union.

This latter enactment appears to supplement and extend the prior statute of 28 & 29 Vict. c. 79, perhaps in consequence of the decision in *Reg.* v. *Northwich Union* (*f*), which was to the effect that the power of a parish not within a union formed under 4 & 5 Will. 4, c. 76, to obtain an order of removal, was not affected by the 28 & 29 Vict. c. 79. And by 30 & 31 Vict. c. 106, s. 26, when an order of removal is made upon the guardians of any union, its execution may be suspended in like manner as in the case of orders of removal heretofore made in parishes, and with the like requirements, liabilities and consequences.

Where any poor person shall have acquired an exemption from removal in any parish or union, and the parish wherein that exemption shall have been wholly or partly acquired shall have been or shall be added to or separated from a union, such poor person shall continue to have the same exemption from removal as he would have been entitled to if no such addition or separation had taken place (*g*).

Persons must be actually chargeable.

This act has been since altered by extending the power of removal to any period whatever, unless forty days' notice in writing of the party's residence has been given to the parish officers (*h*); and by limiting the same powers to parties *actually*

(*a*) As to the present jurisdiction over appeals from parishes in boroughs not being counties of themselves, and having separate quarter sessions, see *ante*, p. 18.

(*b*) *Reg.* v. *Bedingham*, 13 L. J., M. C. 75.

(*c*) *R.* v. *Standish*, Burr. S. C. 150.

(*d*) *Reg.* v. *Justices of Bucks*, 3 Q. B. 800; 12 L. J., M. C. 29; *Reg* v. *Justices of Sussex*, 1 New Sess. Ca. 438.

(*e*) 28 & 29 Vict. c. 79, s. 2.

(*f*) 36 L. J., M. C. 57; L. R., 2 Q. B. 383.

(*g*) 31 & 32 Vict. c. 122, s. 34.

(*h*) 3 & 4 Will. & M. c. 11, s. 10.

chargeable (*i*): for instance, to persons obtaining relief (*k*), and from one of the parish officers (*l*). The only persons who can now be removed to their places of settlement, without being actually chargeable in fact, are persons convicted of felony (*m*) and their families, or as rogues and vagabonds, or as idle and disorderly under the Vagrant Act (*n*), or who appear to two justices of the division where they reside, upon oath of one witness, to be of evil fame or reputed thieves, not being able to give a satisfactory account of their way of living, and are by 35 Geo. 3, c. 101, s. 5, to be "deemed actually chargeable" within that act. Again, husbands or fathers, whose wives or children under sixteen years old, not being blind or deaf and dumb, or whose wives, or children, bastard or legitimate, receive relief, and widows on account of whose children under the age of sixteen relief is given, seem removable on that account by the effect of the Poor Law Amendment Act 1834 (*o*); but relief to a child of greater age, though unemancipated, is not relief to the parent (*p*).

Of Persons removable as actually chargeable.

Grounds of chargeability.

By 9 & 10 Vict. c. 66, s. 4, "no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability."

Chargeability by reason of sickness.

As the statute does not require that the sickness or accident should in fact produce permanent disability, but merely that the justices granting the warrant should state that they are satisfied that it will do so, it is not a ground of appeal to the quarter sessions that the sickness or accident will not produce such an effect (*q*). So, again, it is only necessary to satisfy the justices at the time of granting the warrant that it will have that effect, and it does not affect the validity of the warrant that at a subsequent time the sickness should appear to them to be curable (*r*). *Lunacy* is sickness, and may produce permanent disability within the meaning of this section (*s*). The section does not apply to pregnancy *per se*, and, therefore, the woman is removable, and the warrant does not require a state-

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(*i*) 35 Geo. 3, c. 101, s. 1.
(*k*) *R.* v. *Kingswood*, Burr. S. C. 392.
(*l*) *Ibid.*, and *Great Bedwin* v. *Wilcot*, *id.* 163.
(*m*) 35 Geo. 3, c. 101, s. 5.
(*n*) 5 Geo. 4, c. 83, s. 20; and see 35 Geo. 3, c. 101, s. 5.
(*o*) 4 & 5 Will. 4, c. 76, ss. 56, 57.
(*p*) *Reg.* v. *Guardians, &c. of St. Mary, Islington*, 31 L. J., M. C. 233; 3 B. & S. 46.
(*q*) *Reg.* v. *St. Mary and St. Andrew, Whittlesey*, 32 L. J., M. C. 78; 3 B. & S. 432; and *Reg.* v. *Hardwick*, 12 Q. B. 168; 18 L. J., M. C. 177, per *Patteson*, J.
(*r*) *Reg.* v. *Guardians of Township of Manchester*, 26 L. J., M. C. 1.
(*s*) *Ibid.*

Of Persons chargeable by reason of Sickness or Accident.

ment by the justices to the effect mentioned in the section (*t*); but incurable blindness is sickness within the section, and a warrant for the removal of a pauper suffering from such blindness is bad for not containing a statement by the justices granting it as required by the section (*u*). But an order appealed against on the ground of such omission may, perhaps, be amended under the 11 & 12 Vict. c. 31, s. 6, by the quarter sessions, if it can be shown to the court that sufficient grounds were in proof before the magistrates making the order to have authorized their saying that they were satisfied that the sickness would have the requisite effect (*x*).

This section applies only to the person removed, and relates to his or her sickness or accident, and not to the sickness or accident of any other person, though such latter sickness may be the cause of the removal, as, for instance, an order for the removal of the wife and children of a pauper, chargeable in consequence of the husband's being compelled by sickness to go into a hospital in another parish, need not contain the statement required by the above section as to his illness (*y*). The order need not negative the relief being made necessary by sickness (*z*).

Of women of child with a bastard.

Unmarried women, being with child, are no longer removable on that ground, as they were before the 4 & 5 Will. 4, c. 76, s. 71, inasmuch, as up to that time the bastard on its birth would gain a settlement in the place of its birth; but since that act the child of any single woman, and these words include the case of a widow (*a*), or married woman, who in her husband's lifetime is pregnant under such circumstances of his absence, as would make the child when born, by law, a bastard; *e. g.* where the husband is undergoing a sentence of penal servitude or imprisonment (*b*), is not deemed to be settled in the place of its birth, but, on the contrary, in that of its mother's settlement (*c*).

When persons may not be separated.

Some relationships prevent actual separation of parties on removals taking place under the poor laws. Thus, children under seven years old must be sent with their mothers for nurture (*d*), and having a settlement in a different parish from the mother cannot be removed from the mother, though with her consent (*e*); nor can a wife be separated from her husband though he be not a native of England or Wales, and has no

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(*t*) *Reg.* v. *Overseers, &c. of Huddersfield*, 26 L. J., M. C. 169.
(*u*) *Reg.* v. *Bucknell (Inh.)*, 3 E. & B. 587; 23 L. J., M. C. 129.
(*x*) *Ibid.*, 3 E. & B. 594, per Lord *Campbell*, C. J.
(*y*) *Reg.* v. *St. George's, Middlesex*, 31 L. J., M. C. 85; 2 B. & S. 317.
(*z*) *Reg.* v. *Priors Hardwicke*, 12 Q. B. 168.
(*a*) *Reg.* v. *Wymondham*, 2 Q. B. 54.
(*b*) *Reg.* v. *Collingwood*, 12 Q. B. 681; 17 L. J., M. C. 168; and see *ante*, p. 736.
(*c*) 4 & 5 Will. 4, c. 76, s. 71; see *R.* v. *Tibbenham*, 9 East, 388.
(*d*) *Wangford* v. *Brandon*, Carthew, 449; 2 Salk. 482.
(*e*) *Reg.* v. *Overseers of Birmingham*, 13 L. J., M. C. 1.

Of Persons not separable.

settlement there, but she must be removed with him (*f*); nor a servant from his master, except on complaint of the latter (*g*); but a married woman may be removed to her own or her husband's settlement, unless it is proved as a fact by express evidence that she was living in the same parish with her husband, or that she has been sent to a parish where he is not resident; for the court will not presume that the husband was resident in the removing parish, or that he was not resident in that to which the removal was made (*h*).

Removal to Scotland, Ireland, the Channel Islands, &c.

The 11 Geo. 4 & 1 Will. 4, c. 5, ss. 1, 2; 3 & 4 Will. 4, c. 40; 7 Will. 4 & 1 Vict. c. 10; 3 & 4 Vict. c. 27, and 7 & 8 Vict. c. 42, are repealed; and the statute under which the removal of Irish paupers is now regulated is the 8 & 9 Vict. c. 117, as amended by the 10 & 11 Vict. c. 33; 24 & 25 Vict. c. 76; and 26 & 27 Vict. c. 89. And under these acts it has been held, that the wife and unemancipated children of an Irishman, all born in Ireland, becoming chargeable to an English parish by reason of the desertion of the husband, cannot, in his absence, or without a summons having issued to him, be removed to the Irish settlement of the wife, being different from that of her husband, under the 8 & 9 Vict. c. 109, s. 2. The removal must be to the husband's place of settlement, as members of his family, and with him (*i*). So, unemancipated children born in a parish in England of Irish parents, who have no settlement in England, the mother being dead, and the father having removed to another parish, and then deserted them, are removable, in the absence of the father, or of a summons to him, to the parish of their birth, and not to Ireland under the statute (*k*). Where a woman has a settlement in Ireland, and marries an Irishman, and is deserted by her husband in England, who has no settlement, the maiden settlement of the wife is thereby revived, and she may be removed thither (*l*), and the children, if any, of the marriage would in such a case be removable with the wife to her settlement (*m*). And so, the unemancipated child of Irish parents, who was born in a parish in England, and subsequently became chargeable to a parish other than the parish in which her parents resided, is removable to the parish of her

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(*f*) *Poor Law Commissioners for Ireland* v. *Select Committee of Liverpool*, 39 L. J., M. C. 25; L. R., 5 Q. B. 79; *R.* v. *Leeds*, 4 B. & A. 498; *R.* v. *Carleton*, Burr. S. C. 813.

(*g*) *Farringdon* v. *Witty*, 2 Salk. 527.

(*h*) *St. Michael's, Bath* v. *Nunney*, Stra. 544; *R.* v. *Iron Acton*, Burr. S. C. 153; *R.* v. *Stockton*, 5 B. & Ad. 546. See *post*, "Settlement by Marriage."

(*i*) *Poor Law Commissioners for Ireland* v. *The Select Vestry of Liverpool*, 39 L. J., M. C. 25; L. R., 5 Q. B. 79, *supra*.

(*k*) 8 & 9 Vict. c. 117. *Reg.* v. *All Saints, Derby*, 14 Q. B. 207; 19 L. J., M. C. 14; see also *R.* v. *Great Claxton*, 3 B. & A. 410.

(*l*) *R.* v. *Cottingham*, 7 B. & C. 615; *Reg.* v. *St. Marylebone*, 16 Q. B. 352; 20 L. J., M. C. 61.

(*m*) *Reg.* v. *Much Hoole*, 21 L. J., M. C. 1.

Removal of Irish, &c. Paupers.

birth (*n*). So, before this statute, it had been held that the wife and unemancipated children of a Scotchman, who had not deserted his wife, but was living with her, could not, even with his consent, be removed to her maiden settlement, but that all were removable to the settlement of the husband, with him, in Scotland (*o*).

To whom order to be directed.

An order of removal directed to the overseers of a parish, which *quâ* parish has no overseers or poor rate, is bad (*p*). And if the removal be to a township maintaining its own poor, with its own overseers, those overseers should be mentioned in the order; but if they are not, the removing parish may, by serving the order, estop themselves from taking the objection on appeal (*q*). Thus, where the parish of L. had no parish officers of its own, but contained several hamlets, each of which supported its own poor and appointed its own overseers and churchwardens, an order of removal directed to the churchwardens and overseers of the parish of L. was delivered with the pauper to the overseers of one of the hamlets called T. The overseers of the hamlet gave notice of appeal, and the sessions were held bound to hear the appeal, for the service of the order of removal on them precluded objection to the appeal or notice, on the ground of the appellant's not being named in the order (*r*).

Examination of a pauper.

Before an order of removal is made, the pauper ought to be summoned and examined as to his settlement; but if it happen that by age, illness, or infirmity, he cannot attend at the meeting of two justices, his examination may be taken by one justice, who may report it to another acting in the same division, and

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(*n*) *Reg.* v. *St. Giles*, 21 L. J., M. C. 26; *Reg.* v. *Newchurch* (*Inh.*), 32 L. J., M. C. 19.

(*o*) *Reg.* v. *Leeds*, 5 Q. B. 916; 13 L. J., M. C. 109.

(*p*) *R.* v. *Cartmel*, 2 A. & E. 562. See *R.* v. *Oldbury*, 4 A. & E. 167; 5 N. & M. 547.

(*q*) *Reg.* v. *Justices of Westmoreland*, 12 L. J., M. C. 113.

(*r*) *R.* v. *Justices of Carmarthenshire*, 4 B. & Ad. 563. The parish of Bishop's Wearmouth has no overseers of its own; each of the seven townships in it, including one of the same name as the parish, appointing separate overseers. Another township was named Bishop's Wearmouth Panns. A removal was made to the township of B. W. P. by an order directed (mistakenly) to the churchwardens and overseers of the *parish* of B. W. The overseers of B. W. Panns admitted the pauper to be settled in that township, but refused to receive him under the order as directed, except on some terms which were refused. Whereupon the removing officer took the pauper and the order to the churchwarden of the *parish* of B. W., who received the pauper into the workhouse of the *township* of B. W. That township was held entitled to appeal, as "parties aggrieved" by the order, though not mentioned in it; for as the parish to which it was directed was similarly named, the township might reasonably apprehend that if they did not appeal, the order would estop them from showing on a future occasion that the pauper was not settled there; *R.* v. *Bishop's Wearmouth*, 5 B. & Ad. 942, and *R.* v. *Kirkby Stephen*, 2 Bott, 675, was relied on by the court. *R.* v. *Bingley*, 4 B. & Ad. 567, n.; and see *R.* v. *Justices of Denbighshire*, 1 B. & Ad. 616.

Of the Order of Removal.

both together may make the order (*s*). But it is not essential to the validity of the order that the pauper should be examined at all; it may be made on the evidence of others (*t*).

Upon appeal, large powers of amendment are conferred by 11 & 12 Vict. c. 31, s. 6, and 12 & 13 Vict. c. 45, s. 7 (*u*).

The following is the form of an order of removal:—

County of Hereford } To the churchwardens and overseers of the poor of
to wit. } the parish of P. G., in the said county of Hereford, and to the churchwardens and overseers of the poor of the parish of A. A., in the same county, and to each of them (*x*).

Upon the complaint of the churchwardens and overseers of the poor of the parish of P. G. aforesaid (*y*), unto us whose names are hereunto set and seals affixed, being two of her Majesty's justices of the peace in and for the said county of Hereford, one of us being of the quorum (*z*), that A. B., M. his wife, H. B. their son, aged seven years, E. B. their daughter, aged five years, and C. B. their daughter, aged three years (*a*), have come to inhabit in the said parish of P. G., not having gained a last legal settle-

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(*s*) 49 Geo. 3, c. 124, s. 4; and see now 11 & 12 Vict. c. 31, s. 3, *post*, p. 890.

(*t*) *R.* v. *Bagworth*, Cald. 179; *R.* v. *Everdon*, 9 East, 101.

(*u*) See *ante*, pp. 687, 688, *post*, p. 966.

(*x*) It has been holden that the direction of an order of removal to "the churchwardens and overseers of the poor of the *parish, township, or division* of Ulverstone," is good; *R.* v. *Ulverstone*, 7 T. R. 565.

(*y*) This statement of complaint made by the parish officers is necessary: for the magistrates have no power to remove on the complaint of any other; per *Holt*, C. J., *Weston Rivers* v. *St. Peters*, 2 Salk. 492, and should be by the proper parties, and a complaint by overseers, without mentioning churchwardens, is sufficient; *Reg.* v. *Watford*, 9 Q. B. 626; 16 L. J., M. C. 1. If the complaint is stated to be by the guardians and overseers, and either of them have no authority, their names may be rejected as surplusage; *Reg.* v. *Goodall*, 6 Jur. 86. The complaint itself, however, need not be in writing; *Reg.* v. *Bedingham*, 5 Q. B. 653; 13 L. J., M. C. 75.

(*z*) The authority of the magistrates should be thus expressly shown, as it cannot be supplied by implication; *Reg.* v. *Stockton*, 7 Q. B. 520; but see *R.* v. *Chilverscoton*, 8 T. R. 178; *Reg.* v. *St. Paul's, Covent Garden*, 7 Q. B. 537; *Reg.* v. *Casterton*, 1 New Sess. C. 40; 14 L. J., M. C. 3; *Reg.* v. *Newton Ferrers*, 9 Q. B. 32; *Reg.* v. *Halifax*, 12 Q. B. 111; 17 L. J., M. C. 15; *Anon.*, Salk. 473; *Walton* v. *Chesterfield*, 5 Mod. 322; for in inferior courts, and proceedings by magistrates, the maxim *omnia præsumuntur rite esse acta* does not apply; *R.* v. *All Saints, Southampton* (*Inh.*), 7 B. & C. 785. See *R.* v. *Long*, 1 M. & R. 139; *R.* v. *Hulcot*, 6 T. R. 586; but by 26 Geo. 2, c. 27, no order shall be set aside for not expressing that one of the magistrates is of the quorum. And now it is not necessary, since the 55 Geo. 3, c. 101, s. 1, that either of the justices making the order should be of the quorum; *Reg.* v. *Llangian*, 32 L. J., M. C. 225; 4 B. & S. 249; and before that, by 26 Geo. 2, c. 27, it became unnecessary to state in the order that one of them was of the quorum. See also 7 Geo. 3, c 21, and 4 Geo. 4, c. 27.

(*a*) The wife and children should be named, and the ages of the children stated; and if the children are removed, in consequence of their father's settlement, either their ages should be stated, to show that they could not have gained a settlement of their own, or if any of them are above the age of seven years, it must be stated that they have not gained a settlement in their own right; *R.* v. *Bowling*, Burr. S. C. 177.

Of Suspension of the Order of Removal.

ment there (*b*); and that the said A. B., M. his wife, and H. B., E. B. and C. B. their children, are actually chargeable to the said parish of P. G. (*c*); we, the said justices, upon due proof made thereof, as well upon examination of the said A. B. on oath as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true (*c*); and we do likewise adjudge that the lawful settlement of them the said A. B., M. his said wife, and H. B., E. B. and C. B. their said children, is in the said parish of A. A., in the said county of Hereford (*d*): We do therefore require you the churchwardens and overseers of the said parish of P. G., or some or one of you, to convey the said A. B., M. his wife, and H. B., E. B. and C. B. their children, from and out of your said parish, to the said parish of A. A., and them to deliver to the churchwardens and overseers of the poor there, or to some or one of them, together with this order, or a true copy thereof, at the same time showing them the original; and we do also hereby require you the said churchwardens and overseers of the poor of the said parish of A. A., to receive and provide for them as inhabitants of your parish.

Given under our hands and seals, the ——— day of ———, in the year of our Lord 1828.

L. M.
G. K.

Suspension of order.

If the pauper, by reason of sickness or infirmity, be unable to travel, the justices making the order may suspend its execution by indorsement on the back (*e*), until such time as it shall appear to them that it can be executed with safety (*f*), and no act of the pauper in the interval, *e. g.*, occupying and renting a tenement of 10*l.* a year, will alter his settlement (*g*); and if circumstances require the suspension as to one member of a family, the order will be suspended also as to others. The costs incurred during the suspension are to be paid by the parish to which the pauper is removed by the principal order, which may be levied by distress and sale of the goods of the parish officers refusing to pay, and not paying or giving notice of appeal within three days after demand; where the charges exceed 20*l.* a right of appeal against them is distinctly given (*h*), or, in the case of a parish comprised in a union, be made in favour of the guardians of the union comprising the parish to

(*b*) The statement that the paupers have come to inhabit, or some other words showing an endeavour to settle, are material; see *R.* v. *Bury St. Edmunds*, 10 East, 25.

(*c*) The complaint must aver chargeability, and if it do not, the order does not show jurisdiction; *Reg.* v. *St. Giles-in-the-Fields* (*Inh.*), 7 Q. B. 529.

(*c*) The adjudication must be positive; if the justices say "*we believe to be true*," it is bad; *Stallingborough* v. *Flaxley*, 1 Sess. Cas. 131.

(*d*) The adjudication of the place of settlement must also be positive; if it be "according to our knowledge," it will be defective; *R.* v. *St. Mary Ottery*, Sett. & Rem. 32.

(*e*) Under 35 Geo. 3, c. 101, the suspension of the order can only be made by the justices at the same time as the order of removal itself, the justices being after that time *functi officio; Reg.* v. *Llanllechid*, 2 E. & E. 530; 29 L. J., M. C. 102.

(*f*) See *R.* v. *Oldland*, 4 A. & E. 929.

(*g*) 35 Geo. 3, c. 101, s. 2; *R.* v. *St. John's, Hackney*, 2 A. & E. 548.

(*h*) *Ibid.*

be reimbursed, and against the guardians of the union comprising the parish to which the order of removal was addressed (*i*), an order of removal made upon the guardians of a union may be suspended in like manner (*j*). An order of suspension operates with respect to the condition of all the persons named in it, so that where an order for the suspension of an order for the removal of a man and his wife on account of the sickness of the man, and during the continuance of the order the man dies or recovers, but the wife has become sick and unable to travel, the order continues to operate to suspend her removal also (*k*). Returning after actual removal seems no offence since 35 Geo. 3, c. 101; for the pauper may return with means, and not be actually chargeable (*l*).

Of the Suspension of the Order.

As to the appeal against a suspended order, see *post*, p. 891.

The best practice is that the duplicates of the order should be signed by the magistrates, so as to make two originals (*m*); and that one of them should be delivered by the parish officers directed to remove the pauper to the parish officers of the place directed by the order to receive him. The pauper must be safely conveyed to the place named in the order at the expense of the removing parish; and as he may be compelled by justices' warrant so to remove, the parish officers of the removing parish are liable to indictment for disobeying the order. The other duplicate should be lodged with the clerk of the peace at the next quarter sessions, there to remain as a conclusive record of the settlement, should no appeal be entered against it.

Execution of the order.

Justices surprised into making an order may, before its execution by removal, supersede it of their own authority, and without consent of the removing parish, by supersedeas under their hands and seals (*n*), or even after, if the pauper had been received back, and notice of appeal had not been given (*o*).

Abandoning and superseding orders of removal.

By the 11 & 12 Vict. c. 31, s. 8, in any case in which an order shall have been made for the removal of any poor person, and a copy or counterpart thereof sent as by law required, it shall and may be lawful for the overseers or guardians of the parish who shall have obtained such order of removal, whether any notice of appeal against such order shall or shall not have been given, and whether any appeal shall have been entered or not, to abandon such order by notice in writing under the hands of such overseers or guardians, or any three or more of such guardians, to be sent by post or delivered to the overseers or

Abandonment of orders of removal.

(*i*) 30 & 31 Vict. c. 106, s. 25.
(*j*) *Ibid.* s. 26.
(*k*) *Reg.* v. *Sculcoates*, 38 L. J., M. C. 33; L. R., 4 Q. B. 33.
(*l*) See *R.* v. *Barham*, 8 B. & C. 99.
(*m*) See, as to the inconveniences of the other practice, *R.* v. *Alnwick*, 5 B. & A. 187.
(*n*) *Pancras* v. *Rumbold*, Stra. 6; 2 Bott, 631, as stated by *Bayley*, J., 5 B. & A. 486.
(*o*) *Reg.* v. *West Riding of Yorkshire*, 2 Q. B. 705.

Of the Abandonment of Orders of Removal.

guardians as aforesaid of the parish to which such person is by the said order directed to be removed, and thereupon the said order, and all proceedings consequent thereon, shall become and be null and void to all intents and purposes, as if the same had not been made, and shall not be in any way given in evidence in case any other order of removal of the same person shall be obtained.

Costs of abandoned order.

Provided always, that in all cases of such abandonment the overseers or guardians of the parish so abandoning shall pay to the overseers or guardians of the parish to which such person is by the said order directed to be removed, the costs which the said last-mentioned overseers or guardians shall have incurred by reason of such order, and of all subsequent proceedings thereon, which costs the proper officer of the court before whom any such appeal (if it had not been abandoned) might have been brought, shall, and he is hereby required, upon application to tax and ascertain at any time whether the court is sitting or not, upon production to him of such notice of abandonment, and upon proof to him that such reasonable notice of taxation, together with a copy of the bill of costs, has been given to the overseers or guardians abandoning such order, as the distance between the parishes shall in his judgment require, and thereupon the sum allowed for costs, including the usual costs of taxation which such officer is hereby empowered to charge and receive, shall be indorsed upon the notice of abandonment, and the said notice so endorsed shall be filed among the records of the said court; and if such costs are not paid within ten days after such costs shall have been lawfully demanded, the amount may be recovered in the same manner as penalties or forfeitures are recoverable under 4 & 5 Will. 4, c. 76.

Effect of notice of abandonment on the appeal.

The effect of a notice of abandonment under this section is to take away all further jurisdiction from the quarter sessions over the appeal, and to operate as a stay of proceedings, subject to the right of the appellant to costs up to the time of service of the notice. Therefore, if such notice of abandonment is given after an appeal has been entered and respited, and further adjourned, the sessions have no jurisdiction to hear the appeal at the subsequent sessions (*o*). Before the above statute it had been held, that it was competent for overseers, who had got an order of removal and sent a copy of it to the overseers of the parish to which the removal was to be made, to abandon it, and apply for and obtain a fresh order without even giving previous notice of abandonment to the other parties, and that when that had taken place before notice of appeal against the first order, the sessions were right in dismissing the appeal and confirming the second order (*p*); but before this statute it had been held that the removing overseers were too late in obtaining

(*o*) *Reg.* v. *St. Michael's, Pembroke*, 21 L. J., M. C. 79.
(*p*) *Reg.* v. *St. Pancras*, 3 Q. B. 347.

a supersedeas after notice of appeal had been given, and that the appellants were then entitled to go to the sessions to get the costs of the appeal (*q*).

Removal suspended by Notice of Appeal.

By 4 & 5 Will. 4, c. 76, s. 79, no poor person shall be removed or removable under any order of removal from any parish or workhouse, by reason of his being chargeable to or relieved therein until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, shall have been sent by post or otherwise by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed: provided always, that if such overseers or guardians as last aforesaid, or any three or more of such guardians shall, by writing under their hands, agree to submit to such order, and to receive such poor person, it shall be lawful to remove such poor person according to the tenor of such order, although the said period of twenty-one days may not have elapsed; provided also, that if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish from which such poor person is directed in such order to be removed, within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or in case such appeal shall be duly prosecuted, until after the final determination of such appeal (*r*). And by sect. 80, the overseers or guardians of the parish giving such notice of appeal, or their attorney or any other person authorized by them, shall until such appeal shall have been heard and decided, have free access to such poor person at all proper times, for the purpose of examining him touching his settlement; and in case it shall be necessary for the more effectual examination of such person that he should be taken out of the removing parish, such overseers or guardians shall be permitted to remove him therefrom for the time which may be necessary for that purpose: provided always, that the expense of such removal, and of his maintenance during the same, shall be defrayed by the appellant parish. The 11 & 12 Vict. c. 31, s. 2, enacts, that instead of the copy of the examinations, such notice shall be accompanied by a statement in writing, under the hands of such overseers or such guardians, or any three or more of such guardians, setting forth the grounds of such removal, including the particulars of the settlement or settlements relied on in support thereof: provided always, that on the hearing of any appeal against any order of removal it shall not be lawful for the respondents to

Time at which paupers may now be removed under orders.

Power to examine pauper touching his settlement.

Of statement of grounds of removal.

(*q*) *Reg.* v. *Brighton*, 3 Q. B. 342; see also *Reg.* v. *Justices of Norfolk*, 5 B. & A. 484.

(*r*) As to this, see *Reg.* v. *Justices of Suffolk*, 34 L. J., M. C. 69, and *ante*, p. 658.

Of Statement of Grounds of Removal and Copy of Depositions.

go into or give evidence of any other grounds of removal than those set forth in such statement.

As to the reason for this change, see *Reg.* v. *Justices of Sussex* (*s*).

And by 11 & 12 Vict. c. 31, s. 3, the clerk to the justices who shall make any order of removal shall keep the depositions upon which such order was made, and shall within seven days furnish a copy of such depositions to the overseers or guardians as aforesaid of the parish to which the removal is by such order directed to be made, if such overseers or such guardians shall apply for such copy, and pay for the same at the rate of two pence for every folio of seventy-two words; provided that no omission or delay in furnishing such copy of the depositions shall be deemed or construed to be any ground of appeal against the order of removal; provided also, that on the trial of any appeal against an order of removal, no such order shall be quashed or set aside either wholly or in part on the ground that such depositions do not furnish evidence to support, or that any matter therein contained or omitted raises an objection to the order or grounds of removal.

Of the application for the copy of depositions.

The application for the copy of depositions by the overseers or guardians must be to the clerk to the justices, and not to the overseers or guardians of the removing parish, which latter persons need take no notice of any such application, if made to them (*t*). The depositions, it seems, need not include evidence given before the justices against the making of the order (*u*). This provision relates solely to the protection of the pauper from the annoyance of being thrust out and back from parish to parish, and to the saving of expense, and has not any connection with the time within which it is practically possible to decide on appealing or submitting to the order. If the sessions began within the twenty-one days, it gave no authority to pass them over as impossible, but during the twenty-one days left the parties as they stood before, under 13 & 14 Car. 2, c. 12. And as the practice as to appealing was not altered by this act, the 11 & 12 Vict. c. 31, s. 9, was passed to supplement it (*x*).

The notice of chargeability should be complete in itself, and name the paupers chargeable, and should not do so by reference to another document (*y*); but the omission to name a child under the age of seven years in a notice of chargeability of the mother does not vitiate the notice or order (*z*). The notice must be signed by a majority of the overseers, and evidence is

(*s*) 34 L. J., M. C. 69, *ante*, p. 658.
(*t*) *Reg.* v. *St. Alkmund*, 3 B. & S. 347; 32 L. J., M. C. 99.
(*u*) *Reg.* v. *Holne*, 9 Q. B. 70; 15 L. J., M. C. 125.
(*x*) *Reg.* v. *Justices of Sussex*, 34 L. J., M. C. 69. See *ante*, p. 658, and *post*, p. 896.
(*y*) *Reg.* v. *Gomersal*, 12 Q. B. 76; 17 L. J., M. C. 163.
(*z*) *Reg.* v. *Stockton*, 7 Q. B. 520; 14 L. J., M. C. 128.

admissible to show whether those signing were or were not in fact a majority (*a*).

Of Notice of Chargeability.

If the notice of chargeability and statement of grounds of removal be put in the post on one day, and received by the parish officers on the next, the latter is the day on which they are sent by post, and the application for the depositions is in time if received by the clerk to the parties on the twenty-first day thereafter (*b*); and the delivery on Sunday by post of the notice of chargeability is good as a delivery on the following day (*c*).

Of sending notice by the post.

By sect. 4 of the Union Chargeability Act, 1865 (*d*), every notice, statement, demand or other document required to be given by any such guardians (*i. e.*, of a union formed under the Poor Law Amendment Act, 1834), in respect of any order of removal, shall be deemed to be sufficiently authenticated if signed by their clerk in their name, and shall be deemed to be duly served upon the guardians, to whom it shall be addressed if it be delivered to their clerk personally, or be left at his office, or be sent through the post, addressed to him at such office. See *Reg.* v. *Lambeth* (*e*).

Of notices given by guardians of a union.

Section 2.

Of the Right of Appeal against an Order of Removal, and to what Sessions; and herein, of the Notice of Appeal; Statement of Grounds of Appeal, of Grounds of Removal, and other Matters necessary to the Regular Exercising of that Right.

Having already considered the law relating to appeals in general, we will now review the law more particularly applicable to appeals against orders of justices for removal of poor persons to their respective places of settlement.

Enactments conferring appeal.

By 13 & 14 Car. 2, c. 12, s. 1, two justices are empowered by their warrant to remove parties to their last legal settlements. Provided (sect. 2), that all such persons who think themselves aggrieved by any such judgment of the said two justices, may appeal to the justices of peace of the said county, at their *next* quarter sessions.

Stat. 3 W. & M. c. 11, after establishing several kinds of

(*a*) *Reg.* v. *Westbury*, 5 Q. B. 509; *Reg.* v. *Colerne*, 11 Q. B. 909; 17 L. J., M. C. 121.

(*b*) *Reg.* v. *Recorder of Richmond*, E. B. & E. 253; 27 L. J., M. C. 197. See also *ante*, p. 671, and *post*, p. 895.

(*c*) *Reg.* v. *Leominster*, 31 L. J., M. C. 95, *post*, p. 898.

(*d*) 28 & 29 Vict. c. 79.

(*e*) 5 Q. B. 513; 14 L. J., M. C. 133.

Appeals against Orders of Removal.

settlement, enacts, by sect. 9, that if any person or persons shall find himself or themselves aggrieved by any determination which any justice or justices of the peace shall make in any of the cases aforesaid, the said person or persons shall have liberty to appeal to the next general quarter sessions of the peace to be held for the said county, riding or division, city or town corporate (*f*), who, on full hearing of the said appeal, shall have full power finally to determine the same (*g*).

Who may appeal.

All persons aggrieved by an order of removal, *viz.*, not only the parish officers of the parish to which the pauper is removed, but the pauper himself, may appeal against it (*h*); and guardians of a union, upon whom an order may be made under 28 & 29 Vict. c. 79, may also appeal (*i*), and as to guardians of other unions, see 30 & 31 Vict. c. 106, s. 24. In cases where the order has been suspended, and a subsequent order made for the payment of costs under 20*l.*, pursuant to 35 Geo. 3, c. 101, an appeal lies for the latter as a grievance to the parish, notwithstanding the death of the pauper previous to the removal; and this, though the grievance complained of did not exist till after 3 W. & M. c. 11, s. 9, gave an appeal to the party aggrieved (*k*).

In respect of place.

Appeals against orders of removal were directed by 13 & 14 Car. 2, c. 12, s. 2, to be carried to the next quarter sessions of the county in which the orders were made, and by 8 & 9 Will. 3, c. 30, they were to be tried, "not otherwise or else where."

Since the Municipal Corporations Act (*l*), appeals against orders of removal from a parish within the borough, made by borough magistrates of a borough having a separate court of quarter sessions under that act, must be brought to the borough quarter sessions, and not to the county sessions, for the words giving exclusive jurisdiction to the county sessions are repealed by that act (*m*). So, where county justices have concurrent jurisdiction within such a borough with the justices of the borough, an appeal from an order of removal from a parish within the borough made by such justices must be to the borough sessions (*n*). The quarter sessions, and not the general sessions, is the proper tribunal to which to appeal (*o*).

(*f*) As to this see *post.*

(*g*) There never was any appeal against an order of justices for relief; *R.* v. *Justices of Devon,* 4 M. & S. 421; *R.* v. *North Shields,* Doug. 331; Cald. 68.

(*h*) *R.* v. *Hartfield,* Carthew, 222.

(*i*) Sect. 3.

(*k*) *R.* v. *St. Mary-le-Bow,* 13 East, 51. See *Reg.* v. *Justices of Lancashire,* 12 L. J., M. C. 110.

(*l*) 5 & 6 Will. 4, c. 76.

(*m*) *Reg.* v. *St. Edmunds, Salisbury (Inh.),* 2 Q. B. 72; *Reg.* v. *Justices of Suffolk, Reg.* v. *Justices of Shropshire, Reg.* v. *Justices of Lancashire, ibid.* 85.

(*n*) *Reg.* v. *The Recorder of Liverpool,* 15 Q. B. 1070.

(*o*) *Reg.* v. *Justices of Middlesex,* 4 Q. B. 807.

Appeals against, where to be brought.

In a case which occurred before 5 & 6 Will. 4, c. 76, on an order of removal made in a town, being a county of itself, where general sessions were held twice a year only, it was decided that the appeal should be to the next of such general sessions (*p*); but the words of the charter there were very comprehensive, and comprehended a power to determine upon all articles, misprisions, trespasses and offences which according to law belonged to the office of justices of the peace in their quarter sessions, and to do all things relating to the sessions of the peace.

In respect of time.

Every order of removal being an *ex parte* proceeding only, of which the parish to which the removal is to take place cannot know anything till it actually occurs (*q*), that parish must appeal to the next practicable sessions after they are "aggrieved." That grievance does not accrue from the date of the order, whatever it may be, and though a session has intervened; but from the service of notice of chargeability (*r*). In case of an order of suspension by reason of the sickness of the pauper, or any of his family, the time for appealing against such order shall be computed according to the rules which govern other like cases from the time of serving such order, and not from the time of making the removal, under and by virtue of the same (*s*). If after such suspension the pauper dies before actual removal made, the appeal is to the next practicable session after demand of the charges (*t*). And if in the last case the parish was exposed to a distress, by not having given notice of appeal within three days after such demand, it is not estopped from giving notice of appeal to the next session (*u*).

Time for appealing.

Where the order is suspended.

Where an order of removal was suspended under 35 Geo. 3, c. 101, and no actual removal took place for five years, and two services of the order made in the interval were both bad, one being of a copy only without showing the original order, and the other being of a copy only, though authenticated by the justices who made the original, it was held that the appeal was in time notwithstanding the above acts, though not entered till the next session after the removal (*x*). As the suspended order, if not executed before the death of the pauper, becomes of course a nullity, against which no appeal can be made (*y*), should no notice of the order have been served in a reasonable

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(*p*) *R.* v. *Justices of Carmarthen*, 4 B. & A. 291.
(*q*) Per *Buller*, J., in *Proser* v. *Hyde*, 1 T. R. 414.
(*r*) *Reg.* v. *Recorder of Shrewsbury*, 1 E. & B. 711; 22 L. J., M. C. 98.
(*s*) 49 Geo. 3, c. 124, s. 2. See also *id.* ss. 1 and 3; 35 Geo. 3, c. 101, s. 2.
(*t*) *R.* v. *St. Mary-le-Bow*, 13 East, 51.
(*u*) *R.* v. *Justices of Salop*, 7 East, 549; *R.* v. *Justices of Gloucestershire*, Douglas, 191; *R.* v. *Justices of Hants*, Cald. 283. *Contra*, 3 T. R. 150.
(*x*) *R.* v. *Alnwick* (*Inh.*), 5 B. & A. 184. See *ante*, p. 887.
(*y*) *R.* v. *Penkridge* (*Inh.*), 3 B. & Ad. 538.

Appeal to what Sessions in point of Time.

time after the making of it, notice of the order should be served as soon as possible after it is made, though a year appears not too long a time for such service, if the circumstances of the pauper have not changed in the interval (*z*), *e. g.*, by succeeding to an estate in the removing parish, and thereby becoming irremovable. Three years have been held too long a period to fix the parish to which the removal was ordered with the costs of suspension after the death of the pauper; but the appeal must be to the sessions next after the actual service of the order (*a*), or the appellant parish will lose the opportunity of objecting to it, that it was not served in reasonable time; for the default does not absolutely avoid the order, but renders it voidable only, *if* the fact is found by the next practicable sessions after service of the order (*b*).

Although the appeal must be entered at the next practicable session after the actual removal, there is no necessity for its being then heard, for that session is bound to receive it, though no notice of trying it at that session has been served, and sufficient time to have so served it has elapsed before the session (*c*); and the like, if the notice in fact given is inoperative for trial at that session on account of not having been served in due time according to its practice; and therefore in either case this appeal may as a matter of course be entered and respited at the same time (*d*).

Thus, if by the practice of the sessions there be time enough to give due notice of entering and trying an appeal at the session next immediately following the removal, and such notice is in fact given, the appeal may be entered and tried there (*e*). But if a parish having a right to enter and respite an appeal enters and attempts to try it, but fails from the insufficiency of their statement of grounds of appeal under sect. 81 of 4 & 5 Will. 4, c. 76, and the order is confirmed, they cannot afterwards enter and respite the appeal (*f*).

By 11 & 12 Vict. c. 31, s. 9, "no appeal shall be allowed

(*z*) See per Lord *Kenyon*, in *R.* v. *Llanwinio*, 4 T. R. 473.

(*a*) *R.* v. *Lampeter*, 3 B. & C. 454.

(*b*) *R.* v. *Penkridge*, 3 B. & Ad. 538; and see *R.* v. *Lampeter*, 3 B. & C. 454.

(*c*) *R.* v. *Justices of Bucks*, 3 East, 342; *R.* v. *Justices of Salop*, 7 East, 549; *R.* v. *Justices of Gloucestershire*, Dougl. 191; *R.* v. *Justices of Hants*, Cald. 283. *Contra*, 3 T. R. 150.

(*d*) See *ante*, p. 657 *et seq.*

(*e*) Where due notice of trying an appeal was given for the first sessions, and both parties attended, but the appeal was not entered, and a motion was made late on the first day that it should be entered and adjourned on account of the absence of a material witness, the sessions were held right in refusing to do so, except on payment of the costs of the day; for the notice which had been given saved them from being obliged to respite it under the statute 9 Geo. 1, c. 7, s. 8, so that the application was to their discretion only; *R.* v. *Justices of Monmouthshire*, 1 B. & Ad. 895.

(*f*) *R.* v. *Recorder of Worcester*, 5 Q. B. 508, n.; Dick. Q. S., 6th ed., by Talf. 740.

against any order of removal, if notice of such appeal be not given, as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent, by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the deposition shall have been applied for, as aforesaid, by the last-mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal; but in such case no poor person shall be removed under such order of removal until the expiration of such further period of fourteen days." This statute, and the 4 & 5 Will. 4, c. 76, s. 79, fix a maximum of delay after which the appeal is barred, but they have no reference to fixing any period of time after which the sessions next in fact may be passed over as next practicable, or after which the appellant may demand an adjournment, although the sessions think he has not used due diligence in giving notice of appeal and trial. It is a statute of limitations barring the appeal, of which no notice has been given in the limited time, but gives no right to the appellants to assume that it is not practically possible to prepare for trial of an appeal in less than twenty-one days, with an addition of fourteen days (*g*).

Appeal to what Sessions in point of Time.

Time for applying for copies of depositions.

Next practicable sessions.

The application for the copy of the depositions must be made to the clerk to the justices, and an application to the removing overseers is of no avail, and need not be taken any notice of by such overseers. Therefore, if such an application is made to the removing overseers, who take no notice of it, and twenty-one days after service of the order and statement are allowed to pass over without notice of appeal being given, the next sessions have no jurisdiction to enter and respite an appeal against the order of removal (*h*). The application for the copy of depositions to the clerk of the justices must be duly proved, if the further period for giving notice of appeal is required; and if made by letter, the letter, or, on non-production of the letter, proof of sending it to the clerk, who should be served with a *subpœna duces tecum*, should be given, and, in default of such evidence, the sessions may dismiss the appeal. The fact of the receipt of the copy of the depositions by the removing overseers is no evidence of the application (*i*). The twenty-one days are to be reckoned from the day on which the notice reaches the overseers (*k*). The statute does not require the statement of the grounds of appeal to be given within the prescribed time (*l*).

(*g*) See *Reg.* v. *Justices of Sussex*, 34 L. J., M. C. 69. See *ante*, p. 658, and *post*, p. 896.

(*h*) *Reg.* v. *St. Alkmund*, 3 B. & S. 347; 32 L. J., M. C. 99.

(*i*) *Reg.* v. *West Riding of Yorkshire*, 2 L. M. & P. 651.

(*k*) *Reg.* v. *Recorder of Richmond*, E. B. & E. 253; 27 L. J., M. C. 197.

(*l*) *Reg.* v. *Recorder of Derby*, 1 L. M. & P. 657; 20 L. J., M. C. 44.

Of respiting the Appeal against an Order.

Unless it appear, on the caption of the order of sessions, that the appeal was regularly respited by continuance or adjournment, the ensuing sessions have no jurisdiction to hear and determine it; and if they do, their order will be quashed as void (*m*). But as a neglect to enter the respite of an appeal after it has been ordered is an omission by the court or its officer, without fault in the appellant, it seems that they might be compelled by mandamus to hear it (*n*).

Neglect to enter respited appeal.

Respiting an appeal discretionary.

The sessions, when asked to enter and respite an appeal, should not grant the application as a matter of course, and should exercise their judgment whether justice requires that the appeal should be adjourned; and if they find that the appellant has been guilty of unreasonable delay in not preparing for trial, they ought to refuse to respite (*o*).

The appellant derives no right under the 4 & 5 Will. 4, c. 76, s. 79, which prohibited the removal of the pauper until twenty-one days after the order had been served, with a further delay of the removal in case notice of appeal should be given till such appeal should be determined, to postpone preparing for trial; nor under the 11 & 12 Vict. c. 31, by which no appeal is to be allowed, unless notice of appeal shall be served on the respondent within twenty-one days after the service of the order of removal, subject to a proviso for fourteen days in respect of depositions. The effect of these statutes is to bar all appeals of which notice is not given within the prescribed time, but does not affect the question of what are practicable sessions under 13 & 14 Car. 2, c. 12; and as it is practically possible to prepare for the trial of an appeal in less than thirty-five days after service of the order of removal, the sessions have a right to find that the appellants have been guilty of unreasonable delay, and on that account to refuse an adjournment (*p*). The facts in *Reg.* v. *Justices of Sussex* were, that the order of removal was made on 18th August, and served on the appellants on 30th August. Appellants applied for a copy of depositions on 17th of September, and received them on the 19th September. On the 1st of October they gave notice of appeal for sessions held on 15th October for eastern division of county, and on 18th October for western division, eight days' notice of appeal necessary, but no grounds of appeal were delivered, and it was held that the sessions had a right to refuse to respite the appeal on the 15th of October. In

(*m*) *R.* v. *Hedingham Sible*, Burr. S. C. 112; *R.* v. *Polstead*, Stra. 1263; *Bodmin* v. *Warligen*, 2 Bott, 756, pl. 982, 6th ed.; *R.* v. *West Torrington*, Burr. *id.* 393.

(*n*) *Bodmin* v. *Warligen, ubi sup.*; *R.* v. *Justices of Westmoreland*, 2 Bott, 756, pl. 983.

(*o*) *Reg.* v. *Justices of Sussex*, 4 B. & S. 987; 34 L. J., M. C. 69, *infra*; *Reg.* v. *Skircoat*, 28 L. J., M. C. 224; 2 E. & E. 185.

(*p*) *Reg.* v. *Justices of Sussex*, 34 L. J., M. C. 69; 4 B. & S. 897; *Reg.* v. *Justices of North Riding*, 3 T. R. 150.

Reg. v. *Skircoat*, notice of appeal was given sixteen days before the first sessions after the making an order of removal, and, on an *ex parte* motion of counsel, was respited as of course, and tried at the following sessions; it was held, that the court had power to try it then by reason of the previous entry and adjournment; but the court said that if the question had been put to them whether, in their opinion, the former sessions, in their discretion, ought to have adjourned the appeal, they should have answered in the negative, because the appellant had time to bring on the trial and no ground for the delay was assigned, and that entering and respiting should not be a matter of course, but in each case the court should exercise its judgment whether justice requires that the appeal should be adjourned (*q*). *Of the respiting of an Appeal.*

An appeal *may* be entered at an adjourned quarter session instead of the original session, if the practice of the sessions permits it (*r*); but the appellant is not bound to enter his appeal at such session, for the acts take the holding of the sessions as the point of time to which they refer the appeal, and the sessions are always considered in law as one day, to whatever period they may, by accidental causes, be extended. The legislature never contemplated the continuance or adjournment of the sessions; and if appellants have not a reasonable time between the removal and the first day of the first sessions to consider whether they will appeal, they have till the following sessions to do so (*s*). Entering appeal at adjourned session.

And lastly, it is important to observe, that the act for amendment of the poor law (*t*) does not alter the existing practice of the courts of quarter sessions as to the time for giving notices of appeal against orders of removal. Thus it is not made necessary, by sect. 79, that notice of appeal shall be given within twenty-one days after the notice of removal thereby required, nor by sect. 81, that notice of appeal should be given fourteen days at least before the sessions (*u*).

Reasonable notice of appeal being required by the statute (*x*),

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(*q*) See *ante*, pp. 657 *et seq.*

(*r*) *R.* v. *Justices of Sussex*, 7 T. R. 107; *Reg.* v. *Justices of Sussex*, 34 L. J., M. C. 75.

(*s*) *R.* v. *Justices of Surrey*, 1 M. & S. 479. See *ante*, pp. 667, 668.

(*t*) 4 & 5 Will. 4, c. 76.

(*u*) *R.* v. *Justices of Suffolk*, 4 A. & E. 319.

(*x*) 9 Geo. 1, c. 7, s. 8, enacts, that "no appeal or appeals from any order or orders of removal of any poor person or poor persons whatsoever, from any parish or place to another, shall be proceeded upon in any court of quarter sessions, unless reasonable notice be given by the churchwardens *or* overseers of the poor of such parish or place, who shall make such appeal unto the churchwardens *or* overseers of the poor of such parish or place from which such poor person or persons shall be removed, the reasonableness of which notice shall be determined by the justices of the peace at the quarter sessions to which the appeal is made:—and if it shall appear to them that reasonable time of notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same."

Of Notice of Appeal against the Order of Removal.

the extreme time for giving it, in order to be effectual, is matter of regulation by each session. Their practice on the subject is to be ascertained at the office of their clerk of the peace. Though not insufficient if verbal (*y*), it should always be reduced into writing, and signed by all or the major part of the "churchwardens or overseers" of the appellant parish (or by a majority of the overseers only of an appellant township) (*z*). It is in practice commonly signed by an attorney on behalf of all or a majority of the parish officers, and such signature is sufficient (*a*). It is sufficient to leave a copy with each of the "churchwardens or overseers" of the removing parish (or on the overseers, if a township removes), personally, or at their respective places of abode (*b*). Probably, such service in either kind on one of them would suffice, if without collusion (*c*). Service by consent will be sufficient, if made in the way agreed to. When a copy is served, the original retained may be read in part proof of the notice given, without giving notice to produce the copy of the notice so served (*d*).

Service of notice of appeal.

By 14 & 15 Vict. c. 105, s. 10, "it shall be lawful and sufficient to send any notice of appeal against an order of removal, or statement of grounds of appeal against such order, by post or otherwise, in like manner as a copy of an order of removal and statement of grounds of removal may now be sent by law." Under this statute, the notice of appeal must be supposed to be given at the time when, according to the regular and usual course of post, it ought to reach the respondents, although not, in fact, delivered until another day (*e*); and if in the course of post it would be delivered on a Sunday, it must be taken as sent on the following day (*f*), as a service on the Sunday would be bad (*g*).

Notice of appeal may be sent by post.

Every notice, statement, demand, or other document required to be given by any guardians of any union formed under the 4 & 5 Will. 4, c. 76, in respect of any order of removal, shall be deemed to be sufficiently authenticated if signed by their

Sufficiency of notice given by the guardians of a union.

(*y*) *R.* v. *Justices of Salop*, 4 B. & A. 626; *R.* v. *Justices of Surrey*, 5 B. & A. 539.

(*z*) *R.* v. *Beeston*, 3 T. R. 592; and see on 4 & 5 Will. 4, c. 76, s. 81, *R.* v. *Justices of Warwickshire*, 2 N. & P. 153, *post*, p. 898.

(*a*) *Reg.* v. *Justices of Middlesex*, 20 L. J., M. C. 42; *Reg.* v. *Carew*, *ibid.* p. 44. See *ante*, p. 668.

(*b*) See *Jones* v. *Marsh*, 4 T. R. 464.

(*c*) 2 Nolan, 527, n. 5; and see *R.* v. *Justices of Warwickshire*, 2 N. & P. 153, *post*, p. 898.

(*d*) *Kine* v. *Beaumont*, 3 B. & B. 288; *Swaine* v. *Lewis*, 5 Tyr. 998.

(*e*) *Reg.* v. *Slawstone*, 18 Q. B. 388; 21 L. J., M. C. 145.

(*f*) *Reg.* v. *Leominster*, 31 L. J., M. C. 95; 2 B. & S. 391; *In re Westbury-on-Severn*, 4 E. & B. 314.

(*g*) *In re Asprell* v. *Justices of Lancashire*, 16 Jur. 1067; *Reg.* v. *Leominster*, *ubi sup.*; *Reg.* v. *Recorder of Richmond*, E. B. & E. 253; 27 L. J., M. C. 197.

clerk in their name, and shall be deemed to be duly served upon the guardians to whom it shall be addressed, if it be delivered to their clerk personally, or be left at his office, or be sent through the post, addressed to him at such office (*h*); and by 30 & 31 Vict. c. 106, s. 24, when an order of removal is obtained by the guardians of any union not formed under the 4 & 5 Will. 4, c. 76, "such order shall be dealt with in all respects as provided by the Union Chargeability Act, 1865." And, perhaps, the latter enactment may be taken to include the provision first above mentioned with respect to the authentication and service of notices.

Service of Notices, &c. by Guardians of a Union on Guardians.

If within the twenty-one days following the giving notice of the chargeability, and sending copies of the order of removal and grounds of removal, under 4 & 5 Will. 4, c. 76, s. 79 (*i*), no notice of appeal is given, and within such period no copy of the depositions shall have been applied for, the pauper may be actually removed; but in case a copy of the depositions be applied for, a further period of fourteen days after the sending of such copy shall be allowed, and no removal shall be allowed for such fourteen days (*k*).

Time of serving notice of appeal in order to prevent actual removal.

The grounds of the appeal must now be disclosed to the other side in writing, before coming to the sessions, and the inquiry there is limited to the grounds so stated, the words of the legislature being these (*l*): "In every case where notice of appeal against such order shall be given, the overseers *or* guardians of the parish appealing against such order, or any three or more of such *guardians*, shall, with such notice (*m*), or fourteen days at least (*n*) before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing, under their hands, of the grounds of such appeal (*o*); and it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid: provided always, that it shall not be lawful for the respondent or appellant parish, on the hearing of any appeal, to go into or give evidence of any other grounds of removal, or of appeal against any

Grounds of appeal against orders of removal—how to be stated by appellants and delivered to respondents.

(*h*) 28 & 29 Vict. c. 79, s. 4; *Reg.* v. *Northwich Union*, 36 L. J., M. C. 57; L. R., 2 Q. B. 383.

(*i*) *Ante*, p. 887.

(*k*) 11 & 12 Vict. c. 31, s. 9. See *ante*, p. 892.

(*l*) 4 & 5 Will. 4, c. 76, s. 81.

(*m*) Nothing in this clause compels notice of appeal to be given fourteen days clear before the sessions, unless their practice requires it. *R.* v. *Justices of Suffolk*, 4 A. & E. 319; *Reg.* v. *Justices of Sussex*, 34 L. J., M. C. 69; 4 B. & S. 966.

(*n*) Viz., fourteen *clear* days, see *ante*, p. 667.

(*o*) If the statement of the grounds of appeal is signed by an attorney of the appellant parish, and not the parish officers, it is insufficient. *R.* v. *Recorder of Worcester*, 5 Q. B. 508, n. (*a*); Dick. Q. S., ed. Talf. 740, *ante*, p. 892.

Of the Grounds of Appeal.

order of removal, than those set forth in such respective order, examination, or statement as aforesaid" (*p*).

Statement and service of grounds of appeal.

It has been held, upon the words of this section, that a statement of the grounds of appeal need not be signed by all the parish officers, and that it will be sufficient if signed by a majority (*q*): and that service of the statement, by sending or delivering it to one only of the parish officers of the respondent parish, if without fraud, is good (*r*). Assuming that an assistant overseer may receive authority to sign these instruments, his power to do so will not be inferred without producing his warrant, from which alone he can derive such power (*s*).

Delivery of fresh statement of grounds of appeal.

Where a statement of the grounds of appeal have been delivered in due time for the sessions, but the sessions, on the application of the appellant, have adjourned the appeal on the ground of the absence of a material witness, the applicants may, fourteen days before the next sessions, serve another statement containing fresh grounds of appeal, and the court are justified in quashing the order of removal on the evidence given on one of such fresh grounds (*t*).

The clauses in 4 & 5 Will. 4, c. 76 (*u*), directing the grounds of removal and appeal to be made known by each party to the other, are intended to compel such a disclosure by both as will enable them to go to the sessions fully aware of the questions which are to be there discussed (*v*). To effectuate that intention the statement of the grounds of appeal must condescend to particulars, not to the extent of setting out the evidence by which facts are to be proved, but so as to give the opposite party reasonable means of inquiry (*w*).

Particularity of statement.

As to the requisites of statements of grounds of appeal, first, it is held, that no defect of form or substance apparent on the face of an order of removal will be the subject of objection on the hearing of an appeal, unless stated as a ground of appeal (*x*); and as to the written statements of the grounds of appeal, it is enough if they are sufficiently stated to enable the appellants to dispute the order and to make inquiries, but the sessions

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(*p*) See *ante*, p. 672.

(*q*) *R.* v. *Justices of Warwickshire*, 2 N. & P. 153. See *Doe* v. *Summersett*, 1 B. & Ad. 135.

(*r*) *R.* v. *Justices of Warwickshire*, 2 N. & P. 153; *R.* v. *Justices of Derbyshire*, 1 N. & P. 703, 710; notwithstanding *R.* v. *Norfolk*, 2 B. & Ad. 944, per *Taunton*, J., and the judgments of *Bayley* and *Holroyd*, JJ., in *Malkin* v. *Vickerstaff*, 3 B. & A. 89.

(*s*) *R.* v. *Justices* (*N. R.*) *of Yorkshire*, 1 N. & P. 105, 154.

(*t*) *Reg.* v. *Kendal* (*Inh.*), 28 L. J., M. C. 110; 1 E. & E. 492. See *Reg.* v. *Guardians of Cambridge Union*, 30 L. J., M. C. 137; and see *ante*, p. 674.

(*u*) Sects. 79—81.

(*v*) See the recital to 12 & 13 Vict. c. 45, s. 3.

(*w*) See judgment of the court in *R.* v. *Justices of Derbyshire*, 1 N. & P. 710.

(*x*) *R.* v. *Withernwick*, 6 A. & E. 273; 1 N. & P. 423. See *R.* v. *Bromyard* (*Inh.*), 8 B. & C. 240.

Of the Grounds of Removal and Appeal.

have been held to be right in rejecting evidence of a hiring and service in 1813, when the grounds of appeal stated it to have taken place in 1810. Where the pauper's examination stated a settlement by hiring and service in Spalding, and the ground of appeal stated by the appellants was that the pauper had stipulated for two days' holidays at Spalding club feast, they were held estopped from proving that he had stipulated for one day's holiday at Holbeach fair (*y*). Again, where a statement of a ground of appeal alleged that the pauper had gained a settlement by hiring and service in the appellant parish, it was held bad for not specifying the name of the party she lived with there, and the dates or times of the hiring and service by which she gained the settlement (*z*).

Of formal objections to grounds of removal and appeal.

But now formal objections to grounds of removal or grounds of appeal against the order are not to be allowed unless the party has been misled.

By 11 & 12 Vict. c. 31, s. 4, after reciting a statement of the grounds of removal or of appeal is required to be communicated for the purpose of enabling the party receiving it to inquire into the subject of such statement, and, if need be, to prepare for trial; it is enacted, that upon the hearing of any appeal against an order of removal, no objection whatever on account of any defect in the form of setting forth any ground of removal or of appeal in any such statement shall be allowed, and no objection to the reception of legal evidence offered in support of a ground of removal or appeal alleged to be set forth in any such statement shall prevail, unless the court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial.

Amendment of statement of grounds of removal or appeal.

If the informalities in the statement of grounds of removal or appeal have misled the party, they are to be amended upon terms. By the proviso to the above section, "in all cases where the court shall be of opinion that any such objection to such statement or to the reception of evidence ought to prevail, it shall be lawful for such court, if it shall so think fit, to cause any such statement of grounds of removal or appeal to be forthwith amended by some officer of the court, or otherwise, on such terms as to payment of costs to the other party, or postponing the trial to another day in the same sessions, or to the next subsequent sessions, or both payment of costs and postponement, as to such court shall appear just and reasonable. This proviso applies equally to orders of removal and orders of maintenance of a lunatic pauper (*a*).

(*y*) *R.* v. *Holbeach (Inh.)*, 1 N. & P. 137.

(*z*) *R.* v. *Justices of Derbyshire*, 1 N. & P. 703. So decided after reconsidering *R.* v. *Justices of Cornwall*, 5 A. & E. 134; 1 N. & P. 144; and *R.* v. *Kelvedon (Inh.)*, 1 N. & P. 138.

(*a*) *Reg.* v. *St. Peter in Barton-on-Humber*, 21 L. J., M. C. 23; 17 Q. B. 630.

Of Grounds of Removal and Grounds of Appeal.

Contents of statement.

A statement of the grounds of adjudication required to be sent under the 16 & 17 Vict. c. 97, s. 107, which omitted to give the description and address of all the guardians by whom it was signed, has been properly amended by supplying the defect (*a*). The grounds of removal should state nature and kind of settlement relied on, but need not set out all the evidence in support, and evidence is admissible on the trial to support the order beyond what may have been given when the order was made. If a previous order, unappealed against, is relied on as an acknowledgment of the settlement, though it is doubtful whether this is a ground of removal, or more than evidence in support of the settlement relied on, it is better to state it. Still it would appear that the previous order, with proof of acquiescence, was admissible as evidence in support of a ground which stated that the appellant parish had given relief to the pauper when in the removing parish (*b*); and where one of the grounds of removal stated was, that the settlement had been acknowledged by payment of relief, and one of the grounds of appeal stated that such relief had been given in error, and, under a mistake, it has been held, that the respondents were entitled to give evidence of a birth settlement of the pauper in the appellant parish, to rebut the case of mistake (*c*); but, if not, it is competent to add as a ground a statement that such an order was made and served, and not appealed against (*d*).

The decision of the sessions, however, on all such points is final, and there is no power to state a case on such matters for the Court of Queen's Bench (*e*).

Frivolous and vexatious statements.

Frivolous and vexatious statements, either of grounds of removal or of appeal, are guarded against by 11 & 12 Vict. c. 31, s. 5, which enacts, "that if either of the parties to the said appeal shall have included in the statement of grounds of removal or of appeal sent to the opposite party any ground or grounds of removal or appeal which shall, in the opinion of the court determining the appeal, be frivolous and vexatious, such party shall be liable, at the discretion of the said court, to pay the whole or any part of the costs incurred by the other party in disputing any such ground or grounds, such costs to be recovered in the same manner as any penalties or forfeitures are recoverable under 4 & 5 Will. 4, c. 76.

A general denial that the statements contained in the grounds of removal or depositions are untrue, is not necessarily a frivolous or vexatious ground of appeal (*f*).

(*a*) *Reg.* v. *Manchester*, 6 E. & B. 919; 26 L. J., M. C. 1.
(*b*) *Reg.* v. *Ruyton of the Eleven Towns*, 30 L. J., M. C. 229; 1 B. & S. 534.
(*c*) *Reg.* v. *Bucknell* (*Inh.*), 3 E. & B. 587; 23 L. J., M. C. 129.
(*d*) *Reg.* v. *Llangenney* (*Inh.*), 32 L. J., M. C. 265; 4 B. & S. 311.
(*e*) *Reg.* v. *Ruyton of the Eleven Towns*, 30 L. J., M. C. 229; 1 B. & S. 534; *Reg.* v. *Llangenney* (*Inh.*), 32 L. J., M. C. 265; 4 B. & S. 311.
(*f*) *Reg.* v. *St. Pancras*, 19 L. J., M. C. 23.

Of Grounds of Removal and Appeal.

Decisions of the sessions upon the sufficiency of order, grounds, &c., and upon amendments are final.

By sect. 7 of 11 & 12 Vict. c. 31, "the decision of the court upon the hearing of any appeal against any order of removal, as well upon the sufficiency and effect of the statement of the grounds of removal and of appeal, and of the notice of chargeability, and of the copy or counterpart of the order of removal sent to the appellant parish, as upon the amending or refusing to amend the order of removal as aforesaid, or the statement of grounds of removal or appeal shall be final, and shall not be liable to be reviewed in any court by means of a writ of *certiorari* or mandamus, or otherwise (*g*).

Decision of sessions as to sufficiency of grounds of removal or grounds of appeal final.

Where notice of appeal was given to the county sessions where it ought to have been to the borough, and other notice of appeal was given within the twenty-one days, but the appellants went to the borough sessions, where their appeal was dismissed for want of notice to the borough sessions, it was held, that the statement that the appeal would be to the county sessions was mere surplusage, and was a good notice for the borough sessions, and a mandamus was granted to compel the recorder to hear the appeal (*h*); but where the appellants have acted upon their wrong notice, and gone to the wrong sessions, they cannot afterwards, on discovering their error, go to the proper sessions, and say that the notice was meant for the proper tribunal (*i*).

Notice of appeal for wrong sessions.

The statement of grounds of appeal may be sent by post (*j*), and the day on which it reaches the overseers, in the ordinary course of post, is to be deemed the day on which it is sent (*k*), unless by the course of post the notice is delivered on a Sunday, when it will be treated as being received on the ensuing day (*l*).

Statement when sent by post.

No appeal lies against an order of removal, unless and until notice of chargeability, and a statement of the grounds of removal, have been sent, because mere service of the order is not a grievance; and, therefore, the sessions have no jurisdiction to hear the appeal where the order only has been sent (*m*).

Though it is by no means essential that the statement of the grounds of appeal should accompany the notice of appeal, it is the most convenient. The grounds of appeal may, however, be stated separately from, and before or after the notice of appeal, *viz.*, in fourteen days at least before the sessions (*n*). If, on the other hand, the statement of the grounds of appeal

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(*g*) See *Reg.* v. *Ruyton of the Eleven Towns*, 30 L. J., M. C. 229; 1 B. & S. 534.

(*h*) *Reg.* v. *The Recorder of Liverpool*, 15 Q. B. 1070; *Reg.* v. *Justices of Bucks*, 4 E. & B. 259; 24 L. J., M. C. 15.

(*i*) *Reg.* v. *Justices of Salop*, 24 L. J., M. C. 14; 4 E. & B. 257.

(*j*) 14 & 15 Vict. c. 105, s. 10, *ante*, p. 896.

(*k*) *Reg.* v. *Richmond*, 1 E. B. & E. 253; 27 L. J., M. C. 197.

(*l*) *Reg.* v. *Leominster*, 31 L. J., M. C. 95; *Ashdown* v. *Curtis*, 31 L. J., M. C. 216; see *ante*, p. 889.

(*m*) *Reg.* v. *Recorder of Shrewsbury*, 1 E. & B. 711; 22 L. J., M. C. 2.

(*n*) *Reg.* v. *Justices of Sussex*, 34 L. J., M. C. 69. See *ante*, p. 897.

Of Grounds of Removal and Appeal.

accompanies a notice given before the fourteen days before the sessions, it will suffice though the latter be erroneous, if a good notice of appeal, incorporating such statement by reference, be afterwards served in proper time, according to the practice of the sessions, though within fourteen days before they begin (*o*), nor does anything in sect. 81 or sect. 79 of 4 & 5 Will. 4, c. 76, or in 11 & 12 Vict. c. 31, or 12 & 13 Vict. c. 45, alter the existing practice of sessions as to the time of giving notices of appeal against orders of removal, or compel them to be given fourteen clear days at least before the sessions (*p*).

A letter saying, "I hereby apply for a copy of the depositions of the grounds of removal of H. H., as it is intended to appeal against such order of removal," cannot be construed as a notice of appeal, especially where the appellants subsequently gave a formal notice of appeal which was too late (*q*).

Form of notice of appeal and statement of grounds of appeal.

The following forms of notices of appeal and of grounds of appeal may be useful :—

To the churchwardens and overseers of the poor of the parish of ———, in the county of ———.

In the matter of an appeal, wherein the churchwardens and overseers of the poor of the parish of ———, in the county of ———, are the appellants;

And the churchwardens and overseers of the poor of the parish of ———, in the county of ———, are respondents.

This is to give notice to you and every of you, that we, the churchwardens and overseers of the poor of the parish of ———, in the county of ———, do intend, at the next quarter sessions of the peace to be holden for the said county of ———, to commence and prosecute an appeal against an order of ———, esquire, and ———, clerk, two of her Majesty's justices of the peace of the said county of ———, for and concerning the removal of Thomas Dodd to our said parish of ———.

And take notice, that the grounds of such appeal are, first, that the said Thomas Dodd, in the said order mentioned, is not settled in the parish of ———, in the said county of ———, by hiring and service for a year with Robert Palmer, esquire, as in the examination in this case stated, the said hiring having taken place a week *after* Michaelmas, 1814, to serve till the Michaelmas following. And further, that the said Thomas Dodd afterwards, to wit, at Christmas, 1820, rented a house and garden in the parish of ———, in the county of ———, from Sir T. J. ———, baronet, of that place, at the rent of 10*l.* a year, and occupied the same under such yearly rent and hiring from that time until Christmas, 1826, and paid the rent due for the same during the whole of that time [*this is put as an instance of the mode in which a settlement obtained under* 59 *Geo.* 3, *c.* 50, *might be stated. If the appellants rely on other grounds of appeal, they should here be stated, or cannot be gone into at the trial; but if frivolous or vexatious, the justices may award the costs of disputing them to be paid by the appellants to the respondents* (*r*)], and is settled in the said parish of ———.

And take notice, that, at the trial of the said appeal, we, on behalf of the

(*o*) *Reg.* v. *Justices of Sussex*, 34 L. J., M. C. 69; 4 B. & S. 966.
(*p*) *Ibid.*
(*q*) *Reg.* v. *St. Alkmund*, 32 L. J., M. C. 99; 3 B. & S. 347.
(*r*) 4 & 5 Will. 4, c. 76, s. 83; and 11 & 12 Vict. c. 31, s. 5, *ante*, p. 900.

said appellant parish, will seek to avail ourselves of all the said grounds, or some one or more of them in support of the said appeal. Witness our hands this ——— day of ———, 18—. *Form of Notice and Grounds of Appeal.*

E. F. } Churchwardens.
G. H. }
J. K. } Overseers of the poor of the
L. M. } said parish of ———.

Statement of settlement in the depositions and order of removal.

The parish *from* which a removal takes place, is not placed by the legislature in the same situation as that *to* which it is made, as far as respects the statement in the examination and order of removal of the kind of settlement relied on. For such description may be less specific than that of the settlement relied on by the appellants must be in their statement of the grounds of appeal, inasmuch as the depositions being taken and the order made by the magistrates, no defect in either is the act of the respondents (*s*). Again, as the grounds of appeal can hardly be known but to the appellants themselves, it is made necessary to particularize them in the statement prescribed; whereas by 4 & 5 Will. 4, c. 76, s. 79, no pauper is removable for twenty-one days after the copy of the examination, &c., is sent to the appellant's parish; so that the latter has full opportunity to examine the appellant touching his settlement, as permitted by sect. 80. Accordingly, it has been held that, where, in the copy of the examination sent by the respondent parish under 4 & 5 Will. 4, c. 76, s. 79, which formerly took the place which the copy of depositions now does, the pauper stated that his father belonged to parish C., and that he, the pauper, had done no act to gain a settlement, the respondent parish may prove any kind of settlement acquired by the father in parish C. (*t*).

Section 3.

Of the different kinds of settlement.

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We are now to consider the leading points in the *Law of Settlements* which govern the decision of appeals against

(*s*) *Coleridge*, J., in *R.* v. *Kelvedon* (*Inh.*), 1 N. & P. 138.
(*t*) *R.* v. *Kelvedon* (*Inh.*), 1 N. & P. 138; cited also in *R.* v. *Justices of Derbyshire*, 1 N. & P. 709.

Appeals against Orders of Removal.

orders of removal; but the effect of the statutes by which the area of the parish is for practical purposes (*i. e.*, chargeability) enlarged to that of a union, and of those by which the status of irremovability is conferred by residence for a year in the same union, is to reduce the importance of this branch of sessions law, which will accordingly be treated of but briefly; and the reader is referred to the fourth volume of Burn's Justice of the Peace, 30th ed., *tit.* Poor, edited by Davis, for a more ample treatise on the subject.

Different kinds of settlement.

A settlement is either in the place of birth, which is the *primâ facie* settlement of every one till another is discovered to have been derived from one acquired by parents (called settlement by parentage), or, in the case of females, to have been acquired by marriage; or next, it may be acquired from inhabitancy connected with some circumstance giving it a character of permanency, as apprenticeship, hiring and service, renting a tenement, payment of public taxes of a parish (if *before* the passing of 35 Geo. 3, c. 101, or *since* the passing of 59 Geo. 3, c. 50; 6 Geo. 4, c. 57, and 1 Will. 4, c. 18) (*t*), serving an annual office, or by admission or acknowledgment, *e. g.*, by certificate of settlement in a parish named, relief, or previous order of removal unquestioned on appeal.

1. *Of Settlement by Birth.*

Of legitimate children.

Primâ facie, the place in England or Wales maintaining its own poor at which *any* (*u*) person is born in wedlock, is the place of his settlement; however, as that is only so because no other can be discovered (*v*), (*e. g.*, the father's (*w*), or if that cannot be found, the mother's (*x*), or one acquired by the pauper himself), proof of birth at any given place is the weakest evidence of a settlement there (*y*), but birth confers a settlement without a residence of forty days (*z*). First, the marriage of the father and mother, and the pauper's subsequent birth (*a*) must

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(*t*) See 4 Burn's J. by Chitty, 29th ed.; and 1 & 2 Will. 4, c. 42; and *post*.

(*u*) Whether of English, Welsh, Scotch, or Irish, *R.* v. *Preston*, 12 A. & E. 822; or foreign parents, *R.* v. *Eastbourne*, 4 East, 103; *Reg.* v. *All Saints, Derby*, 19 L. J., M. C. 14; 14 Q. B. 207.

(*v*) *Reg.* v. *All Saints, Derby*, 14 Q. B. 207; 19 L. J., M. C. 14, per *Coleridge*, J.; *R.* v. *Heaton Norris*, 6 T. R. 653; 3 A. & E. 649, per *Patteson*, J.

(*w*) *R.* v. *St. Giles-without-Cripplegate*, 17 Q. B. 636; 21 L. J., M. C. 26.

(*x*) *Reg.* v. *Newchurch* (*Inh.*), 3 B. & S. 107; 32 L. J., M. C. 19; *Tynton* v. *King's Norton*, 2 Bott, 31. See 1 B. & Ad. 201.

(*y*) *R.* v. *Wakefield* (*Inh.*), 5 East, 338. See 15 East, 351.

(*z*) *Reg.* v. *Watford*, 6 Q. B. 626; 16 L. J., M. C. 1.

(*a*) Baptism after marriage is not *per se* proof of the birth having been after the latter event, *Goodright* v. *Moss*, Cowp. 591; nor of the place of birth, but, combined with other circumstances, may be sufficient proof of the latter fact, *Reg.* v. *Crediton* (*Inh.*), 27 L. J., M. C. 265; 3 B. & E. 231.

be shown: next the place of birth. These may be proved by the father or mother (*b*), though not by the pauper, as the utmost he can prove is his first recollection of himself as living at a given place (*c*). Nor will an entry in a register of baptisms, showing a person of the pauper's name to have been baptized in a particular parish, suffice *per se* without evidence to connect him with that entry (*d*). This settlement may be lost by the township in which the pauper was born within a parish, having been subsequently separated for the purpose of maintaining its own poor (*e*). *Of Settlement by Birth.*

Bastards born on or before 14th August, 1834, are settled at their places of birth, except where the transaction was vitiated by fraud, or contrivance to throw a burden on the parish (*f*); or where the child was born of a woman who was at the time under an order of removal, whether before actual removal or *in transitu*, or during a suspension of the order, but not after its actual execution by removal, though she returned to and was delivered in the removing parish (*g*). Of bastards born on or before 14th August, 1834.

A bastard born in an extra-parochial place did not follow the settlement of its mother (*h*); nor if it was born in a parish to which the mother was removed by an order which was afterwards quashed (*i*). It was entitled to remain with its mother while the purposes of nurture required, and afterwards to relief as casual poor till it acquired a settlement (*k*).

But by 4 & 5 Will. 4, c. 76, s. 71, a child born bastard *after* 14th August, 1834, has and follows its mother's settlement (*l*), even when acquired by her marriage after its birth (*m*), till it attains the age of sixteen, or acquires a settlement in its own Bastards born after 14th August, 1834.

(*b*) See *R.* v. *Erith*, 8 East, 539.

(*c*) *R.* v. *Trowbridge*, 7 B. & C. 252, cited 11 A. & E. 623. See *R.* v. *St. Mary, Leicester*, 3 A. & E. 644.

(*d*) *Creech* v. *St. Michael's, Pitminster*, Burr. S. C. 765; *R.* v. *North Petherton*, 5 B. & C. 208; *R.* v. *Clapham*, 4 C. & P. 29; *Wihen* v. *Law*, 3 Stark. R. 63; *Walker* v. *Beauchamp*, 6 C. & P. 552; *R.* v. *Lubbenham*, 5 B. & Ad. 968.

(*e*) *Reg.* v. *Tipton* (*Inh.*), 3 Q. B. 215; 2 G. & D. 92.

(*f*) See *R.* v. *Mattersey*, 4 B. & Ad. 211; *R.* v. *Wilson*, 2 *id.* 230; *Tewkesbury* v. *Twining*, 2 Bulst. 349; *Masters* v. *Child*, 3 Salk. 66.

(*g*) *R.* v. *Halifax*, 2 B. & Ad. 211; see *contra*, *R.* v. *Llandinaboe*, 1 Stra. 476.

(*h*) *R.* v. *St. Nicholas, Leicester*, 2 B. & C. 889; 4 D. & R. 462. But as to extra-parochial places, see now 20 Vict. c. 19, and 31 & 32 Vict. c. 122, s. 27.

(*i*) *R.* v. *Martlesham*, 10 B. & C. 77. The order of removal of a mother and her bastard child is not bad for adjudicating the settlement of the child to be that of the mother absolutely, *Reg.* v. *Shipston-on-Stour*, 6 Q. B. 119; 13 L. J., M. C. 128.

(*k*) *R.* v. *St. Nicholas, Leicester*, 2 B. & C. 889.

(*l*) *Reg.* v. *Sutton-le-Braile*, 5 E. & B. 814; 25 L. J., M. C. 57. See *Reg.* v. *Wendron*, 7 A. & E. 819; 3 N. & P. 62; *R.* v. *St. Mary, Leicester*, 3 Ad. & E. 644; 5 N. & M. 215.

(*m*) *Reg.* v. *St. Mary's, Newington* (*Inh.*), 4 Q. B. 581; 12 L. J., M. C. 8.

Of Settlement by Birth.

right. Supposing, however, the mother to have *no* settlement at the time of the birth, or to acquire none by marriage, the place of birth seems the only settlement of her illegitimate child. And after sixteen years date, whether the mother be living or not, or has a settlement or not, the child is removable to its birth settlement (*o*).

In extra-parochial places, workhouses, &c.

The place of birth confers no settlement where the birth is in an extra-parochial place not having an overseer (*p*), or in a parish to which a removal of the mother had taken place under an order afterwards reversed, or in a prison in which the mother was confined (*q*), or in a house of industry, or house incorporated by statute for reception and care of the poor of any district, &c. (*r*), or in the workhouse of a union where she was an inmate as a pauper (*s*), or in a parish in which she was residing (*t*), under a certificate not including her specifically by description (*u*), or in a lying-in hospital licensed by quarter sessions (*x*), or in a lunatic asylum (*y*), or other charitable institution (*z*).

2. *Of Settlement by Parentage.*

Of legitimate children.

The settlement of every child born in wedlock is to be referred in the first instance to its *father's* settlement, if it can be traced, though derivative from *his* mother's maiden settlement, who married a foreigner without one, and though the child's mother has acquired one for herself since (*a*); but if it cannot, then, in the second place, to his *mother's* maiden settlement.

Legitimate children, while continuing part of their father's family, have such a right to his legal, *i. e.*, his *last* legal settlement, that it is not defeated by his attainder for felony (*b*), nor by the removal of his residence (*c*), unless he acquire the

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(*o*) *St. Andrew, Worcester* v. *Bodenham*, 22 L. J., M. C. 39; 1 E. & B. 65.

(*p*) *R.* v. *Oakmere* (*Inh.*), 5 B. & A. 577. But see now as to extra-parochial places, 20 Vict. c. 19; 31 & 32 Vict. c. 122, s. 27.

(*q*) 54 Geo. 3, c. 170, s. 2. See 13 Geo. 3, c. 82, ss. 2, 5; *R.* v. *Manchester*, 4 B. & A. 504. Bastards born in a house of industry, &c., before 14th August, 1834, are deemed born in the parish on whose account the mother was received and maintained.

(*r*) 54 Geo. 3, c. 170, s. 3. See 20 Geo. 3, c. 36, s. 2.

(*s*) 7 & 8 Vict. c. 101, s. 56.

(*t*) *R.* v. *Sherborne*, Burr. S. C. 182.

(*u*) *R.* v. *Darlington*, 4 T. R. 797.

(*x*) 54 Geo. 3, c. 170, s. 2. See as to foundling hospital, 13 Geo. 2, c. 29.

(*y*) 51 Geo. 3, c. 79.

(*z*) 54 Geo. 3, c. 170, s. 6.

(*a*) *R.* v. *St. Matthew's, Bethnal Green*, Burr. S. C. 482, not overruled by *R.* v. *St. Mary, Leicester*, 3 A. & E. 644; 5 Nev. & M. 215, for there no settlement of the father appeared.

(*b*) *R.* v. *Haddenham*, 15 East, 463; *R.* v. *St. Mary, Cardigan*, 6 T. R. 116. See 5 B. & C. 585.

(*c*) 2 Sess. Cas. 150.

status of irremovability conferred by statutes (*d*), nor by his acquiring a new settlement before the child's emancipation (*e*), nor by the father's death either before or after the birth (*f*). Indeed, proof of a father's settlement is deemed in all cases good *primâ facie* evidence of the settlement of his son, though emancipated, and even of his son's wife's family (*g*). The same general law applies to a settlement derived from the mother, whether maiden, or acquired in her own right after her husband's death, during widowhood, *e. g.*, by renting a tenement, &c. But if after the death of her husband she marries a man with a settlement, and thus obtains his settlement, she does not communicate the latter to her children by her former husband (*h*); but this is subject to the rule, that a legitimate child is irremovable from its mother, or, if she is dead, from its father, till it be seven years of age, as requiring nurture.

Of Settlement by Parentage.

The rule was as to emancipation laid down by Lord *Tenterden* to be, that during the minority of a child, there can be no emancipation, unless in case of marrying and *so* becoming the head of a family, or contracting some other relation, so as wholly and permanently to exclude the parental control (*i*); *e. g.*, acquires a fresh settlement by hiring and service which a minor may do (*k*); and therefore, where a minor having enlisted in the marines was discharged before full age, and returned to his father's house, he was held not to be emancipated, though the crown might have retained him for life (*l*); but by remaining *absent at and after attaining twenty-one* he might become emancipated, though his original separation from his family was by compulsion (*m*). But as the emancipation under the circumstance of absence in the merchant sea service does not accrue till the age of twenty-one, any settlement acquired by

The settlement by parentage may be ousted by obtaining another settlement or by emancipation.

(*d*) 9 & 10 Vict. c. 66; 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, see *post*, p. 960.

(*e*) 2 Salk. 528, *Cumner* v. *Milton*, 6 Mod. 87; and acted on in *R.* v. *Hendon*, 2 Q. B. 455, tit. *Settlement by Estate*, *post*, p. 943.

(*f*) *R.* v. *Clifton*, 19 Vin. Ab. 382.

(*g*) *R.* v. *Stone*, 6 T. R. 56.

(*h*) *Cumner* v. *Milton*, 6 Mod. 87; 2 Salk. 528; *St. Giles's* v. *St. Clement's*, Cald. Ca. 10. They retain the settlement which she had at the time of her second marriage, either in right of her first husband, or as after acquired by herself, till they acquire settlements of their own, *Wangford* v. *Brandon*, Carth. 449; *R.* v. *St. Giles-in-the-Fields*, Burr. S. C. 2, &c., &c.; and they are not removable with the second husband and their mother; unless under the age of seven years, *R.* v. *Walthamstow*, 6 A. & E. 301. See *Reg.* v. *St. Mary, Newington*, 4 Q. B. 583, per *Patteson*, J.

(*i*) *R.* v. *Wilmington*, 5 B. & A. 525; 1 D. & R. 140.

(*k*) *R.* v. *Bleasby*, 3 B. & A. 377; and see also Lord *Kenyon* in *R.* v. *Roach*, 6 T. R. 247; *R.* v. *Offchurch*, 3 T. R. 114; *R.* v. *Hardwicke*, 5 B. & A. 176.

(*l*) *R.* v. *Rotherfield Greys*, 1 B. & C. 245; 2 D. & R. 628.

(*m*) *R.* v. *Hardwicke*, 5 B. & A. 176; *R.* v. *Lawford*, 8 B. & C. 271; 2 M. & R. 556; *S. P.* 2 Stra. 831. As to service in a local militia, see *Reg.* v. *Scammonden*, 8 Q. B. 349; 15 L. J., M. C. 30; and in the police force, *Reg.* v. *Selborne* (*Inh.*), 29 L. J., M. C. 11; 2 E. & E. 275.

Of Settlement by Parentage.

Of emancipation.

the parent before the child attains that age belongs to the latter (*n*). But if from idiocy he is in fact incompetent to manage his own affairs, the presumption arising from separation after full age fails, and his settlement will follow his father's, though acquired by him after his son attained twenty-one (*o*). Again, where a man of full age carried on business on his own account, but had never left his mother's roof, the court held him unemancipated (*p*).

Where a daughter was placed by her father at eleven years of age with an uncle, by whom she was wholly maintained after that time, and with whom *she continued to reside after she came of age* (doing service to him, but without any contract of hiring to give her a settlement of her own), the father in the meantime having gone out to service: it was holden that the daughter was emancipated on her coming of age (*q*).

A separation while under twenty-one does not produce an emancipation, unless a subsequent settlement be gained (*r*).

3. *Of Settlement by Marriage.*

The following are the rules generally applicable to settlements by marriage:—

1. A woman marrying a man with a known settlement shall follow it, even whether she lived at the place of it with him or not (*s*).

2. A wife cannot gain a new settlement for herself during coverture (*t*), or complete one in widowhood which her husband did not live long enough to obtain (*u*).

3. It was formerly held, that a woman marrying a man without a known settlement retains her maiden settlement (*x*); and that inquiry after the husband's settlement is merely a precautionary measure to prevent an improper removal; and on removal it is sufficient in the first instance to prove the maiden settlement of the wife.

But in *Reg.* v. *Birmingham* (*y*), it is said, that where the respondent's evidence makes out a maiden settlement and contains nothing to show that any subsequent settlement which would supersede the maiden settlement has been gained that

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(*n*) *R.* v. *Lytchet Matravers*, 7 B. & C. 226; *R.* v. *Whitton*, 3 T. R. 355.
(*o*) *R.* v. *Much Cowarne*, 2 B. & Ad. 861.
(*p*) *R.* v. *Sowerby*, 2 East, 276.
(*q*) *R.* v. *Cowhoneyborne*, 10 East, 88; *R.* v. *Hardwicke*, 5 B. & A. 176.
(*r*) *R.* v. *Huggate*, 2 B. & A. 584.
(*s*) *St. Giles's* v. *Eversley*, 2 Bott, 103; 4 Burn's J., 30th ed. 359.
(*t*) *R.* v. *Aythrop Rooding* and other cases, *ibid.*
(*u*) *R.* v. *Crayford* (*Inh.*), 6 B. & C. 68; 9 D. & R. 80, *e. g.*, by renting a tenement.
(*x*) See cases, 4 Burn's J., 30th ed. 360. We have seen that a settlement obtained by a woman's after-marriage is not communicated to her children of the first marriage, *ante*, p. 907.
(*y*) 8 Q. B. 410.

constitutes a *primâ facie* case; and the onus of proof that the pauper was not settled there lies upon the appellants; but if it appeared before removal that the husband had gained a settlement in England, but that no one could prove in what parish it was, the wife could not properly be removed to the maiden settlement, nor to any place until knowledge was obtained of the place of the husband's settlement. The duty of making the search after the husband's settlement belongs to the respondents in the first instance, and is transferred to the appellants after removal. *Of Settlement by Marriage.*

First, then, where the marriage is legal, the settlement of the husband shall, by the intermarriage, be immediately communicated to the wife; for wherever the husband is settled, there the wife must likewise be.

This being an admitted principle without exception, the only question it involves, which admits of being controverted on an appeal, is the legality of the marriage under which the settlement is claimed.

This question of the legality of marriages is too large and general to admit of discussion here, and the reader must be referred not only to Burn's Justice, vol. iv. 30th ed. p. 361 *et seq.*, but to other treatises on questions relating to marriage, and the evidence proper to prove that fact; but here it must suffice to say that marriages are illegal, as well as being forbidden under the Marriage Acts, as being within the degrees of consanguinity, as also being bigamous. Legality of marriage.

The principal acts now in force relating to marriages are 4 Geo. 4, cc. 5, 76; 5 Geo. 4, c. 32; 11 Geo. 4 & 1 Will. 4, c. 66; 6 & 7 Will. 4, c. 85; 7 Will. 4 & 1 Vict. c. 22; 3 & 4 Vict. c. 72; 19 & 20 Vict. c. 119; 21 & 22 Vict. c. 25; 23 & 24 Vict. c. 18; 23 & 24 Vict. c. 24.

And with respect to marriages within the prohibited degrees, the 5 & 6 Will. 4, c. 54, s. 4, makes null and void all marriages within the prohibited degrees; and it has been held, that the prohibited degrees include natural relations, and that a woman marrying the husband of her aunt did not acquire any settlement by marriage, and that it was immaterial that the pauper's mother was illegitimate (*z*); so a marriage by a widower with his deceased wife's niece is void (*a*).

And with respect to bigamous marriages the requisite law will be found in Archbold's Criminal Pleading, 17th ed. p. 883 *et seq.*

4. *Of Settlement by Apprenticeship.*

The settlement by apprenticeship derives its origin from stat. 3 & 4 W. & M. c. 11, s. 8, which enacts, that "if any

(*z*) *Reg.* v. *Brighton*, 30 L. J., M. C. 197.
(*a*) *Reg.* v. *Allen*, 41 L. J., M. C. 97.

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person shall be bound an apprentice by indenture (*b*), and inhabit (*c*) in any town or parish, such binding and inhabitation (*d*) shall be adjudged a good settlement."

Apprenticeship appears to be the earliest mode recognized by law by which an adventitious or personal settlement could be acquired. It has been already observed that seven years is fixed as the limit of the age of nurture (*e*); and by an act of Elizabeth (*f*), the children of the poor, on obtaining that age, might even be *compelled* to go into apprenticeship by the officers of the parish in which they are settled, though not resident in or a burden to it (*g*). However, this compulsory apprenticeship has been altogether put an end to (*h*), and since 3 & 4 Vict. c. 85, no child under the age of sixteen may be bound apprentice to a chimney sweeper, and every indenture of such apprenticeship is void; and before that time the age was ten, and prior to that eight, and in such cases also, the indenture contrary to the statutes was void (*i*). No boy under the age of ten, or girl of any age, can be bound to work in collieries underground (*k*), nor boy under the age of twelve, or girl of any age, in metalliferous mines underground (*l*). No *child* can be bound apprentice by *parish officers* till the age of nine (*m*).

Who may not be bound apprentices.

By an earlier act of Elizabeth (*n*), the qualifications of persons entitled to take and to become apprentices had been regulated. The changes of time and the progress of commerce having made many of its provisions inconvenient, caused its penalties and restrictions to fall into a disuse, from which they were only occasionally revived for the purposes of vexation. They were therefore repealed (*o*); and all power specially given to justices over apprenticeships, contracted subject to the repealed act of 5 Eliz. c. 4, is still reserved to the justices *generally* (*p*).

By 4 & 5 Will. 4, c, 76, s. 67, no settlement can be acquired by apprenticeship to the sea service, or to a householder exercising the trade of the seas as a fisherman or otherwise, or by

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(*b*) According to law, *i. e.*, for seven years, 5 Eliz. c. 4, ss. 26, 31, 41. See *Reg.* v. *Barmston* (*Inh.*), 7 A. & E. 858; a case of ante-dating found to be fraudulent: but if for less time, it is not void, though void*able*.

(*c*) *i. e.*, for forty days.

(*d*) *R.* v. *Linkinhorne*, 3 B. & A. 418; 6 Ad. & E. 140; *Reg.* v. *Burslem*, 11 Ad. & E. 52; 3 P. & D. 38.

(*e*) See *Wangford* v. *Brandon*, Carth. 449; 2 Salk. 482.

(*f*) 43 Eliz. c. 2, s. 5.

(*g*) *R.* v. *St. George, Exeter* (*Inh.*), 3 A. & E. 373; 5 N. & M. 61.

(*h*) 7 & 8 Vict. c. 101, ss. 12, 13.

(*i*) *R.* v. *Hipswell*, 8 B. & C. 466.

(*k*) 35 & 36 Vict. c. 76.

(*l*) 35 & 36 Vict. c. 77.

(*m*) 56 Geo. 3, c. 139, s. 7.

(*n*) 5 Eliz. c. 4.

(*o*) 54 Geo. 3, c. 96.

(*p*) *Id.* s. 3.

any person who at the passing of this act (*q*) was such an apprentice, in respect of such apprenticeship (*r*), unless he had served and resided forty days in the parish before the act passed (*s*). *Of Settlement by Apprenticeship.*

The contract itself, by which the relation of master and apprentice is formed; the residence under it, and the effects of that residence; its premature termination; and the questions of evidence which arise on the indenture are discussed in detail in Burn's Justice, vol. iv., 30th ed., but we will merely shortly refer to the leading points in respect of such indentures.

1. The contract may be made by any person of more than seven years of age, for him or herself; for being invariably supposed to be for the child's benefit, it is a case beside the common rule of law, which makes the contracts of infants void (*t*); but the binding, to confer a settlement, must be such as would at the time be effectual for the purpose (*u*). Contract of binding.

The other contracting party, the master, may also be an infant (*x*). It is perfectly immaterial what is the trade or occupation, if it be a contract of which the substantial object is to learn, and not to teach and serve (*y*), as, for instance, an articled clerk to a lawyer (*z*).

2. Except in the case of *parish apprentices*, even if the contract be not the sole act of the parties who are to stand in the relation of master and apprentice, it is absolutely necessary that they should both be *consenting* parties, in order to enable the apprentice to obtain a settlement by the service under the contract (*a*). But the signature of the master is not absolutely necessary, because his accepting the apprentice is sufficient proof of *his* consent (*b*).

3. The contract must be *by deed*, though actual indenture is not requisite (*c*). And the contents of this document has given rise to many fine distinctions between a contract of apprenticeship and one of master and servant.

(*q*) 14th August, 1834.
(*r*) 4 & 5 Will. 4, c. 76, s. 67.
(*s*) *Reg.* v. *St. Giles's, Middlesex* (*Inh.*), 2 Q. B. 458.
(*t*) 1 Bott, 613; 2 Bott, 363; *R.* v. *Kilby*, 2 M. & S. 501; *R.* v. *Arundel*, 5 M. & S. 257.
(*u*) *R.* v. *Leeds* (*Inh.*), 4 B. & Ad. 248; 1 Nev. & M. 651; *R.* v. *Queenborough* (*Inh.*), 2 B. & Ad. 219; *R.* v. *Manningtree*, 6 M. & S. 214.
(*x*) *R.* v. *St. Petrox*, 4 T. R. 196.
(*y*) *R.* v. *Edingale*, 10 B. & C. 739; *R.* v. *St. Margaret's, King's Lynn*, 6 B. & C. 97; 9 D. & R. 160; *R.* v. *Combe*, 8 B. & C. 82; 2 M. & R. 30; *R.* v. *Gwinnear*, 1 Ad. & E. 152; 3 Nev. & M. 297, in husbandry.
(*z*) *Parish of Clapham* v. *St. Pancras*, 29 L. J., M. C. 141; 2 E. & E. 742.
(*a*) *St. Nicholas, Rochester* v. *St. Botolph Without, Bishopsgate*, 31 L. J., M. C. 258.
(*b*) 2 Bott, 367, 371.
(*c*) 3 W. &. M. c. 11, s. 8; 31 Geo. 2, c. 11, s. 1.

Of Settlement by Apprenticeship.

Of the contract of binding.

4. The indentures must be stamped with the proper stamps provided by statute (*d*). Till 1804 there was one stamp in respect of the instrument itself, and another in respect of the fee or premium. All previous stamp duties were in that year repealed by 44 Geo. 3, c. 98. The duties granted by Sched. A. of that act were repealed in 1808 by 48 Geo. 3, c. 149, which imposed others again repealed on 31st August, 1815, by 55 Geo. 3, c. 184, the act now in force. Every writing relating to service, tuition, or employment of any apprentice is to be deemed an instrument of apprenticeship. Exempt from duty are indentures for placing out children at the sole charge of any parish or public charity, also assignments of such indentures (*e*). The 16 & 17 Vict. c. 59, altered the duties on indentures of apprenticeship where no premium is paid, and is now 2*s.* 6*d.* By 33 & 34 Vict. c. 97, apprenticeship indentures with premium are charged 5*s.* for every 5*l.* or fractional part thereof.

5. The full sum or consideration given must be set forth in the indenture in words at length, and the duties paid on it (*f*); nor is this provision to be evaded by giving other things instead of money (*g*).

But it has been determined, that where money was given by the grandfather of an apprentice to clothe him, *before* he entered upon his apprenticeship, this was not such a consideration as the statute requires to be set out in the indenture (*h*). Nor where the friends of the apprentice covenanted to maintain and clothe him (*i*). Nor if the subject-matter of agreement for apprenticeship is not shown to be of 20*l.* value (*k*). And the enactment, that the *full sum* be inserted in the indenture, means *not less than* the full sum: therefore if *more* be inserted, and the duty paid according to that, it is good (*l*).

The above are the principal points respecting the binding, on which settlements by apprenticeship, in the ordinary course, are usually resisted, upon appeal to the quarter sessions. The apprenticeships of *the poor exclusively* fall under a different consideration, so far as respects the contract itself; and therefore are necessary to be noticed, before we proceed to consider the effects and consequence of contracts of apprenticeships generally.

Exemptions from stamp duties—poor apprentices.

The terms of 37 Geo. 3, c. 111, s. 3, exempting from the additional stamp duty of 10*s.* imposed on every deed made

(*d*) *R.* v. *Edgeworth*, 3 T. R. 353.

(*e*) See indentures of apprenticeship under 7 & 8 Vict. c. 112, and 13 & 14 Vict. c. 93.

(*f*) 8 Ann. c. 9. See *R.* v. *Bourton-on-Dunsmore*, 9 B. & C. 872; *R.* v. *Baildon*, 3 B. & Ad. 427.

(*g*) 48 Geo. 3, c. 98.

(*h*) *Reg.* v. *Northowram*, Burr. S. C. 145.

(*i*) *R.* v. *Portsea*, Burr. S. C. 834. See *R.* v. *Aylesbury*, 3 B. & Ad. 569.

(*k*) *R.* v. *Enderby*, 2 B. & Ad. 205; *R.* v. *Aylesbury*, 3 B. & Ad. 569; 2 Chit. Stat. 963, n.; *Morris* v. *Cox*, 2 M. & Gr. 660.

(*l*) *R.* v. *Keynsham*, 5 T. R. 309.

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after 1st August, 1797, where a sum or value not exceeding 10*l.* shall be given or contracted, with or in relation to the apprentice, do not apply to protect a case where *nothing* is given or contracted for (*m*). Indentures and assignments of apprentices bound out at the charge of any parish, or public charity, are exempted, by statute, from the duties otherwise payable on the consideration money; nor *need* trustees of public charities be parties to indentures for putting out poor children apprentices with the funds of the charity (*n*).

As to parish apprentices.

Poor children bound out (*o*) *parish* apprentices are exempted in like manner (*p*), and, being so bound out under the provisions of particular statutes, the contract must be conformable with their particular directions (*q*), which are—

The binding.

1. That the binding must be by the majority of the churchwardens and overseers of the parish to which the pauper belongs (*r*). And where a parish has united with others for the support of the poor, according to the provisions of 22 Geo. 3, c. 83, and a guardian has been appointed, an indenture executed by the churchwardens and overseers is still good, and the guardian need not execute (*s*).

Binding of parish apprentices in unions.

But by the Poor Law Amendment Act, 1844 (*t*), no poor child shall be bound apprentice by the overseers of any parish included in any union or subject to a board of guardians under the provisions of the Poor Law Amendment Act, 1834, but that it shall be lawful for the guardians of such union or parish to bind any such poor child to be an apprentice, and in such case the indenture of apprenticeship shall be executed by the

(*m*) *R.* v. *Mabe* (*Inh.*), 3 A. & E. 531.

(*n*) See 8 Ann. c. 9, s. 40; *R.* v. *St. Petrox, Dartmouth*, 4 T. R. 196; 12 Ann. st. 2, c. 9, s. 21; 32 Geo. 3, c. 57, s. 10, (indorsements on indentures of parish apprentices;) 37 Geo. 3, c. 90, s. 1; and c. 111, s. 1; 44 Geo. 3, c, 98, Sched. A. (assignments); 48 Geo. 3, c. 149, Sched.; 55 Geo. 3, c. 184, Sched. See *R.* v. *Clifton-on-Dunsmoor*, Burr. S. C. 697; *R.* v. *St. Matthew, Bethnal Green, id.* 574; *R.* v. *Quainton*, 2 M. & S. 460.

(*o*) Accordingly, when persons above twenty-one are bound out by the parish officers, on paying part of the premium from the parish funds, the assent of two justices is not necessary under that act; *R.* v. *St. John, Bedwardine*, 5 B. & Ad. 169. Recital in an indenture is no evidence that the premium was paid out of charity money, the fact of payment being proved *aliunde*, *R.* v. *Skeffington*, 3 B. & A. 382.

(*p*) And parol evidence is admissible to show the money paid on assignment of a parish apprenticeship, to be parish money, so that a stamp was unnecessary; *R.* v. *Llangunnor*, 2 B. & Ad. 616; 2 N. & M. 86.

(*q*) 43 Eliz. c. 2; 56 Geo. 3, c. 139, &c., see *infra*.

(*r*) These words, "*majority of* the churchwardens and overseers," retrospectively include indentures signed by two persons only, who acted as churchwardens and also as overseers, 51 Geo. 8, c. 80; or signed by the overseers of any township, &c., and the church or chapelwarden *acting or appointed* in respect thereof; 54 Geo. 3, c. 107; *R.* v. *Hinckley*, 12 East, 361; *R.* v. *Nantwich*, 16 East, 228. See 6 A. & E. 870; 2 Nev. & P. 106; *R.* v. *Shelton*, 1 B. & A. 175.

(*s*) *R.* v. *Lutterworth*, 3 B. & C. 487; 5 D. & R. 343.

(*t*) 7 & 8 Vict. c. 101, s. 12.

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guardians, and shall not need to be allowed, assented to, or executed by any justice or justices of the peace.

2. That the apprentices must be the children of parents whom the churchwardens and overseers shall judge not able to maintain them.

3. That boys shall be bound till twenty-one, and girls till twenty-one or marriage (*u*).

4. That two justices appearing on the indenture to have jurisdiction in the county, &c. (*x*), must be assenting parties to it, and it being a judicial act, must be together at the time of such assenting or allowance (*y*), though it is not absolutely necessary that they should sign it while together (*z*), and the allowance must show on its face that the justices making it were acting within their jurisdiction (*a*). If, without being parties to the indentures, the parish officers provide part of the expense out of the parish funds, the justices must seal as well as sign (*b*); but not even in that case, if the sum thus contributed was voluntarily supplied by the overseers, and allowed by the parish in aid of other charitable contributions (*c*).

As to defective contracts of apprenticeship, see the provisions of 3 & 4 Will. 4, c. 63, ss. 1, 2, 3.

By the Consolidated Order of the Poor Law Board, made under 4 & 5 Will. 4, c. 76, rules are laid down for the direction of unions and places with respect to the apprenticing of pauper children.

5. That such apprentices may, by the assent of two such justices as aforesaid, be assigned, and if so assigned, shall be subject to all such regulations as if they had continued to serve under the original indenture (*d*). Such assignments, not being subject to the regulations imposed by 8 Ann. c. 9, need not be stamped within two months, nor need the indenture set out the consideration paid for it (*e*).

(*u*) If a person of full age is bound by parish officers, the indentures, though not within 56 Geo. 3, are voidable only; *R.* v. *St. Gregory* (*Inh. Vill of*), 2 A. & E. 99; 4 N. & M. 137. See 4 A. & E. 618.

(*x*) "County aforesaid," in the allowance in the margin, held to refer to the county named in the indenture; *R.* v. *Countesthorpe*, 2 B. & Ad. 487; *R.* v. *St. Mary, Leicester*, 1 B. & A. 327; *R.* v. *Witney*, 5 A. & E. 191; 6 N. & M. 152; and see 3 & 4 Will. 4, c. 63, *post*.

(*y*) *R.* v. *Hamstall Ridware*, 3 T. R. 380.

(*z*) *Ibid.*; *R.* v. *Winwick*, 8 T. R. 454. See 2 M. & S. 451.

(*a*) *Staverton* v. *Ashburton*, 4 E. & B. 526; 24 L. J., M. C. 53; *Reg.* v. *Totness*, 13 Q. B. 190; *Reg.* v. *St. George's, Bloomsbury*, 4 E. & B. 520; *Reg.* v. *Stainforth*, 17 L. J., M. C. 25; 11 Q. B. 80; 18 L. J., M. C. 46; 11 Q. B. 66.

(*b*) *R.* v. *St. Paul, Exeter*, 10 B. & C. 12; 5 M. & R. 94; 56 Geo. 3, c. 139, s. 1 to 11 inclusive; *R.* v. *Halesworth* (*Inh.*), 3 B. & Ad. 717; *R.* v. *Quainton*, 1 A. & E. 133; 3 N. & M. 289.

(*c*) *R.* v. *St. Peter, Hereford*, 1 B. & Ad. 916.

(*d*) 32 Geo. 3, c. 57; *R.* v. *Countesthorpe*, 2 B. & Ad. 487; *R.* v. *Witney*, 5 A. & E. 191; 6 N. & M. 152.

(*e*) *R.* v. *Ide*, 2 B. & Ad. 866.

Of Settlement by Apprenticeship.

The settlement of an apprentice does not necessarily depend on the settlement of the master or mistress, but on his own binding and inhabitation for forty days, during his apprenticeship, in the actual service of such master or mistress, though not within the compass of any one year (*f*).

Apprentice need not sleep in the master's parish.

But the residence must be in the service of the master; for the words of the statute creating this species of settlement (*g*), "*binding and habitation*," must be understood of a habitation referable in some way to the apprenticeship (*h*), *viz.*, in the character of an apprentice, and in some way or other in furtherance of the object of the apprenticeship (*i*).

Must be in the service of the master.

If an apprentice, on account of illness, go into another parish than that in which his master lives, merely as a temporary residence to get cured, without performing *any sort of service for his master* during such residence, a settlement is not gained there by *such* temporary residence in such *other* parish (*k*); but his settlement is where he slept the night previous to quitting. And a mere residence by indulgence is not sufficient to confer a settlement in a parish where no service is performed (*l*).

Residence on account of illness or indulgence confers no settlement.

On the other hand, if, during the residence in a parish different from that of the master, the apprentice performs service for his master there, his residence is then considered referable to, and connected with, the apprenticeship, and he gains a settlement in the parish where he resides (*m*). There is also a third case where the master assents to the residence of his apprentice in a different parish, and maintains him there, though no service be performed (*n*).

Forty days is, in *all* cases, the time of residence necessary for gaining a settlement by apprenticeship; which arises by inference from the statute making settlements depend on residence (*o*); as by a subsequent statute (*p*), apprentices, bound by indenture, and inhabiting in a parish (under such apprenticeship), are excepted out of the provision for removal contained

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(*f*) *R.* v. *Aldstone*, 2 B. & Ad. 207; *R.* v. *Stratford-upon-Avon*, 11 East, 176; *Reg.* v. *Somerby*, 9 A. & E. 310; *R.* v. *St. Peter's-on-the-Hill*, 4 Burn's J., 30th ed. 479; *R.* v. *Banbury*, 5 B. & Ad. 706.

(*g*) 3 Will. & M. c. 11, *ante*, p. 909.

(*h*) *R.* v. *Barnesley*, 7 East, 381; *R.* v. *Linkinhorne*, 3 B. & Ad. 413; *Reg.* v. *Burslem* (*Inh.*), 11 A. & E. 52, and Lord *Tenterden's* judgment in *R.* v. *Dremerchion*, 3 B. & Ad. 420.

(*i*) Per Lord *Tenterden*, *R.* v. *Ilkeston*, 4 B. & C. 64.

(*k*) *R.* v. *Ribchester*, 2 M. & S. 482; *R.* v. *Barnesley*, 7 East, 381.

(*l*) *R.* v. *Ilkeston*, 4 B. & C. 64; 6 D. & R. 64; *R.* v. *St. Mary, Bredin*, 2 B. & A. 382.

(*m*) *Reg.* v. *Somerby* (*Inh.*), 9 A. & E. 310; 1 P. & D. 180. So though the apprentice was illegally employed by his master.

(*n*) *R.* v. *Ilkeston*, 4 B. & C. 64; 6 D. & R. 66; *Reg.* v. *Burton-upon-Irwell*, 32 L. J., M. C. 102; 3 B. & S. 604; *R.* v. *Banbury*, 3 B. & Ad. 706; 2 N. & M. 205.

(*o*) 13 & 14 Car. 2, c. 12.

(*p*) 3 Will. & M. c. 11, s. 8, referring to sect. 3; *ante*, p. 909.

Of Settlement by Apprenticeship.

in that act (*q*). The forty days' "inhabitation" within a parish need not be all at one time, or in one year (*r*).

Assignment of indentures of apprenticeship.

An indenture of apprenticeship may be assigned from master to master, through any number successively; and if the original contract was valid, and the assignments were regularly made by each master in succession, the residences under them will, for the purposes of settlement, be governed by the same rules as if the apprentice had continued in his first place of abode under the indenture.

But though the assignment may be by parol, it must be expressly given before the indentures are parted with, and be for a service with a particular person, whether king or subject, not a general leave or licence, to serve *any one*, at the discretion of the apprentice: for such permission and service will not amount to an assignment, and therefore cannot enable the party to obtain a settlement (*s*).

The true question in all such cases is, whether the service to the second master is a constructive service to the first master under the indenture, as between him and the apprentice: to the solution of which it is wholly immaterial whether the second master knew of the apprenticeship or not (*t*); though such ignorance furnishes strong evidence that the second service was unconnected with any such contract (*u*). The mutual delivering up of the indentures of a parish apprentice, whether a minor or of full age, does not discharge the apprenticeship (*x*), unless, being of full age, he consent to it (*y*), or unless, being an infant, such discharge is for his benefit, *e. g.*, in case of a master's insolvency (*z*), or the apprentice buying his indentures (*a*).

As has been observed, the assignment may be by parol; but if it be by deed, the deed is governed by the same rules of evidence, when offered in proof, as the original indenture; *i. e.*, it must be stamped, and having been reduced to writing, must be produced, and cannot be proved by parol testimony (*b*).

If the assignment of a person, not a *parish* apprentice, is by

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(*q*) *R.* v. *Gwinnear*, 1 A. & E. 152; 3 N. & M. 297.

(*r*) *R.* v. *Aldstone*, 2 B. & Ad. 207.

(*s*) *R.* v. *Maidstone* (*Inh.*), 5 A. & E. 327; 6 N. & M. 545; *R.* v. *Holy Trinity*, 3 T. R. 605; *R.* v. *Shebbear*, 1 East, 73; *R.* v. *Hindringham*, 6 T. R. 557.

(*t*) Per Lord *Denman*, C. J., in delivering the judgment of the court in *R.* v. *Sandhurst*, 6 A. & E. 142; 1 N. & P. 296, where all the cases on the subject are reviewed.

(*u*) *Ibid.*, and see *R.* v. *Banbury*, 5 B. & Ad. 185; 2 N. & M. 105; and 5 A. & E. 328; 6 N. & M. 545.

(*x*) *R.* v. *Sandford*, 2 Bott, 391; *R.* v. *Austrey*, Burr. S. C. 441.

(*y*) *R.* v. *Ecclesal Bierlow*, Burr. S. C. 562; 1 Bla. R. 592. Giving up and exchanging indentures is virtually a cancelling of them, *R.* v. *Titchfield*, Burr. S. C. 511.

(*z*) *R.* v. *Mountsorrel*, 3 M. & S. 497.

(*a*) *R.* v. *Harberton*, 1 T. R. 139.

(*b*) *R.* v. *St. Paul, Bedford*, 6 T. R. 452.

deed or indorsement on the indenture, it must be stamped as an assignment; and if the parish officers of an appellant parish are sworn to have the custody of such a document, they will not be compelled to produce it at the instance of the respondents, in order that by having it stamped it might be made evidence for the latter, on the hearing of an appeal (*c*). An agreement by a master that in consideration of 8*s.* the apprentice should serve his father for the rest of his term, requires no stamp, it being under 20*l.* value (*d*). But after a great lapse of time, a legal assignment by indorsement may be presumed (*e*). *Of Settlement by Apprenticeship.*

The consent of two justices is essential to the valid placing out or assignment by a master of his *parish* apprentice (*f*). Nor since 1st October, 1816, can any settlement be gained by service and inhabitation under such transfer, unless performed under sanction of such consent. So that where an apprentice served a second master without assent of the original one to that particular service till 1st October, 1816, the subsequent ratification of that service by the first master, without assent of justices, was held not to render the prior service valid so as to confer a settlement (*g*). Assignment of parish apprentices.

The interest of a master in his apprentice is a mere personal trust determined by the death of either. Thus, a master's executors cannot claim the latter's services, though if the master has covenanted to maintain him for the term, they are bound at common law to perform that covenant (*h*). However, with respect to parish apprentices, with whom no more than 5*l.* was paid, provision has been made that no covenant for maintenance shall continue for more than three calendar months after the death of the master, during which time the apprentice is to live with, and serve as an apprentice, his master's personal representative, or such person as he shall appoint (*i*). Within those three months any two justices of the peace where the master died, on application by the widow of the master, husband of the mistress, son, daughter, brother, sister, or personal representative of the deceased, may, by indorsement on the indenture, order the apprentice to serve as such, any one of such persons so applying (such person having lived with, and been part of the family of such master, &c., at the time of his death (*k*); and the apprentice being such an one only as lived with and made part of the family, or was Premature termination of the relation created by the indenture, as by death, bankruptcy, agreement to cancel indentures, &c.

(*c*) *R.* v. *Churchwardens, &c. of Westoe*, 5 A. & E. 786. See 6 A. & E. 84; 9 B. & C. 541.
(*d*) *R.* v. *Enderby*, 2 B. & Ad. 205.
(*e*) *R.* v. *Barnesley*, 1 M. & S. 337.
(*f*) 56 Geo. 3, c. 139, s. 9; 3 B. & Ad. 418; 6 A. & E. 140; 32 Geo. 3, c. 57, s. 7.
(*g*) *R.* v. *Maidstone* (*Inh.*), 5 A. & E. 326.
(*h*) See cases 1 Burn's J., tit. *Apprentice*, 29th ed.
(*i*) 32 Geo. 3, c. 57, s. 1.
(*k*) *Id.* s. 2.

Of Settlement by Apprenticeship.

in the actual employment of the original master, or any subsequent master appointed under the act at the time of their deaths respectively (*l*); and it was held that an apprentice, though living with the son of a person to whom he was originally bound by that person's individual consent, at the time of his decease, if not so living with him as apprentice regularly assigned according to the specific provisions of the act, or as the words are, "by virtue" of it, cannot gain a settlement in another parish by serving another person, with the mere consent of the son and assignee of such first master or mistress, unless continued in the precise manner directed therein; the court observing that the words, "subsequent master or mistress," mean such as become so by provisions of the statute (*m*).

Bankruptcy of master and discharge of indentures.

By the 12 & 13 Vict. c. 106, the bankruptcy of the master is made to operate as a discharge of the indentures by which the apprentice is bound (*n*).

Cancellation of indenture.

An agreement to cancel the indenture, in consideration of a sum of money to be paid by the apprentice at a future time, and an abandonment of the master by the apprentice, in consequence of such agreement, does not avoid it (*o*); nor even a voluntary entering into the king's service, the master not prohibiting it, but not giving up the indenture (*p*). But where the apprentice and his master were the only contracting parties to the indenture, the apprentice being under age, and the master after a year's service ran away, and agreed that the indenture should be given up, which was done: this being so manifestly for the interest of the apprentice, it was decided that his acceptance of the indentures was a sufficient dissolution of the contract, and that he was at liberty to go into another service, and was capable of obtaining a settlement by so serving (*q*).

Discharging parish apprentices.

Parish apprentices, with whom less than 5*l.* has been given, may be discharged by two justices from any master who is so far reduced in circumstances as to be unable to keep or employ them (*r*).

Termination of contract by consent.

An indenture of a *parish* apprentice may be put an end to by consent of *all* parties; that is to say, the master, the apprentice, and the parish officers, consenting; but not otherwise, while the apprentice is a minor. Also by the master and the apprentice only, *the latter being of full age*, but not otherwise; for, though an apprentice under age may *bind* himself,

(*l*) 32 Geo. 3, c. 57, s. 5.
(*m*) *R.* v. *Sheepshead*, 15 East, 59; see also *R.* v. *Shipton*, 8 B. & C. 88.
(*n*) 12 & 13 Vict. c. 106, s. 170.
(*o*) *R.* v. *Chipping Warden*, 8 T. R. 108.
(*p*) 2 Bott, 402.
(*q*) *R.* v. *Mountsorrel*, 3 M. & S. 497.
(*r*) 32 Geo. 3, c. 37.

being a contract necessarily for his advantage, and a case excepted out of the general rule of law respecting infants, the consent of an infant alone to his *discharge*, is, "no consent at all" (*t*). And, therefore, where an infant apprentice, who had bound himself for seven years, and served three of them, acquiesced in his master's proposal to buy the remainder of his time for *sixpence*, paid the sixpence, and then bound himself to another master, it was held that the first contract was not dissolved, and that the second was, consequently, invalid (*u*). *Of Settlement by Apprenticeship.*

The master assigning, and the (infant parish) apprentice consenting, without the approbation of two justices, will not make an apprenticeship within the statute of Elizabeth, according to Dalton (*x*). The assent of the infant apprentice adds no authority to the assignment; and it appears from the general current of recent authorities, that these apprenticeships being compulsory, it is the assent of the overseers that gives the validity to all acts on the part of *infant parish* apprentices; but since, by the statute of 32 Geo. 3, masters, by the consent of two justices, may assign these apprentices, and their executors, &c. may assign within three months, upon similar conditions, which power is usually exercised, the premature conclusion of the contract by death is rarely the source of any litigation.

Evidence of the indenture.

The sessions can only receive parol evidence of an apprenticeship after it has been shown that the indentures are destroyed, or cannot be found or produced (*y*). And if the opposite party produce an indenture, on notice given to them for that purpose, it can only be read by the party at whose instance it is produced on giving the usual proof of the execution (*z*). However, if the producing party claims a beneficial interest under it, this is otherwise (*a*).

An expired indenture of apprenticeship sometimes remains with the master and sometimes with the apprentice; but it is more likely that it should remain with the apprentice, as he has an interest in its preservation (*b*).

It is a question to be decided by the court at quarter sessions whether the search has been sufficient or not (*c*); but it is a mixed question of law and fact, which can be reviewed, whether

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(*t*) Burr. S. C. 462; 1 Bla. R. 592.

(*u*) *R.* v. *Great Wigston*, 3 B. & C. 484. See *R.* v. *Gwinnear*, 1 A. & E. 152.

(*x*) Dalt. c. 58.

(*y*) *R.* v. *Denio* (*Inh.*), 7 B. & C. 620.

(*z*) *Doe* d. *Wilkinson* v. *Marquis of Cleveland*, 9 B. & C. 869; *Gordon* v. *Secretan*, 8 East, 548; *Carlisle* v. *Eady*, 1 C. & P. 234. Other cases, 2 Phill. Ev. 9th ed. 207; overruling *R.* v. *Middlezoy*, 2 T. R. 41; and see *R.* v. *Stourbridge*, 8 B. & C. 96.

(*a*) 2 Phill. Ev. 9th ed. 207; *Doe* v. *Marquis of Cleveland*, *ubi sup.*

(*b*) *Brewster* v. *Sewell*, 3 B. & A. 296, per *Abbott*, C. J., and *Bayley*, J.; *Reg.* v. *Hinckley* (*Inh.*), 3 B. & S. 885; 32 L. J., M. C. 158; *Hall* v. *Ball*, 3 M. & G. 242.

(*c*) *M'Gahey* v. *Alston*, 2 M. & W. 206, 214.

Of Settlement by Hiring and Service.

there was reasonable evidence to satisfy the sessions that the document was lost (*e*). In that case, to prove a settlement by apprenticeship in a parish, a document purporting to be an indenture of apprenticeship, by which the apprentice had been bound by parish officers of another parish to serve the master in the parish of alleged settlement, was produced from the parish chest of the binding officers' parish. The document was signed and sealed by the master, but not by the parish officers. Proof of search among the papers of the apprentice which he left at his decease (the date of the binding was 1791), and the evidence of the search was given in 1863. No indenture could be found, and the court considered it more probable that the indenture would be kept by the apprentice at the expiration of the service than by the master.

Again, if produced, it must appear to be properly stamped (*f*). The sessions are bound to admit evidence offered to show that the contract was not one of apprenticeship, but for immoral or fraudulent purposes (*g*).

5. *Of Settlement by Hiring and Service.*

How it originated.

The settlement by *hiring and service*, which has given rise to more litigation than any other, was founded on 3 Will. & M. c. 11, and 8 & 9 Will. 3, c. 30. The first of these statutes enacts, "that if any unmarried person, not having child or children (*h*), shall be lawfully hired into any parish or town for one year, *such service* shall be adjudged and deemed a good settlement therein." In consequence of the ambiguity attendant on the words "*such service*," 8 & 9 Will. 3, c. 30, s. 4, provided, "that no person so hired shall be judged or deemed to have a good settlement in any such parish or township, unless such person shall continue and abide in the same service during the space of *one whole year*." The intention of the legislature, in this last act, probably was that the year's service should be performed under the yearly contract; but, as we shall see, the words used have been held not to warrant this construction. By 9 & 10 Will. 3, c. 11, an exception is made as to servants residing under certificates; which (by 12 Ann. st. 1, c. 18, and 33 Geo. 3, c. 54) is extended to all persons hired by, and serving with, certificated masters.

But now, inasmuch as since the 14th August, 1834, no settlement can have been acquired by hiring and service, or by resi-

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(*e*) *Reg.* v. *Hinckley* (*Inh.*), 32 L. J., M. C. 158; 4 B. & S. 885.

(*f*) See *ante*. *Doe* d. *St. John* v. *Hore*, 2 Esp. 724; *Johnson* v. *Llewellen*, 6 Esp. 101.

(*g*) *R.* v. *North Wingfield* (*Inh.*), 1 B. & Ad. 912; *R.* v. *Barmston*, 7 A. & E. 858.

(*h*) *i. e.*, not having *un*emancipated child or children.

dence under the same (*i*); and no person under any contract of hiring and service, *not completed* on 14th August, 1834, can have acquired, or be deemed or judged to have acquired, any settlement by reason of such hiring and service, or of any residence under the same (*k*); this branch of settlement has been abolished, and the learning upon it has become almost useless; therefore it is not proposed to enter upon a discussion of it, but the reader is referred to Burn's Justice, vol. 4, 30th ed., for a review of all the cases on the subject. *Of Settlement by Renting a Tenement.*

6. *Of Settlement by Renting a Tenement.*

The acquisition of a settlement by this means has been greatly narrowed. It originally grew out of the first section of 13 & 14 Car. 2, c. 12, which confined the power of parish officers to remove poor, resident in their parishes, to the cases of persons "*coming to settle* in any *tenement* under the yearly value of 10*l.*" (*l*); so that a certificated person, residing for forty days in a parish while holding in his own right a tenement there of at least 10*l.* annual value, being irremovable, might thereby acquire a settlement of this kind (*m*). The comprehensive terms of the above act led to such extensive claims under it, and open so wide a field of litigation in consequence, that, in 1819, they were much contracted by 59 Geo. 3, c. 50, which came into operation on 2nd July in that year. That act, after giving rise to some very nice distinctions, was repealed on 22nd June, 1825, and replaced by statute 6 Geo. 4, c. 57, which having omitted to retain one of the strict conditions imposed by 59 Geo. 3, c. 50, was rendered more stringent by 1 Will. 4, c. 18; and was again altered by 4 & 5 Will. 4, c. 76, s. 66 (*n*). These acts are stated at length in a subsequent page, with a sketch of the numerous decisions on each; but, inasmuch as any questions can now hardly arise on rentings of tenements before 2nd July, 1819, the law respecting them is here omitted, but the reader is referred for such decisions to Burn's Justice, vol. 4, 30th ed., excepting so far as such decisions assist in elucidating the later statutes. Of settlement by renting a tenement. Rentings before 1819.

Numerous cases show that *tenement* is a term of such comprehensive meaning, that it may extend to hereditaments incorporeal as well as corporeal, *e. g.* any thing permanently attached to, or necessarily and immediately arising out of, land. It therefore includes rabbit warrens, even though the tenant What is a tenement within 13 & 14 Car. 2, c. 12.

(*i*) 4 & 5 Will. 4, c. 76, s. 64.
(*k*) *Id.* s. 65.
(*l*) See per Lord *Denman*, C. J., 5 A. & E. 544; and *Le Blanc*, J., 4 M. & S. 210, *post.*
(*m*) *R.* v. *Findern*, Cald. 426; *R.* v. *Croft*, 3 B. & A. 171; 9 & 10 Will. 3, c. 11.
(*n*) Sect. 68 of this act may also apply.

Of Settlement by Renting a Tenement before 1819.

A tenement, what.

has no direct interest in the soil; because, as was said in one case, "it is a pernancy of the profits of the land by the mouths of the rabbits (*o*); so, also, a dairy of pasture-fed cows (*p*); a fishery; for as trespass will lie for it, and it may be recovered in ejectment, it must be a tenement (*q*); a right of common in gross; because it is matter of tenure, and a *præcipe* lay for it (*r*); a mill, whether grinding by wind or water; for it is attached to the land (*s*); after-mowth; for it arises immediately out of the land (*t*); the use of a pot-kiln, sheds and yards, with liberty of digging clay and selling ware, for which more than 10*l.* was paid (*u*); the right of taking sand or gravel from a river (*x*), or rushes and flags from a pond (*y*); a cattle-gate (*z*); and the agistment of cows, if the contract for it be specific (*a*); have been holden to confer a settlement." Where a ferry, with the use of a boat and line was included in a demise of a cottage, yard, and garden, at 10*l.* a year, the premises without the ferry not being worth 10*l.* a year; the ferry was allowed to be included to make up the necessary value of the tenement (*b*).

The distinction between what is, and is not, considered as a "tenement," is clearly shown by a case, in which the use of machinery in a mill was decided not to be a tenement, the renting of which would confer a settlement, and was likened, somewhat ludicrously, to the liberty of pounding in a mortar. It is a mere chattel, removable at pleasure, and cannot have its peculiar value reckoned with the land on which it is placed (*c*).

Tolls of a bridge, where it was not part of a turnpike road (and on that account excluded from conferring a settlement by 13 Geo. 3, c. 84, s. 56), were collected under an act, which

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(*o*) Per Lord *Kenyon*, in *R.* v. *Piddletrenthide*, 3 T. R. 775; *R.* v. *Londonthorpe*, 6 T. R. 378.

(*p*) *Reg.* v. *Mendham* (*Inh.*), 9 Q. B. 971; 16 L. J., M. C. 67; *R.* v. *Darley Abbey*, 14 East, 284; that is, pasturage for them all the year round on the growing produce of the land, *Reg.* v. *Cumberworth, Half* (*Inh.*), 13 L. J., M. C. 49; "Milk of a cow" will not suffice, *R.* v. *Langriville*, 10 B. & C. 899; *R.* v. *Iken*, 2 A. & E. 147; 4 N. & M. 407.

(*q*) *R.* v. *Old Alresford*, 1 T. R. 358.

(*r*) *R.* v. *Dersingham*, 7 T. R. 671.

(*s*) *Evelyn* v. *Rentcombe*, 2 Salk. 536.

(*t*) *R.* v. *Brampton*, 4 T. R. 348.

(*u*) *R.* v. *Iken*, 2 A. & E. 147.

(*x*) *R.* v. *All Saints, Derby*, 5 M. & S. 90.

(*y*) *R.* v. *All Saints, Cambridge*, 1 B. & C. 23.

(*z*) *R.* v. *Whixley*, 1 T. R. 137; pasturage for cattle subject to repairing certain gates.

(*a*) *R.* v. *Sutton, St. Edmond's*, 2 D. & R. 800; *R.* v. *Hollington*, 3 East, 713.

(*b*) *Reg.* v. *Fladbury* (*Inh.*), 10 A. & E. 706.

(*c*) *R.* v. *Dodderhill*, 8 East, 449. See like decision in the case of a windmill, not affixed to the freehold, *R.* v. *Londonthorpe*, 6 T. R. 377, followed by *R.* v. *Otley* (*Inh.*), 1 B. & Ad. 161; *Wansborough* v. *Maton*, 6 N. & M. 367.

even declared the tolls to be the *personal property* of the proprietors: and were held to confer a settlement, being a "tenement" in the possession of the person to whom they were demised (*d*). And so, stallage for a butcher's stall in a market (*e*).

Of Settlement by Renting a Tenement before 1819.

A tenement, what.

Tolls, however, were, in a subsequent case, said to be things which do not lie in tenure, but only in grant, and, therefore, if demised by a corporation, must be granted under the corporate seal, or will not confer a settlement (*f*). By 54 Geo. 3, c. 170, s. 5; 3 Geo. 4, c. 126, s. 51; 4 Geo. 4, c. 95, s. 31, gate or toll-keepers of turnpike roads or navigations, persons collecting or renting turnpike tolls, or residing in turnpike toll-houses, their apprentices or servants, and receivers of tolls for overweight, are excluded from gaining settlements in respect of residence in turnpike houses, &c. (*g*).

What taking or occupation would enure as a "coming to settle."

It is not the occupation for a year, nor the payment of rent for a year, but the residence for forty days in the parish where some part of the tenement lies (*h*), that is the substantial ground of this settlement. Less than forty days will not do (*i*); and residence for thirty-three days as a widow, cannot be coupled with residence on the same tenement with her husband for sixteen days preceding, so as to make up sufficient residence (*k*). The *time* of the forty days' residence, whether at the beginning or end of the year of occupation, is immaterial (*l*); but, in case of residence in two parishes, the one in which the pauper slept the last night is the parish of settlement (*m*). It is scarcely necessary to observe that a mere colourable contract for taking a tenement, entered into for the purpose of obtaining a settlement, without any *bonâ fide* transfer of possession, will be, for that object, wholly void; but, if the person whose settlement be in dispute be tenant, it matters not that the rent was guaranteed by another (*n*).

The occupation must be under a taking and residing *as a tenant*, and not merely a residing as a servant (*o*). So, where a labourer who, in addition to his wages, was to have a house and garden, the milk of a cow, and the feeding of a pig, had the exclusive occupation of the house, which was about one

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(*d*) *R.* v. *Bubwith*, 1 M. & S. 515.
(*e*) *R.* v. *Caversham*, 4 B. & C. 683.
(*f*) *R.* v. *Duffield*, 3 M. & S. 247.
(*g*) See *R.* v. *St. Andrew the Less, Cambridge*, 10 B. & C. 742.
(*h*) *R.* v. *Topcroft*, Cald. 478; *R.* v. *Knighton*, 2 T. R. 48.
(*i*) *R.* v. *Caversham*, 4 B. & C. 683.
(*k*) *R.* v. *South Lynn*, 5 T. R. 664.
(*l*) See per *Patteson*, J., *R.* v. *Willoughby*, 4 A. & E. 151; 5 N. & M. 457.
(*m*) *R.* v. *St. Mary, Lambeth*, 8 T. R. 240, 241; *R.* v. *Ringwood*, 1 M. & S. 381.
(*n*) *R.* v. *Butley*, Burr. S. C. 107; 2 Bott, 128; *R.* v. *Hove*, 4 East, 362.
(*o*) *R.* v. *Cheshunt*, 1 B. & A. 473.

Of Settlement by Renting a Tenement before 1819.

Occupation as tenant, what.

hundred yards from the master's house, and a house was necessary for the performance of the service, and the servant would have had more wages if he had not had the house, the occupation was held to be that of the master by the servant, and not an independent holding of the servant (*p*).

Where a waiter at an hotel had the tap, or privilege of selling malt liquors, and for the purpose of so doing had the use of a cellar belonging to the hotel, which had a separate entrance, and of which he kept the key; it was held that there did not appear *any taking* of the cellar *as a tenant*, but the occupation of it appeared to be merely a privilege annexed to *the place of waiter* (*q*). But taking a man's cottage to *rent*, which would not have been allowed by the owner, but for services of the tenant's children previously agreed for, and which were ancillary to that contract, is a sufficient renting a tenement by which to acquire a settlement, for the relation of landlord and tenant existed, though the rent was deducted from the children's wages (*r*). And so, where the feed of two cows, of the value of 10*l*., was made a part of the wages of a bailiff, but the feed of the cows was in no way necessary for the performance of the service, or connected with it, it was held to confer a settlement (*s*). An agreement by a pot maker for the use of a pot-kiln, sheds, &c., with the owner of the kiln, and for liberty to dig clay, and sell ware, and for a cottage in which the pauper resided, upon terms by which the owner was to cart the clay, and carry out the ware for sale, was held to confer an independent interest in the pot maker, and not to render by occupation ancillary to the service of the owner (*t*).

The sessions must decide, as a fact, whether the occupation is as servant or independent (*u*).

There must be an occupation in the capacity of a tenant with a design to settle, and, therefore, where the wife of a deserter, without her husband's knowledge, took a tenement in her own name, and some time after her husband, who was a deserter, came to her *to conceal himself*, and resided in concealment more than forty days; it was held that the husband did not thereby adopt the wife's contract, or gain a settlement (*x*).

But where a soldier, his regiment being in barracks in the place, took a house for himself and family, and resided therein more than forty days, though always liable to be called away on duty, it was held to be a sufficient taking, and *coming to settle* (*y*).

(*p*) *R.* v. *Kelstern*, 5 N. & S. 136.
(*q*) *R.* v. *Seacroft*, 2 M. & S. 473.
(*r*) *Reg.* v. *Bishopton* (*Inh.*), 9 A. & E. 824; 1 P. & D. 598.
(*s*) *R.* v. *Minster*, 3 M. & S. 276; *R.* v. *Melkridge*, 6 T. R. 598.
(*t*) *R.* v. *Iken*, 2 A. & E. 147.
(*u*) *Reg.* v. *Bishopton*, *ubi sup.*; *R.* v. *Snape*, 6 A. & E. 278.
(*x*) *R.* v. *Ashton-under-Lyne*, 4 M. & S. 357.
(*y*) *R.* v. *Brighthelmstone*, 1 B. & A. 270.

Of Settlement by Renting a Tenement before 1819.

Where a pauper took a tenement of 10*l.* per annum in a parish, and after living in it with his family for five days, was arrested and sent to prison in another parish, his wife and children continuing to live in the first-mentioned parish for seven weeks longer, it was held that no settlement was gained in the first parish, either by the husband or wife (*a*). Since which it has been provided (*b*), that no person shall be deemed to have gained a settlement by reason *of any* residence, while he or she shall be detained as a prisoner by any civil process, or for any contempt whatever; and that no person shall gain a settlement by reason of any residence provided by a charitable institution, while such person is supported by its funds; but residence by the family of the pauper may be sufficient, notwithstanding that, owing to absence on business, the pauper did not reside sufficiently long (*c*).

Residence during imprisonment.

A contract, on the other hand, may sometimes be legally considered as a *bonâ fide* transaction, which satisfies the *words* of a statute, though not in strict compliance with the spirit which dictated it.

What renting satisfies the words of the statute.

It is not necessary that the tenement should be holden under an express contract, and an implied contract is sufficient (*d*).

So, also, the occupation of a cottage for forty days by the leave of an outgoing tenant, under an agreement with him to pay the landlord the same rent which he, the outgoing tenant, had before done, but without any authority from the landlord, the cottage, together with other premises occupied at the same time, being worth 10*l.* a year and upwards, has been holden sufficient to give the occupier a settlement; nothing appearing to show that the former tenant's term had expired, and the law giving him authority to assign his interest (*e*).

Occupation as tenant at a rent is not essential; it is enough if he occupy as having an interest of his own, and not as servant to another. Thus residence by a curate licensed by the bishop at a yearly salary according to 57 Geo. 3, c. 99, in the rectory-house, was held to be such a "coming to settle," within 13 & 14 Car. 2, c. 12, as conferred a settlement (*f*). So, though the pauper never resided on any part of the land rented, but in the house of another person (*g*). But joint renting will not

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(*a*) *R.* v. *St. George the Martyr, Southwark*, 7 T. R. 466.
(*b*) 54 Geo. 3, c. 170; *R.* v. *Dilwyn*, Burr. S. C. 54.
(*c*) *R.* v. *Ditcheat*, 9 B. & C. 176.
(*d*) See *R.* v. *Netherseal*, 4 T. R. 258; *R.* v. *Chediston*, 4 B. & C. 230.
(*e*) *R.* v. *Aldborough*, 1 East, 597.
(*f*) *R.* v. *St. Mary, Newington*, 5 B. & Ad. 540. The time for which the tenement is taken is unimportant, provided there be an occupation for forty days, there being an intention to come and settle, though not for a fixed time or permanently; *R.* v. *Woolpit*, 4 A. & E. 205; 5 N. & M. 526; *R.* v. *Helsham*, 2 B. & Ad. 620.
(*g*) *R.* v. *Kenardington*, 6 B. & C. 70; 9 Dowl. & Ry. 72.

Of Settlement by Renting a Tenement before 1819.

suffice under 13 & 14 Car. 2, at least where the rent was under 20*l.*, though the pauper occupied exclusively (*e*).

Of the mode of estimating the value of the tenement.

It was repeatedly determined, before 6 Geo. 4, c. 57, that the *value* and not the *rent* was the true criterion, according to the words of the statute; and, therefore, if the rent be only 5*l.*, yet, as the value may be 10*l.* or 20*l.*, or other greater sum, a residence for forty days will consequently confer a settlement (*f*). Yet, in ordinary cases, it has been almost as frequently observed by the court that the rent is a good medium through which to ascertain the value. The yearly value is so ascertained upon a consideration of what the premises would let for if let by the year; if let by the week, a margin would have to be left for the extra trouble and expense, and risk of being unoccupied part of the year (*g*).

The value of a chattel placed on the land, such as a post-windmill, or a wood-windmill with a brick foundation, resting, by reason of its own weight, cannot be considered (*h*); but landlords' fixtures are to be taken into the calculation (*i*).

But if there be no circumstances in the case which import the value to be less than the rent, the rent is good evidence of the value (*k*). The value of the tenement may be calculated without deducting taxes, rates, and charges, usually denominated tenant's taxes (*l*), or tithes (*m*).

The value, however, must be with reference to the tenement at the time of taking, not to anything to be done to it after entry at the expense of the tenant, but in order to increase the value (*n*). A piece of land not in itself worth 10*l.* per annum, made so for planting potatoes by the labour bestowed upon it at the landlord's expense, *previous to the contract*, was held, *on that account*, a tenement *of the value of* 10*l.* to be let by the year (*o*); so an increased value arising from manure to be put in after the holding commences, at the expense of the landlord, is to be taken into account (*p*).

If a farm be occupied by *several persons* who agreed to be partners in the stock and farm before one of them took it, and which party only was rated, and each of them has an interest in it to the value of 10*l.* per annum, although it be rented in

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(*e*) *Reg.* v. *Aberdaron*, 1 Q. B. 671. See *R.* v. *Seamer*, next page.

(*f*) *South Sydenham* v. *Lamerton*, 1 Sess. Cas. 115, or *vice versâ*; *R.* v. *Bilsdale, Kirkham*, 2 Bott, 137; *R.* v. *Southwood*, 2 Sess. Cas. 198.

(*g*) *R.* v. *Hellingly*, 10 East, 41.

(*h*) *R.* v. *Londonthorpe*, 6 T. R. 377; *R.* v. *Otley*, 1 B. & Ad. 161.

(*i*) *R.* v. *St. Dunstan*, 4 B. & C. 686.

(*k*) *Parishes of Kirton and Western*, 2 Stra. 1156.

(*l*) *R.* v. *St. Paul, Deptford*, 13 East, 320. See *R.* v. *Thurmaston*, 1 B. & Ad. 731, on 59 Geo. 3, c. 50.

(*m*) *Reg.* v. *St. John's-in-Bedwardine*, 8 A. & E. 192; 3 N. & P. 302.

(*n*) *R.* v. *Aston*, 6 M. & S. 54.

(*o*) *R.* v. *Ringwood*, 1 M. & S. 381.

(*p*) *R.* v. *Paulton-cum-Fearnhead*, 6 M. & S. 252; *R.* v. *Huntsham*, 2 B. & Ad. 503.

the name of one of them only, they will all gain a settlement by residing thereon forty days (*q*).

Of Settlement by Renting a Tenement between 1819 *and* 1825.

In consequence of the extent of litigation opened by the law affecting settlements by renting a tenement, the statute 59 Geo. 3, c. 50, which passed on 2nd June, 1819, enacted, "That no person shall acquire a settlement in any parish or township maintaining its own poor in England, by or by reason of his or her dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building within such parish or township, being a *separate and distinct* (*r*) dwelling-house or building, or, of land, within such parish or township, or of both, *bonâ fide* hired by such person at and for the sum of 10*l.* a year at the least, for the term of *one whole year* (*s*); nor unless such house or building shall be held, and such land occupied, and the rent for the same actually paid for the term of one whole year at the least *by the person hiring the same;* nor unless the whole of such land shall be situate within the same parish or township wherein the person hiring such land shall dwell and inhabit."

Of the law as altered by 59 Geo. 3, c. 50: —between 2nd July, 1819, and 22nd June, 1825.

Residence.

Forty days' residence in the parish is requisite where the whole, or such part of the tenement as is of the value of 10*l.* lies (*t*); but if the tenement consists of land, such residence may be in a house in the same parish (*u*).

Nature of the tenement.

The "tenement" may, under 59 Geo. 3, c. 50, consist of a house or building, or land, or both; and may be taken at different times and from different owners (*x*). If it be a house or building, it must be "separate and distinct," *i. e.*, as to any other person (*y*), so as to exclude questions about the various occupation of rooms: but two dwelling-houses not communicating internally are "separate" buildings, though under the

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(*q*) *R.* v. *Seamer*, 6 T. R. 554.

(*r*) *Viz.*, meaning, that the "tenant must be unconnected with any other person, and a separate occupier," per Lord *Denman*, *Reg.* v. *Caverswall*, 1 P. & D. 427. "Separate and distinct as to any other person," per *Patteson*, J., in *R.* v. *Wootton Bassett*, 1 A. & E. 232; 3 N. & M. 314; *R.* v. *Usworth*, 6 N. & M. 811; 5 A. & E. 261. So that a joint entry and occupation of *any part of* the house or building will not suffice, though the pauper pays in all a share of rent amounting to 10*l.*, *Reg.* v. *Caverswall*, 1 P. & D. 436. There the pauper's husband rented a house at 7*l.*, occupied and paid rent and poor's rates for more than a year, and during all the time of that occupation (*viz.*, four years) rented *bonâ fide* a building, called a pot-work, jointly with E. A., at 15*l.* for part of the time, and 17*l.* for the residue: occupied it jointly with E. A. and paid a moiety of rent and poor's rates during all the time.

(*s*) See *R.* v. *Chawton* (*Inh.*), 1 Q. B. 245.

(*t*) *R.* v. *Pickering*, 2 B. & Ad. 267, on similar words in 6 Geo. 4, c. 57.

(*u*) *R.* v. *Barham*, 8 B. & C. 99; *R.* v. *Wainfleet*, *id.* 229. See *R.* v. *Kenardington*, 6 B. & C. 70; 9 Dowl. & Ry. 72.

(*x*) *R.* v. *North Collingham*, 1 B. & C. 578; and see *R.* v. *Ormesby*, 4 B. & Ad. 214.

(*y*) See by *Patteson*, J., 5 A. & E. 265; 1 A. & E. 236.

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Separate and distinct dwelling-house, what.

same roof, and one having a garret over both (*c*). So, it may consist of a dwelling-house and a building entirely separate from it, and used as a shed or stable (*d*), or of two dwelling-houses, even under a continuous roof, if having distinct outer doors, without internal communication, and rented at distinct rents, but at one hiring (*e*); though one be underlet and never personally occupied by the party hiring (*f*).

A toll-house of a navigation, though by being used as a public-house, it is of greater value than 10*l.* per annum, will not confer this settlement (*g*).

Land which has been hired, taken or inclosed, under acts for

(*c*) *R.* v. *Macclesfield*, 2 B. & Ad. 870, on 6 Geo. 4, c. 57.

(*d*) *E. g.*, by having another dwelling-house between them, *R.* v. *Tadcaster*, 4 B. & Ad. 703; 1 N. & M. 466, on 6 Geo. 4, c. 57; though rented of different landlords; *R.* v. *Gosforth*, 1 A. & E. 226; 3 N. & M. 303, on 59 Geo. 3, c. 50.

(*e*) *R.* v. *Iver*, 1 A. & E. 228 (rented under same landlord, and one exclusively occupied by tenant's son); *R.* v. *Wootton*, 1 A. & E. 232 (rented under different landlords); both on 6 Geo. 4, c. 57, before 1 Will. 4, c. 18.

(*f*) *R.* v. *Wootton, supra.* A granary formed one entire floor above a granary standing in a yard belonging to a dwelling-house, which yard opened by a gateway into the high road. The two granaries adjoined to and were under the same roof, with a stable, and were detached from the dwelling-house. There was no internal communication between the lower and upper granary, or between the upper granary and the stable, the only entrance to the upper granary being a separate entrance from the outside by means of a moveable ladder reaching from the yard to a door in the side of the granary. Another upper granary over a stable detached from a dwelling-house, without internal communication with either, and entered in like manner, was rented under like circumstances. Held, that as there were other buildings under the same roof, the granaries were not "separate and distinct" dwelling-houses or buildings, *R.* v. *Henley-on-Thames* (*Inh.*), 6 A. & E. 294 (on 59 Geo. 3, c. 50). However, *R.* v. *Usworth* (*Inh.*), 5 A. & E. 261 (not cited in *R.* v. *Henley*), seems difficult to reconcile with it. W. the pauper rented and occupied the middle floor of a house. Two outer doors and some steps which gave access to that floor were appropriated to him exclusively. A separate flight of steps on the outside of the house led by a different outer door to a passage on the middle floor, from which passage a tenant occupying the upper floor reached his premises by a staircase of his own. One of W.'s rooms opened into this passage; he could not reach it but by going up the last-mentioned steps and along the passage, or by crossing the passage from his other rooms, by a door in one of them, which was usually locked. All these last-mentioned rooms communicated with each other, and with both the doors appropriated to W. The premises occupied by W. were held to be a "separate and distinct dwelling-house" within 6 Geo. 4, c. 57, by renting which a settlement might be gained. Whilst in *Reg.* v. *Elswick*, 30 L. J., M. C. 66, where the ground floor of a house was occupied by a tenant, and consisted of a shop and two rooms to which access was had by a passage leading from the street to a back yard, while another person occupied the first floor, and gained access to it by the same passage of the outer door of which he had a key, and who cleaned a part of the passage: it was held that this was not a separate and distinct dwelling-house.

(*g*) *R.* v. *St. Andrew the Less, Cambridge*, 10 B. & C. 742.

relief of poor (*h*), will not confer a settlement on a poor inhabitant to whom it is let, by reason of his renting and occupying it, either alone or with any other land or tenement (*i*).

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The *value* of the tenement need not be 10*l.* a year if *bonâ fide* rented at that amount, but if the tenement turned out to be of much less annual value than the rent, that might be evidence to show that the renting at that sum was not *bonâ fide* (*k*). If a house is demised to a tenant with the landlord's fixtures, or with land out of the parish, at a general rent of 10*l.*, it will suffice (*l*); but a mere chattel, as a post or smock windmill, resting on, but not inserted into, a brick foundation, and so not affixed to the freehold, will not, even to eke out land held with it to 10*l.* (*m*). *Cæteris paribus*, the rent paid is a fair criterion of the value (*n*).

Value.

The hiring of the tenement, if *bonâ fide*, may be general; for, if general, it must be presumed to be for a year (*o*). It will suffice if defeasible by three months' notice (*p*), provided the tenancy do, in fact, continue for one whole year, or if the rent is made payable at any interval of time less than a year (*q*). So a letting for six months, and so on from six months to six months till six months' notice given, under a rent of 13*l.* for every six months, and an occupation thereunder for several years, was held sufficient, as a demise for half-a-year, and so on from half-year to half-year, and therefore a demise for one year at least (*r*). And a letting for three months at a yearly rent with monthly payments and a three months' notice to quit, with an occupation thereunder for eighteen months, was held sufficient as a letting for three months, and after that time a yearly tenancy subject to a three months' notice to quit (*s*). It must be for 10*l.* for a year at least, taking that rent at the gross sum actually payable to the landlord under the hiring,

Hiring of the tenement.

(*h*) *Viz.* 59 Geo. 3, c. 50; 1 & 2 Will. 4, c. 42, and *id.* c. 59, as to crown lands.

(*i*) 1 & 2 Will. 4, c. 42, s. 55, and *id.* c. 59, s. 2.

(*k*) *R.* v. *Ashfield*, 9 B. & C. 939; 4 N. & M. 709; *R.* v. *Ampthill*, 2 B. & C. 847.

(*l*) *R.* v. *St. Dunstan in Kent*, 4 B. & C. 686; 7 Dowl. & Ry. 178.

(*m*) *R.* v. *Otley*, 1 B. & Ad. 161; *Culling* v. *Tuffnell*, Bull. N. P. 34.

(*n*) See *R.* v. *Ashfield-cum-Thorpe*, 9 B. & C. 439; 4 Man. & Ry. 709.

(*o*) *Doe* v. *Brown*, 8 East, 165; *Doe* v. *Watts*, 7 T. R. 83; *R.* v. *Wainfleet*, 8 B. & C. 229; 2 Man. & Ry. 223; *R.* v. *Rawden*, 8 B. & C. 708; 3 Man. & Ry. 426.

(*p*) *R.* v. *Herstmonceaux*, 7 B. & C. 551; 1 Man. & Ry. 426; and so under 6 Geo. 4, c. 57.

(*q*) *Ibid.*; *R.* v. *Wainfleet*, 8 B. & C. 229; *R.* v. *Kibworth Harcourt*, 7 B. & C. 790.

(*r*) *Reg.* v. *Chawton*, 1 Q. B. 245, decided under 6 Geo. 4, c. 57.

(*s*) *Reg.* v. *Willesden*, 32 L. J., M. C. 109; *Reg.* v. *St. Giles Without, Cripplegate*, 33 L. J., M. C. 3; *Hastings Union* v. *St. James, Clerkenwell*, 35 L. J., M. C. 65; L. R., 1 Q. B. 38.

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whether he pays the tithes (*u*) or tenant's taxes or not (*v*), and is not avoided by a third person being a surety for the rent (*x*); but a hiring of a *dwelling-house* and premises by two in joint tenancy at an entire rent above 10*l.* and under 20*l.* per annum will not confer a settlement on either, either by renting the tenement, or by being rated and paying rates in respect of it, though only one occupy and pay the whole rent (*y*), or rent to the amount of 10*l.* (*z*); though such a joint hiring and occupation of *land* would suffice (*a*).

Evidence of the hiring, occupation and renting the tenement.

Where a lost agreement was in the lessor's possession, the pauper as lessee has an interest in it, which, if both were parties to a then pending action, or, as it seems, to an appeal in which the renting the particular premises was in question, might entitle him to obtain its production by a *mandamus* for the purpose of stamping it (*b*). But if the pauper is no party to the appeal, and the respondent parish officers possess the instrument, they will not be thus compelled to produce it at the instance of appellant parish officers, who have not an interest in it (*c*). A judge has no such jurisdiction over sessions as entitles him to grant an order for giving a copy and producing the original at the stamp office for stamping (*d*). Unless the original agreement is known to have been unstamped, notice should be given to produce it at the hearing of the appeal, so as to let in a copy as secondary evidence, if the original is not produced (*e*). But if the agreement is proved to have been in writing, and has been lost, or is not produced, or even if it has been destroyed by the wrongful act of the party against whose interest it operated (*f*), then, should it be *proved* (*g*) to be un-

(*u*) *Reg.* v. *St. John's, Bedwardine*, 8 A. & E. 192; 3 N. & P. 302. See *Reg.* v. *Hockworthy*, 7 A. & E. 493, and *R.* v. *Pickering*, 2 B. & Ad. 267, *ante*, p. 927, as to renting land and incorporeal hereditament at one rent.

(*v*) *R.* v. *Thurmaston, South End*, 1 B. & Ad. 731. See *R.* v. *St. Paul's, Deptford*, 13 East, 320.

(*x*) *R.* v. *Kegworth*, 2 M. & Ry. 28; 1 *id.*; Mag. Cas. 281. See *R.* v. *Hove*, 4 East, 362.

(*y*) *R.* v. *Great Wakering*, 5 B. & Ad. 971; *Reg.* v. *Aberdaron* (*Inh.*), 1 Q. B. 241; 1 G. & D. 178.

(*z*) *Reg.* v. *Caverswall*, 10 A. & E. 270, on 59 Geo. 3, c. 50; see however, *contra*, per *Patteson*, J., in *R.* v. *St. Nicholas, Rochester*, 5 B. & Ad. 223, remarking on *R.* v. *Tonbridge*, 6 B. & C. 88. As to relinquishing a tenancy by verbal agreement and then retaking it, see *R.* v. *Banbury*, 1 A. & E. 136; 3 N. & P. 292.

(*a*) *Reg.* v. *St. Lawrence, Appleby* (*Inh.*), 6 Q. B. 842; 14 L. J., M. C. 56. This case was under 6 Geo. 4, c. 57, but applies equally to the above statute. See also *Reg.* v. *Husthwaite*, 1 E. & B. 501; 21 L. J., M. C. 189.

(*b*) *Cocks* v. *Nash*, 9 Bing. 727, and cases collected 5 A. & E. 788.

(*c*) *R.* v. *Churchwardens, &c. of Westoe*, 5 A. & E. 786.

(*d*) So held by *Wightman*, J., at Chambers, Mich. T. 1841; Dick. Q. S., ed. Talf., p. 816.

(*e*) *R.* v. *Castle Morton*, 3 B. & A. 588. See also 7 B. & C. 613; 4 B. & Ad. 208; *Doe* d. —— v. *Slight*, 1 D. P. C. 163.

(*f*) *Rippener* v. *Wright*, 2 B. & A. 478. See judgment of *Bayley*, B., in *Travis* v. *Collins*, 2 Tyr. 730; and *Bousfield* v. *Godefroy*, 5 Bing. 418.

(*g*) *Wheatley* v. *Williams*, T. & Gr. 1043; for if this is not *proved*,

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stamped at the time of its signature, or when it was last seen, the legal proof of renting the tenement will be inaccessible, for no parol evidence can be given of its contents.

Stamping in court unstamped documents.

It is doubtful whether the enactments of the 17 & 18 Vict. c. 225 (the Common Law Procedure Act, 1854), giving the power to the officer of the court upon the production of an unstamped document to receive the amount of unpaid stamp duty, and thereupon rendering the document admissible in evidence, can be applied to appeals at quarter sessions, notwithstanding sect. 103, which makes such enactment applicable to every court of civil procedure (*h*).

Where the terms of the tenancy are in writing the written document must in general be produced.

However, though the agreement may have existed, or may still exist, in writing, still, if the *terms of the tenancy* are immaterial to the case, the *facts* of the taking, the occupation, the value of the tenement, and the payment of a sum as rent for it, may be proved by oral testimony; unless it should appear from any witness, whether in chief or on cross-examination, that a written agreement was entered into (*i*), and, as it seems, existed in force and applicable at the time in question to which the oral evidence is sought to be applied (*j*). For the rule is very clearly settled, that if it comes out on the cross-examination of the witnesses on one side, that there is a written agreement concerning the premises, the party who called them must produce it (*k*); but if he makes out a *primâ facie* case, without showing that there was any written contract, the other party, if he relies for a defence on the specific terms of that written contract, must produce and prove it in the usual way (*l*).

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the court ought to assume that it was stamped *before* the parties signed, *S. C.* See 2 M. & W. 74; 1 *id.* 533; 4 Bing. N. C. 434. See also same rule in use and occupation, *Fry* v. *Chapman*, 5 D. P. C. 265.

(*h*) See, however, *contra*, Leeming & Cross, 268, 1st ed.

(*i*) *R.* v. *Holy Trinity, Kingston-on-Hull*, 7 B. & C. 611; 1 M. & Ry. 444, as remarked on by *Bayley*, J., in *R.* v. *Merthyr Tydvil*, 1 B. & Ad. 31; *Fenn* d. *Thomas* v. *Griffith*, 6 Bing. 534. The observation made *arguendo* in *R.* v. *Padstow*, 2 A. & E. 213, on *R.* v. *Holy Trinity*, that, as it turned on 13 & 14 Car. 2, c. 12, the *fact* of tenancy only was requisite to be proved, so that its *terms* were immaterial, was probably suggested by the dictum of *Bayley*, J., to that effect, in *R.* v. *Merthyr Tydvil*. It was, it seems, answered by the decision in *R.* v. *Padstow*, 4 B. & Ad. 208, where the rent agreed for, the occupation, and payment of rent under 6 Geo. 4, c. 57, were proved for the respondents by like oral evidence, as in *R.* v. *Holy Trinity*; and as it only appeared from the evidence adduced for the *appellants* that there had been an agreement in writing on unstamped paper, the latter were held bound to produce it in answer to the respondents' case. Besides, in *R.* v. *Merthyr Tydvil*, it appeared on cross-examination of the witness who had sworn to the renting under 6 Geo. 4, c. 57, of a tenement at 35*l.* a year, as well as to the occupation, and payment of a year's rent, that the agreement for the premises was in writing; which seems to reconcile that case with *R.* v. *Padstow*.

(*j*) *Doe* v. *Morris*, 12 East, 237. See *Stevens* v. *Penny*, 2 B. Moore, 349.

(*k*) See last note, and *Fenn* d. *Thomas* v. *Griffith*, 6 Bing. 533.

(*l*) *R.* v. *Padstow*, 4 B. & Ad. 208, per *Parke*, J.; and see the previous

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To prove a tenancy under 6 Geo. 4, c. 57, where the letting was by a writing which was in existence, the writing is essential, though it was otherwise before that act (*m*); but a declaration by a deceased occupier of a tenement that he rented the house and had paid the rent is good evidence, not only of the payment of the rent, but also of the fact of the tenancy and the amount of the rent (*n*).

Proof of tenancy and payment of rent.

Use and enjoyment of the tenement under 59 Geo. 3, c. 50.

The tenement, if it consist of a house or building, must be held by the hirer himself for a whole year (*o*), but he may underlet part (*p*); and if he continues to pay the rent, his interest will last to the end of the year, though he leaves weeks before it (*q*).

But land cannot be underlet; for, by 59 Geo. 3, c. 50, it must be *occupied* for the year, that is, separately (*r*). Nor can it be held jointly, unless perhaps if each share is 10*l.* or over (*s*). The hiring, occupation, and payment of rent need not, under *this* act, be in the same year (*t*); but that for the year single occupation may be under different hirings (*u*). So if there were two hirings, and two occupations, but each occupation was under a single hiring for a year, and there was one year's occupation to a sufficient amount under a yearly hiring (*x*).

Payment of rent.

The party hiring must, under *this* act, himself pay the whole year's rent, whatever its amount (*y*), but though he so pays, if, by the practice of a society to which he belongs, and in whose

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cases of *Stevens* v. *Pinney*, 8 Taunt. 327; *R.* v. *Rawden* (*Inh.*), 8 B. & C. 708; *Fielder* v. *Ray*, 6 Bing. 335; *Reed* v. *Deere*, 7 B. & C. 266; *Cotterill* v. *Hobby*, 4 B. & C. 465. Also *Brewer* v. *Palmer*, 3 Esp. C. 213 (approved by *Best*, C. J., and *Burrough*, J., in *Strother* v. *Barr*, 5 Bing. 136; *per cur.* in *Fenn* d. *Thomas* v. *Griffith*, 6 Bing. 533; by *Williams*, J., in *Budd* v. *Hughes*, 8 D. P. C.; but denied by *Park* and *Gaselee*, JJ., in *Strother* v. *Barr*, 5 Bing. 136, in which last case the Court of C. P. was equally divided). See also 2 New Cas. 735; 2 M. & S. 434, 445; 3 B. & C. 627; 7 *id.* 265; M. & Malk. 257; 4 C. & P. 481; 3 T. R. 406; 2 B. & P. 118; 2 Esp. 724; *Magnay* v. *Knight*, 1 M. & Gr. 947.

A witness cannot be suffered to refresh his memory by *extracts* from any writing, even though made by himself, *ante*, p. 289.

(*m*) *R.* v. *Merthyr Tydvil*, 1 B. & Ad. 29.

(*n*) *Reg.* v. *Governor and Guardians of Exeter*, 38 L. J., M. C. 126; L. R., 4 Q. B. 341; *Reg.* v. *Overseers of Birmingham*, 31 L. J., M. C. 63; 1 B. & S. 763.

(*o*) *R.* v. *Crayford* (*Inh.*), 6 B. & C. 68.

(*p*) *R.* v. *North Collingham*, 1 B. & C. 578; *R.* v. *Great Bolton*, 8 B. & C. 71.

(*q*) *R.* v. *Stow Bardolph* (*Inh.*), 1 B. & Ad. 219.

(*r*) *R.* v. *Ockley*, 1 B. & Ad. 818.

(*s*) See per *Patteson*, J., in *R.* v. *St. Nicholas, Rochester* (*Inh.*), 5 B. & Ad. 223; remarking on *R.* v. *Tonbridge* (*Inh.*), 6 B. & C. 88; *R.* v. *Great Wakering* (*Inh.*), 5 B. & Ad. 971.

(*t*) *R.* v. *Churchwardens of Stow*, 4 B. & C. 87.

(*u*) *Ibid.*

(*x*) *R.* v. *Tadcaster* (*Inh.*), 4 B. & Ad. 703, on 6 Geo. 4, c. 57, as stated by *Parke* and *Patteson*, JJ., in *R.* v. *Banbury* (*Inh.*), 1 A. & E. 142, 144, which was decided differently on 1 Will. 4, c. 18, see *post*, *R.* v. *Banbury*. *R.* v. *Tadcaster* will not be extended.

(*y*) *R.* v. *Carshalton*, 6 B. & C. 93; *R.* v. *Kibworth Harcourt* (*Inh.*), 7 B. & C. 790; *R.* v. *Ditcheat*, 9 B. & C. 183. See *post*, p. 934.

service he hired the tenement, the sum is repaid to him by them, it is not sufficient (*z*): and payment after his death, though out of his assets, cannot confer a settlement on his widow (*a*). Whether payment by distress will satisfy this act, as a payment by the party, is not expressly decided (*b*): but it would probably be held that it will not, being made out of that, over which the pauper had no control (*c*). The occupation and payment of rent must not be under different hirings (*d*). The year's rent must be paid at the time the order of removal from the parish is made (*e*). A settlement is gained by a pauper who has occupied a tenement for a year, rated at 10*l.*, and paid 10*l.* in respect of it, though the sum of 6*s.* for tithes was agreed to be paid, and was paid, by his landlord (*f*).

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As to the evidence of payment of the rent, see *ante*, p. 932.

The statute 6 Geo. 4, c. 57, passed on 22nd June, 1825, recites in sect. 1, that the settlement of the poor has been made in some instances to depend on the annual value of tenements which they may have rented, or upon the annual value of tenements in virtue of which they have paid parochial rates; and that the ascertaining such value in such respective cases has given rise to very expensive litigation, and that doubts had been entertained whether 59 Geo. 3, c. 50, had been effectual for the purpose of altering the law in respect of the necessity of proving the annual value of tenements so rented. It then *repeals that act;* and by sect. 2 (without effecting any revivor of 13 & 14 Car. 2, c. 12) (*g*), enacts, that no person shall acquire a settlement in any parish or township maintaining its own poor, by, or by reason of settling upon, renting (*h*), or paying parochial taxes (*i*) for any tenement not being his or her own property, unless such tenement shall consist of a *separate and distinct* (*k*) dwelling-house or building, or of

Of the law as altered by 6 Geo. 4, c. 57, and 1 Will. 4, c. 18, s. 2, after the repeal of 59 Geo. 3, c. 50:—between 22nd June, 1825, and 30th March, 1831.

(*z*) *Reg.* v. *Churchwardens of Tiverton*, 30 L. J., M. C. 79; 3 E. & E. 555. See *post*, p. 938.

(*a*) *R.* v. *Crayford* (*Inh.*), 6 B. & C. 68.

(*b*) *R.* v. *Carshalton*, 6 B. & C. 93; and cases collected, 2 A. & E. 600. As to payment by the landlord accepting tenant's fixtures as an equivalent, see *R.* v. *Merthyr Tydvil*, 1 B. & Ad. 29. See *ante*, p. 932.

(*c*) *R.* v. *Pakefield*, 4 A. & E. 612, *post*, p. 938.

(*d*) *Reg.* v. *Melsonby*, 12 A. & E. 687.

(*e*) *R.* v. *Ampthill*, 2 B. & C. 847; but see *R.* v. *Barham*, 8 B. & C. 99; *R.* v. *Willoughby*, 4 A. & E. 152, on 1 Will. 4, c. 18; stated *post*, p. 936.

(*f*) *Reg.* v. *St. John's, Bedwardine* (*Inh.*), 8 A. & E. 192; 3 N. & P. 302.

(*g*) *R.* v. *Carshalton*, 6 B. & C. 93.

(*h*) "Renting" as here taken together with "yearly hiring" means *yearly* renting, and is the same with "hiring," per *Patteson*, J., *Reg.* v. *Recorder of Pontefract*, 2 Q. B. 556.

(*i*) Including land-tax, *R.* v. *East Teignmouth*, 1 B. & Ad. 244; and all levies collected within the parish, *R.* v. *Ringstead*, 7 B. & C. 607. See also p. 940.

(*k*) See cases on these words in 59 Geo. 3, c. 50, *ante*, p. 927, *et seq.*, which apply here.

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land, or of both, *bonâ fide rented* (*l*) by such person in such parish or township, at and for the sum of 10*l.* a year at the least, for the term of *one whole year* (*m*); nor unless such house, or building, or land, shall be occupied under such yearly hiring, and the rent for the same to the amount of 10*l.* actually paid for the term of one whole year at the least; provided always, that it shall not be necessary to prove the actual value of such tenement; but, though the rent is to be taken as the criterion of value, yet, if an entire rent is paid in respect of a holding of tenements lying partly in one parish and partly in another, it is competent for the sessions to receive evidence as to how much of the rent is paid in respect of the tenement in either parish, and to find how much of the rent was paid in the parish of alleged settlement (*n*).

The tenement must be of the like nature, *viz.* separate and distinct house or building, or land, or both, hired in the same way for a year, and at the same rent, 10*l.*, in order to satisfy 6 Geo. 4, c. 57, as was required under 59 Geo. 3, c. 50.

User or occupation of tenement rented between 22nd June, 1825, and 30th March, 1831.

No distinction is made by 6 Geo. 4, c. 57, as to user and occupation, between house or building, and land; but the tenement, whether consisting of one description only, or of both, must be *occupied* under the yearly hiring (*o*) for a year ending within the hirer's lifetime (*p*); though it need not all be dwelt in *by the hirer*, and any part may be underlet, as lodgings, by him, if he, or any part of his family, dwell in the rest (*q*). So, the occupation is sufficient, if before the end of the year the tenant locks up the house, leaving some few things in it, and removes with his family to his house in another parish (*r*). *Quære*, whether a coal-mine is a tenement within 6 Geo. 4, c. 57, s. 2 (*s*).

(*l*) Coupled with what follows imports hiring for a year, per *Williams*, J., in *Reg.* v. *Recorder of Pontefract*, 2 Q. B. 556; and should be so stated in copies of depositions, *Reg.* v. *St. Sepulchre, Northampton* (*Inh.*), 14 L. J., M. C. 8.

(*m*) A house and land were taken by lease "for the term of six months from the first of January next," (1830), "and so on from six months to six months, until one of the said parties shall give to the other of them six calendar months' notice in writing to determine the tenancy, at and under the rent of 13*l.* for every six months; the first payment to be made on the first of July, 1830." It was held that the months here spoken of were shown by the context to be *calendar* months, and that this was a taking for a year at least, by which a settlement might be gained under the above section, *Reg.* v. *Chawton* (*Inh.*), 1 Q. B. 247.

(*n*) *R.* v. *Pickering*, 2 B. & Ad. 267; *Reg.* v. *Hockworthy*, 7 A. & E. 493.

(*o*) *R.* v. *Kibworth Harcourt* (*Inh.*), 7 B. & C. 790.

(*p*) *S. C.*; *R.* v. *Carshalton*, 6 B. & C. 96; *R.* v. *Ditcheat*, 9 B. & C. 183. See *R.* v. *Crayford* (*Inh.*), *ante*, p. 933; *Reg.* v. *West Ardsley*, 32 L. J., M. C. 255; 4 B. & S. 95.

(*q*) *R.* v. *Ditcheat*, 9 B. & Cr. 176; 4 Man. & Ry. 151; *R.* v. *Great Bentley*, 10 B. & C. 520; 5 M. & Ry. 559.

(*r*) *Reg.* v. *St. Mary Kalendar* (*Inh.*), 9 A. & E. 626; 1 P. & D. 497. The tenant offered the key to the landlady, but she would not receive it till the end of the year, when the full rent was paid.

(*s*) *Reg.* v. *West Ardsley* (*Inh.*), 4 B. & S. 95; 32 L. J., M. C. 255.

Of Settlement by Renting a Tenement between 1825 *and* 1831.

If a separate house and land are let conjointly for a year, but the times of entering on and quitting them be different, *viz.* Lady-day and May-day, the occupation of each for a whole year, with payment of rent for a year, makes an occupation of a tenement for one whole year sufficient to confer a settlement under 6 Geo. 4, c. 57 (*t*). A like residence for forty days is necessary under both acts (*u*). A house hired quarterly at a yearly rent to be paid on the usual quarter days, and a quarter's notice to be given by either party, is sufficient to satisfy a renting of a tenement for a whole year upon the authority of *R.* v. *Herstmonceaux* (*x*); but a joint occupation of land, and payment of a moiety of the rent, so as with the rent for the separate occupation of a dwelling be to make up an amount of more than 10*l.* is not sufficient (*y*).

Payment of rent.

Under 59 Geo. 3, c. 50, the whole year's rent must have been paid, whatever its amount (*z*); but the consequence being, that payment of 999*l.* out of 1,000*l.*, the year's rent, would not confer that settlement, while the payment of 10*l.* only, if a whole year's rent, would, it was enacted, on 30th March, 1831, by 1 Will. 4, c. 18, s. 2, that where the yearly rent exceeds 10*l.*, payment *to that amount* (*a*) shall be deemed sufficient for the purpose of gaining a settlement under 6 Geo. 4, c. 57. This section operates retrospectively on hirings of tenements since 22nd June, 1825 (*b*).

From 22nd June, 1825 (*viz.* the passing of 6 Geo. 4, c. 57), to 30th March, 1831, the year's rent might be paid by any person, and the "person hiring the same" was no longer obliged to pay it himself, as under 59 Geo. 3, c. 50 (*c*). But this has been altered since the latter date.

It seems that payment of the year's rent, after an order of removal executed, is sufficient to confer a settlement since this act (*d*).

(*t*) *R.* v. *Ormesby* (*Inh.*), 4 B. & Ad. 214; and see *R.* v. *North Collingham*, 1 B. & C. 578.

(*u*) *R.* v. *Ditcheat* (*Inh.*), 9 B. & C. 176.

(*x*) *Guardians of the Poor of Hastings Poor Law Union* v. *Guardians of St. James, Clerkenwell*, L. R., 1 Q. B. 38; 35 L. J., M. C. 65.

(*y*) *Reg.* v. *Caverswall*, 10 A. & E. 270.

(*z*) *R.* v. *Kibworth Harcourt* (*Inh.*), 7 B. & C. 790; 2 M. & Ry. 28; *R.* v. *Ramsgate*, 6 B. & C. 713; *R.* v. *Ashley Hay*, 8 B. & C. 27; 2 M. & Ry. 21.

(*a*) This enactment dispenses with payment of a whole year's rent, if 10*l.* of it is paid, as well in a settlement claimed by payment of rates as by renting a tenement, *Reg.* v. *Brighton* (or *Brighthelmstone*) (*Inh.*), 1 Q. B. 674; 10 L. J., M. C. 93.

(*b*) *R.* v. *Dursley*, 3 B. & Ad. 465.

(*c*) *R.* v. *Kibworth Harcourt* (*Inh.*), 7 B. & C. 790. Thus, letting in payments by overseers of another parish in *bonâ fide* relief of pauper. *R.* v. *Tillingham*, 1 B. & Ad. 180. *Secus*, if with fraudulent intent of completing his settlement in a parish, *R.* v. *St. Sepulchre, Cambridge*, *id.* 924, and *semble* payments by distress. See as to this the cases collected, 2 A. & E. 600; *R.* v. *Pakefield*, 4 A. & E. 612, *post*, p. 938.

(*d*) *R.* v. *Willoughby*, 4 A. & E. 152; 5 N. & M. 457, on 1 Will. 4, c. 18.

Of Settlement by Renting a Tenement since 1831.

As to evidence of payment of rent, see *ante*, p. 932.

Law of renting tenement since 30th March, 1831, viz., Under statutes 1 Will. 4, c. 18, s. 1, and 4 & 5 Will. 4, c. 76, s. 66.

By 1 Will. 4, c. 18, s. 1 (which passed 30th March, 1831, and is prospective only) (*f*), after reciting 6 Geo. 4, c. 57, it is stated, "and whereas doubts had arisen with respect to the intention of the legislature concerning the occupation of such house, building, or land (*viz.* those mentioned in 6 Geo. 4, c. 57), by the person hiring the same, and concerning the amount of the rent to be paid and the person paying the same; and whereas it is expedient that such doubts should be removed," and is enacted, that from and after the passing of the act (*viz.* 30th March, 1831), no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of such yearly hiring of a dwelling-house or building, or of land, or of both, as in the said act (6 Geo. 4, c. 57) expressed, unless *such* house, or building, or land shall be "*actually occupied under such yearly hiring*," in the same parish or township, by the person hiring the same, for the term of one whole year at the least, and unless the rent for the same, to the amount of 10*l. at the least*, shall be paid by the person hiring the same.

Payment of poor's rates for a year requisite.

And by 4 & 5 Will. 4, c. 76, s. 66, from and after 14th August, 1834, "no settlement shall be acquired or completed by *occupying a tenement* unless the person occupying the same shall have been *assessed* (*g*) to the poor's rate, and shall have paid the same in respect of such tenement for one year" (*h*).

A farm being occupied under a joint letting to the pauper and his father, and the rent being paid by the father in the rate books of the parish, the surname common to both appeared as the occupier in respect of two rates, and in respect of a third the name of the father appeared. The father had paid all these rates, the sessions having found as a fact that the pauper was assessed to the poor rate; it was held that there was evidence to support that finding, and that the payment by the father under the circumstances was sufficient (*i*); but the payment by a third person must be authorized (*k*). And where a landlord was assessed to a poor rate under a local act rendering it obligatory on the parish officers to rate the landlord; but the tenant having claimed to be rated under the Reform Act (2 Will. 4, c. 45, s. 30), his name was accordingly inserted together with that of his landlord in the rate, and he paid the rate, it was held sufficient (*l*).

(*f*) *R.* v. *Ruthin*, 5 B. & Ad. 215.

(*g*) An occupier of a dwelling-house who pays is "assessed," though his name is not in the poor's rate as occupier, *Reg.* v. *Hulme* (*Inh.*), 4 Q. B. 538; 12 L. J., M. C. 100. See *Reg.* v. *St. Olave, Southwark* (*Inh.*), 5 Q. B. 912; 13 L. J., M. C. 161; *post*, p. 942.

(*h*) See sect. 68 of this act, *post*, p. 950, which extinguishes any settlement gained by the possession of any estate or interest in the parish upon ceasing to inhabit within ten miles thereof.

(*i*) *Reg.* v. *Husthwaite*, 1 E. & B. 501; 21 L. J., M. C. 189.

(*k*) *R.* v. *Bridgnorth* (*Inh.*), 3 E. & B. 627; 23 L. J., M. C. 124.

(*l*) *Reg.* v. *St. Giles-in-the-Fields*, 7 E. & B. 205; 26 L. J., M. C. 55.

Of Settlement by Renting a Tenement since 1831.

A settlement may still be gained, under 3 & 4 W. & M. c. 11, s. 6, by *payment of poor's rates*, though the occupier has been assessed and paid them for part of the year only, and has let part of the tenement to lodgers since 1 Will. 4, c. 18; provided his renting and occupation satisfy the act in force at the time (*viz.* 6 Geo. 4, c. 57) (*m*). So, though the *whole* year's rent be not paid, if 10*l.* is (*n*).

The three modern acts, 59 Geo. 3, 6 Geo. 4, and 1 Will. 4, require the same residence of forty days, and the same hiring and renting for a year of a tenement of the same nature and description.

What occupation of the tenement is requisite since 1 Will. 4, c. 18, passed 30th March, 1831.

To obtain this settlement in respect of a "*dwelling-house or building*," it must be "separate and distinct" within the decisions on these words in 6 Geo. 4, c. 57, and 59 Geo. 3, c. 50; and the hirer must actually occupy for the year the *whole* of the house or building which he rents (*o*). In computing the "one whole year at the least," within 1 Will. 4, c. 18, s. 1, a fraction of a day counts as a day, so that a tenancy and occupancy for one whole year, commencing on the 30th of September, is complete if the tenant enters at noon of 30th of September of one year, and quits at four in the afternoon of the 29th of September of the next year (*p*).

Separate and distinct dwelling-house.

A ground floor, but with a passage and doors open to and in common with the occupier of the first floor, is not a separate and distinct dwelling-house (*q*). For, if he underlets any portion of it, however small, at however low a rent, for any time, however short, so as by such underletting to confer on another the right to exclusive occupation of that part which is occupied accordingly by the lodger, the hirer of the house has not the "*actual*" *occupation* of the whole house as required by 1 Will. 4, c. 18, and cannot, therefore, obtain this settlement (*r*).

But an innkeeper, by merely taking an inmate, does not exclude himself from a settlement, for the guest's occupation is his (*s*); and the like is held in the case of a householder letting beds or half beds by the night or week (*t*), where he has access to and control over the whole house, keeping the keys of all the

(*m*) *Reg.* v. *St. Mary Kalendar*, 9 A. & E. 626; 1 P. & D. 497. Decided on a renting which began after the passing of 4 & 5 Will. 4, c. 76, s. 66. See *post*, p. 942.

(*n*) *Reg.* v. *Brighton* (*Inh.*), 1 Q. B. 674; 10 L. J., M. C. 93. See *ante*, p. 935.

(*o*) See per *Patteson*, J., in *R.* v. *Great Usworth*, 5 A. & E. 263; *R.* v. *Bedwell*, 6 A. & E. 282.

(*p*) *Reg.* v. *St. Mary, Warwick* (*Inh.*), 1 E. & B. 816; 22 L. J., M. C. 109.

(*q*) *Reg.* v. *Elswick*, 3 E. & E. 437; 30 L. J., M. C. 66.

(*r*) *R.* v. *St. Nicholas, Rochester*, 5 B. & Ad. 219; *R.* v. *St. Nicholas, Colchester*, 2 A. & E. 599.

(*s*) Per *Denman*, C. J., 2 A. & E. 604.

(*t*) *R.* v. *St. Giles-in-the-Fields*, 4 A. & E. 495.

Of Settlement by Renting a Tenement since 1831.

rooms, and conferring on his lodgers no other right than to the use of their beds by night.

So it seems that a party hiring since 30th March, 1831, must pay the rent out of his own funds, and have the exclusive occupation, by right, for the year, and cannot, by remaining in occupation after an assignment to a trustee of his farming effects to be worked for the benefit of his creditors, obtain a settlement, as he had neither paid the rent, nor had an undivided occupation for the year (*x*).

Payment of rent.

The minister of a Wesleyan congregation does not gain a settlement by paying the rent, and the rates and taxes of a house occupied by him within his circuit for a year, in accordance with the practice of the Wesleyan congregation, by which the circuit stewards repay him the amount so paid (*y*).

Occupation under one hiring.

It has been held under this act that no settlement is gained by occupying the same tenement for a continuous year, the occupation during part of that year being under one hiring for a year, and during the remainder under another similar hiring (*z*). If a tenant from year to year lets from year to year, and then gives up his own interest to the landlord paramount by verbal agreement, and the tenant in possession afterwards verbally agrees with the landlord to become his tenant from year to year, such last agreement is a new hiring, and puts an end to the former hiring as under-tenant (*a*).

Yearly tenancy, what.

An agreement to take a cottage "for three months," at a yearly rent of 18*l.*, the first monthly payment to be made on 25th January, with three months' notice to quit from either party, and occupation for eighteen months, with payment of some of the rates, was held to confer a settlement (*b*). Renting and going into possession of three acres of land in order to sink a coal pit, at a yearly rent of 135*l.* an acre for the coal, and 50*s.* an acre for the surface, from June, 1844, the rent not to commence till after the coal was reached, and the coal was reached in December 1844, and in June, 1845, half-year's rent for coal paid, and a year's rent for surface; in September pit fell in and land was given up. From June, 1844, to September, 1845, a cottage was also rented at 5*l.* 10*s.* a year, and occupied and rent paid; held not sufficient, as tenements to the value of 10*l.* a year were not rented and occupied (*c*).

(*x*) *R.* v. *Pakefield*, 4 A. & E. 612; adhered to in Q. B., 11 Nov. 1840, *Reg.* v. *Melsonby* (*Inh.*), 12 A. & E. 687.

(*y*) *R.* v. *Churchwardens of Tiverton*, 3 E. & E. 555; 30 L. J., M. C. 79.

(*z*) *R.* v. *Banbury* (*Inh.*), 1 A. & E. 136. See, however, *Reg.* v. *Chawton* (*Inh.*), 1 Q. B. 247; 10 L. J., M. C. 55, *ante*, p. 929.

(*a*) *Ibid.*

(*b*) *Reg.* v. *Churchwardens of Willesden*, 3 B. & S. 593; 32 L. J., M. C. 109. See also *Reg.* v. *St. Giles, Cripplegate*, 4 B. & S. 509; 33 L. J., M. C. 3.

(*c*) *Reg.* v. *West Ardsley* (*Inh.*), 4 B. & S. 95; 32 L. J., M. C. 255.

7. *Of Settlement by Payment of Parochial Taxes.*

Origin of Settlement by Payment of Parochial Taxes.

The reason why payment of parochial taxes confers a settlement is, that a parish, by rating a man, admits that he is a parishioner (*d*). The history of this settlement is curiously diversified. Long and often on the verge of extinction, it has always been revived by the unforeseen result of the various acts intended to destroy it. It originated in 1691, with the enactment (*e*), that if any person who shall come to inhabit in any parish, shall be charged with and pay his share towards the public taxes (*f*) or levies of the parish (*g*), he shall be adjudged and deemed to have a legal settlement. Under this act a settlement was acquired by forty days' residence on a tenement of whatever yearly value, after being rated to any parochial tax, as the land-tax, or the poor or church rate (*h*); but a watch rate, being a ward rate and not a parochial rate (*i*), or assessed taxes, are not public taxes of the parish within the statute (*k*). But when this kind of settlement was at length limited to payments of parochial rates in respect of tenements of the yearly value of 10*l*., removals on this ground fell into disuse, and the settlement became in a degree confounded with that obtained by renting a tenement, the same condition precedent being required in both cases (*l*). However, as soon as 59 Geo. 3, c. 50, imposed special restrictions on the right of obtaining a settlement by renting a tenement, the settlement by paying parochial rates or levies was again noticed and resorted to; for it often happened that a party had paid one or more of the "public taxes or levies" (*i. e.*, the taxes raised within the parish (*m*)) in respect of a tenement of the yearly value of 10*l*., as pointed out by 35 Geo. 3, c. 101, s. 4, though he had neither hired, nor held, nor paid rent for a year, as required by 59 Geo. 3, c. 50; and, in such a case, though he gained no settlement by renting the tenement, he would still acquire one by having contributed to the parochial burdens. The result of this unforeseen circumstance was, that an act which had been passed to shut one avenue of litigation, opened another scarcely less fruitful. Nor

(*d*) *R.* v. *Llangammarch* (*Inh.*), 2 T. R. 628.
(*e*) 3 Will. & M. c. 11, s. 6.
(*f*) Payment of one poor's rate and church rate held sufficient, *R.* v. *Openshaw*, Burr. S. C. 522; 1 Bla. R. 463.
(*g*) Means "the taxes raised within the parish where the pauper resided," *R.* v. *St. Michael-at-Thorne in Norwich*, 6 T. R. 536. See *post*, p. 940.
(*h*) *R.* v. *Bramley*, Burr. S. C. 75; so held on account of the notice of inhabitancy arising by the party having been assessed and paid the rate. Per *Bayley*, J., 8 B. & C. 663.
(*i*) *R.* v. *Christchurch, London*, 8 B. & C. 660. As to what are included in public taxes of the parish, see *post*, pp. 940, 941.
(*k*) 43 Geo. 3, c. 116, s. 59.
(*l*) 35 Geo. 3, c. 101, s. 4.
(*m*) See *supra*, and *post*, pp. 940, 941.

Of Settlement by Payment of Parochial Rates.

has the act of 22nd June, 1825 (*n*), by which the settlement by paying parochial rates for any tenement "not being the party's own property" is expressly narrowed to the same conditions as that by which the settlement in respect of renting a tenement may be acquired under that act, prevented new cases of establishing this settlement in a manner which bears a strong resemblance to the result of 59 Geo. 3, just above mentioned. For, in a case where the occupation of a tenement of 10*l.* yearly value was such as to satisfy 6 Geo. 4, c. 57, it was held, that though, as the hiring had taken place after the passing of 1 Will. 4, c. 18, and in consequence of the underletting of a part, no settlement could be gained under that act by renting the tenement, still it might be acquired by payment of the parochial rates in respect of it (*o*). This important decision appears by a sidewind to render nugatory the strict enactments of 1 Will. 4, c. 18; as in nearly every case the householder who lets lodgings has been rated to and paid parochial rates.

Between the 22nd June, 1795 (the time of passing 35 Geo. 3, c. 101), and 22nd June, 1825 (when 6 Geo. 4, c. 57 passed), a settlement might be gained by residing in a parish for forty days after being rated and paying parochial taxes in respect of a tenement there, of the annual value of 10*l.* or more (*p*), though not rated at 10*l.* (*q*), if all the forty days were subsequent to such payment (*r*).

Since 22nd June, 1825, we have seen (*ante*, p. 933) that by 6 Geo. 4, c. 57, s. 2, no settlement can be gained by payment of "parochial rates" for any tenement not being the party's own property, unless it answers the requisites of that act. And there must also be an occupation of such a tenement for one whole year, as a forty days' residence is not sufficient (*s*). The words "parochial rates" in that act, and "public taxes or levies" of a town or parish in 3 W. & M. c. 11, s. 6, mean the same thing, *viz.*, the taxes and levies collected within a parish, such as poor's rate, church rate, land tax (*t*). Improvement and lamp rates under an improvement act for a city, leviable by commissioners and collected by the churchwardens and over-

Parochial rates, what.

Public taxes of a parish, what.

(*n*) 6 Geo. 4, c. 57, s. 2. See *ante*, p. 933.

(*o*) *R.* v. *Stoke Damerel*, 6 A. & E. 308; 1 N. & P. 453. So, though not only had 1 Will. 4, c. 18, not been complied with as to *actual* occupation of the whole by the tenant, but he had not been assessed to or paid poor's rates for the *whole* year, *Reg.* v. *St. Mary Kalendar*, 9 A. & E. 626; 1 P. & D. 497. See p. 937.

(*p*) *R.* v. *Penryn*, 4 B. & Ad. 224; 1 N. & M. 74; *R.* v. *St. Pancras*, 2 B. & C. 122.

(*q*) *R.* v. *Ringstead*, 7 B. & C. 607; *R.* v. *St. Dunstan's*, 4 B. & C. 686.

(*r*) *R.* v. *Ringstead*, *ubi sup.*

(*s*) *Reg.* v. *Westbury-on-Trym*, 7 E. & B. 444; 26 L. J., M. C. 76.

(*t*) *R.* v. *Teignmouth, East* (*Inh.*), 1 B. & Ad. 244; *R.* v. *Issey*, Burr. S. C. 826; *R.* v. *Ringstead*, 7 B. & C. 607, church rate. As to watch rate, &c., see *post*, p. 941.

seers of the respective parishes or townships (*u*); property tax under 5 & 6 Vict. c. 35, Sched. H. (*x*); and a borough watch rate, made under 5 & 6 Will. 4, c. 76, and 7 Will. 4 & 1 Vict. c. 8, extending over the whole of a parish, and collected by overseers, are public taxes and levies of the parish (*y*), but it was doubted whether if a certain quota of the rate was ordered to be assessed and levied on the whole of a township, excepting such parts as were more than 200 yards from any street or continuous line of houses, such rate would be such a public tax of the parish (*z*); but a watch rate for a city ward, levied by the alderman and council of each ward, under 10 Geo. 2, c. 22, and collected by the beadle of the ward, is not within the 3 W. & M. c. 11 (*a*), and payment towards a county bridge is not, and it would seem, notwithstanding 12 Geo. 2, c. 29. Again, the words "charged with" in 3 W. & M. c. 11, s. 6, and "assessed to" in 4 & 5 Will. 4, c. 77, s. 66, are construed alike (*b*), and accordingly the occupier of a tenement, who claims a settlement by payment of parochial taxes in respect of it, must be "charged with" as well as pay a parochial rate or tax (*c*); and after such charging and payment it is immaterial that the rate was invalid (*d*).

Of Settlement by Payment of Parochial Rates.

What are public taxes and levies of the parish.

But a local act may be so worded as to apportion the rate between an outgoing and incoming tenant during the currency of the rate, and to make the payment by the incoming tenant of his proportion of the rate amount to a payment of rate, notwithstanding the outgoing tenant was originally assessed and continued to stand on the rate book as occupier, and confer a settlement under 3 W. & M. c. 11, s. 6 (*e*). But under the now repealed statute 17 Geo. 2, c. 38, s. 12 (*f*), which formerly provided for the apportionment of poor's rates in case of removing, it was held that an outgoing tenant paying only up to the time of leaving did not acquire a settlement under 3 W. & M. c. 11, s. 6 (*g*); and so in like manner the payment by an incoming tenant of a proportion of the rate was not held to amount to a rating and payment of rate (*h*).

(*u*) *Reg.* v. *Guardians of St. Thomas Poor Law Union, Devon*, L. R., 5 Q. B. 371; 39 L. J., M. C. 83.
(*x*) *St. George's, Hanover Square* v. *Cambridge*, 37 L. J., M. C. 17.
(*y*) *Reg.* v. *Everton*, 29 L. J., M. C. 165.
(*z*) *Ibid.*
(*a*) *R.* v. *Christchurch, London*, 8 B. & C. 660, *ante*, p. 939.
(*b*) See *Reg.* v. *Hulme* (*Inh.*), 4 Q. B. 538; 12 L. J., M. C. 100, *ante*, p. 936.
(*c*) *Reg.* v. *St. Olave, Southwark*, 13 L. J., M. C. 161; *R.* v. *Bramshaw*, Burr. S. C. 88.
(*d*) *St. Giles, Cripplegate* v. *St. Mary, Newington*, 19 Vin. Abr. 386; *R.* v. *St. Bees*, 9 East, 203.
(*e*) *Reg.* v. *St. Marylebone* (*Inh.*), 15 Q. B. 399. See *Reg.* v. *St. Anne, Westminster*, 29 L. J., M. C. 78.
(*f*) See 32 & 33 Vict. c. 41, s. 16.
(*g*) *Reg.* v. *Everton*, 29 L. J., M. C. 165.
(*h*) *Reg.* v. *Eddowes*, 28 L. J., M. C. 84.

Of Settlement by Payment of Parochial Rates.

Mode of charging the party with the rate.

We have seen that, since 30th March, 1831, it is sufficient, in order to claim a settlement in this right, or in that of renting a tenement, if 10*l.* of the year's rent is paid (*i*). All that is requisite is, that the parish shall rate (*i. e.*, assess or charge) the occupier, so as to show themselves aware that he is in the parish, and that he should pay on such rating (*k*); so that being so rated, whether he occupy rent free in increase of salary due from his landlord, or is a tenant, properly so called, *viz.*, rendering rent, or whether after himself paying the rates he is allowed them in account with his landlord, is immaterial (*l*). Since 6 Geo. 4, c. 57, he need not reside forty days in the parish after payment of such a rate (*m*).

If the premises are rated and the rate paid, the occupier need not be actually named on the rate or assessment itself (*n*). The assessment will be good if the tenement occupied or the occupier are also described as to show that the parish, though ignorant of his name, are aware (*e. g.*, by collecting rates from him) that he is in fact the occupier (*o*). If both landlord's and tenant's names appear on the rate, the presumption is that the tenant is intended to be rated till the contrary is shown to the sessions (*p*), but which is intended in such case to be rated is a question of fact for the sessions (*q*).

Payment of rates by a joint tenant may be a payment by both (*r*). But if a third person pays a man's rates, there must be an authority from the person assessed to the payer, otherwise such a payment will not confer a settlement on the person assessed (*s*);

(*i*) *Reg.* v. *Brighton*, 1 Q. B. 674, *ante*, p. 935.

(*k*) See judgment of court in *R.* v. *Heyford* (*Lower*), 1 B. & Ad. 75.

(*l*) *R.* v. *Heyford* (*Lower*), 1 B. & Ad. 75. See the case explained by Lord *Denman*, on its being cited in *Reg.* v. *Mayor of Bridgewater*, 10 A. & E. 68. In *Reg.* v. *South Kilvington* (*Inh.*), 5 Q. B. 216; 13 L. J., M. C. 3, pauper occupied premises at a yearly rent under an *agreement by which the landlord was to pay all rates.* The rent was higher on that account. Pauper was assessed to the poor as occupier, but the landlord always paid the rate. Held, that pauper did not gain a settlement by being charged with, or assessed to, or paying the poor's rate under stat. 4 Will. & M. c. 11, s. 6, or 4 & 5 Will. 4, c. 76, s. 55. See *R.* v. *Weobly*, 2 East, 68; and see *R.* v. *Openshaw*, Burr. S. C. 522; *R.* v. *Okehampton*, Burr. S. C. 5; *R.* v. *Axmouth*, 8 East, 383.

(*m*) *R.* v. *Ringstead*, 7 B. & C. 607, relied on *arguendo*, 9 A. & E. 628.

(*n*) *Reg.* v. *Hulme*, 4 Q. B. 538; 12 L. J., M. C. 100, *supra*, p. 941; *R.* v. *Walsall*, Cald. 35; *R.* v. *Painswick*, Burr. S. C. 465.

(*o*) In *R.* v. *Walsall*, Cald. 35, "late Lowbridge's house," held sufficient rating coupled with payment, though actual occupier not named. See *R.* v. *Llangammarch*, 2 T. R. 628; *Reg.* v. *St. Anne, Westminster*, 29 L. J., M. C. 78.

(*p*) Per *Buller*, J., in *R.* v. *Rainham*, 5 T. R. 240; *R.* v. *St. Lawrence, Winchester*, 4 Doug. 190; *R.* v. *Mitcham*, 4 Doug. 226.

(*q*) *R.* v. *Folkestone*, 3 T. R. 505.

(*r*) *Reg.* v. *Husthwaite* (*Inh.*), 21 L. J., M. C. 189.

(*s*) *R.* v. *Bengeworth* (*Inh.*), 3 E. & B. 637; 23 L. J., M. C. 124; *R.* v. *Weobley*, 2 East, 68; *Reg.* v. *Bridgwater*, 10 A. & E. 66; *Hughes* v. *Chatham*, 13 L. J., C. P. 44.

and *R.* v. *Bridgwater* (*t*) can only be supported on the ground that the court thought the sessions inferred as a fact from the relationship of the parties then that there was such authority. *Of Settlement by Payment of Parochial Rates.*

But where land hired, taken, or inclosed under acts for relief of the poor (*u*), is let by parish officers to a poor inhabitant, he shall not gain a settlement by reason of his paying parochial taxes for it, either alone or with any other land or tenement (*x*).

This settlement cannot be established by evidence of payment only without the production of the rate, or accounting reasonably for its non-production after notice given to the parish officers to produce it (*y*). Evidence.

We have seen that, by 4 & 5 Will. 4, c. 76, s. 66 (*z*), no settlement shall be acquired or completed by *occupying a tenement* unless the person occupying the same shall have been *assessed to* the poor's rate, and shall have paid the same in respect of such tenement for one year.

This enactment leaves the settlement by payment of rates on the same footing as before, *viz.*, under 3 & 4 W. & M. c. 11, s. 6.

8. *Of Settlement by Estate.*

Before 1722, a person who enjoyed a legal or equitable estate, of whatever value, gained a settlement by forty days' residence in the parish where it lay (*a*), for it was never meant to banish men from the enjoyment of their own lands (*b*). In that year it was enacted by 9 Geo. 1, c. 7, that no person or persons shall be deemed to acquire a settlement in any parish or place by virtue of any "*purchase* of any estate or interest in such parish or place, whereof the consideration for such purchase doth not amount to the sum of 30*l.* *bonâ fide* paid, for any longer or further time than such person or persons shall inhabit in such estate, and shall then be liable to be removed to such parish or place where such person or persons were last legally settled, before the said purchase, and inhabitancy therein."

In all cases, therefore, the first question is, Whether an estate of the nature proposed confers a settlement? and if it is suggested that the consideration money was under 30*l.* other questions may arise, *e. g.*, Is the estate within the restriction of 9 Geo. 1, c. 7, as acquired by *purchase?* Next, if it is, was the consideration for the purchase of the amount contemplated by the statute? If these questions are decided against the settlement, a further question may arise, whether, though no

(*t*) 3 T. R. 550.
(*u*) *Viz.* 59 Geo. 3, c. 50, as amended by 1 & 2 Will. 4, c. 42, and c. 59, as to crown lands.
(*x*) 1 & 2 Will. 4, c. 42, s. 5; and c. 59, s. 2.
(*y*) *R.* v. *Coppull*, 2 East, 25.
(*z*) *Ante*, p. 936.
(*a*) *R.* v. *Deddington*, Stra. 1193; 2 B. & Ad. 877.
(*b*) Per Lord *Holt*, *Ryslip* and *Harrow*, Salk. 524.

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permanent settlement is acquired by estate, the party may not be so connected with it, as to be irremovable during his possession.

What amount of estate will confer this settlement with regard to 9 Geo. I, c. 7.

The estate must be an interest issuing out of realty, so that an annuity charged on personalty confers no settlement (*d*). A right of common actually enjoyed may confer it; but a mere inalienable franchise, which would not suffice (*e*). The like was held in the case of a burgess of a borough, entitled as such to receive a share of the rent of corporate land (*f*). But the nature of the tenure is immaterial; nor is the duration of the estate material, provided it is of sufficient permanency, and so conferred by will or otherwise, as to ensure to the party residing a right to remain for forty days (*g*). Thus it may be a freehold estate in fee (*h*), or for life (*i*), or a copyhold (*k*), in dower (*l*), a leasehold interest determinable on lives (*m*), or under an agreement to build a house on land of another, at a cost of 85*l*., and to pay an annual rent-charge of 25*s*. in consideration of the grant of a lease of three lives (*n*), or for a term of years (*o*) (which includes a tenancy from year to year (*p*), or for even half or quarter of a year) (*q*), or guardianship in socage (*r*), or an equitable estate (*s*), or even a weekly tenancy, as where a man, who married a woman being the weekly tenant of a cottage, resided in it for forty days, and occupied the cottage for seven years, paying the weekly rent, was held to have acquired an estate by marriage, the payment of rent by him, after marriage, being equally consistent with a continuance of the old weekly tenancy, as with the creation of a new one in him, and the residence was sufficient, notwithstanding the tenancy was not for forty days certain (*t*); but not a mere tenancy at will (*u*), or an estate in remainder or reversion (*x*),

(*d*) *R.* v. *Stockley Pomroy*, Burr. S. C. 762.
(*e*) *R.* v. *Warkworth*, 1 M. & S. 473.
(*f*) *R.* v. *Belford* (*Inh.*), 10 B. & C. 54.
(*g*) See *R.* v. *Cassington*, 2 B. & Ad. 874.
(*h*) *R.* v. *Great Farringdon*, 6 T. R. 679.
(*i*) *R.* v. *Shenston*, Burr. S. C. 468.
(*k*) See 2 Nolan, 71; *R.* v. *Haddenham* (*Inh.*), 15 East, 463, even before admittance; *R.* v. *Thruscross*, 1 A. & E. 126; see *post*.
(*l*) *R.* v. *Painswick*, Burr. S. C. 783; *R.* v. *Northweald Basset*, 2 B. & C. 724; *R.* v. *Long Wittenham*, 4 Doug. 193.
(*m*) *R.* v. *Marwood*, Burr. S. C. 386.
(*n*) *Reg.* v. *Overseers of Belford*, 32 L. J., M. C. 156; 3 B. & S. 662.
(*o*) *Murphy* v. *Grandborough*, Stra. 97. See 2 A. & E. 536; 1 B. & Ad. 750.
(*p*) *Doe* d. *Shore* v. *Porter*, 3 T. R. 13.
(*q*) *Doe* d. *Phillips* v. *Roe*, Litt. s. 67; Co. Lit. 54 b; 5 B. & Ad. 768.
(*r*) *R.* v. *Oakley*, 10 East, 491.
(*s*) Doug. 767; *R.* v. *Wivelingham*, *R.* v. *Houghton-le-Spring*, 1 East, 247, and see cases, *post*.
(*t*) *Reg.* v. *Thornton* (*Inh.*), 29 L. J., M. C. 162; 2 E. & E. 788.
(*u*) *R.* v. *Widworthy*, Burr. S. C. 109. See *Reg.* v. *Halifax*, 4 E. & B. 647; 24 L. J., M. C. 65.
(*x*) *R.* v. *Willoughby-with-Slothby*, 10 B. & C. 62; *R.* v. *Ringstead*, 9 B. & Cr. 218; *R.* v. *Eatington*, 4 T. R. 177.

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or an annuity though specifically charged on an estate if unappropriated to the holder of the estate (*y*), or a mere licence (*z*).

Inferring original title from long possession.

It is not necessary that strict proof of an indefeasible title should be given as in ejectment; for if the party has had twenty years' undisturbed possession, or even rather less by a few weeks, without any acknowledgment, the possession is a sufficient title from which to presume a grant, though it had its origin in wrong (*a*). Thus, where a cottage was built on the waste thirty years before, and had descended to the daughter, the lord making no claim, it was holden to be a sufficient title to found a settlement (*b*). Again, where a party or his son has resided for twenty years, within a few weeks, on an estate as given by a relative, although there be no proof of any conveyance, yet a settlement will be gained; for "the strict rules which prevail on the trials of ejectments ought not to be applied to settlement cases;" and under such circumstances a conveyance, if necessary, might be presumed (*c*).

Possession and residence undisturbed for more than forty days under a claim of title without fraud.

An undisturbed residence on property, which the pauper claimed as his right, without any consciousness of wrong, conferred a settlement (*d*). If a tenant from year to year dies intestate, his administrator has the same yearly interest in the land which his intestate had (*e*), and will acquire a settlement by subsequent residence in the parish for forty days after administration duly taken out (*f*). In an early case (*g*), it was held that after an undisturbed and exclusive possession of leasehold property by one of several next of kin, for very near twenty years, it must be presumed that the other next of kin agreed with him as to their respective shares.

An equitable estate is sufficient to confer a settlement; so that a settlement may be acquired by the mortgagor, who has only the equity of redemption (*h*); but not, if being one of

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(*y*) *R.* v. *Stockley Pomroy*, Burr. S. C. 762; *R.* v. *Melbourn*, *id.* 244; Stra. 1225.

(*z*) *R.* v. *Horndon-on-the-Hill*, 4 M. & S. 562; *Reg.* v. *St. Mary, Castlegate*, 21 L. J., M. C. 106.

(*a*) *R.* v. *Butterton*, 6 T. R. 554; but see *R.* v. *Chew Magna*, 10 B. & C. 747; also *Doe* d. *Wilkins* v. *Marquis of Cleveland*, 9 B. & C. 864; and 2 M. & W. 503. Possession, to confer a right, must be adverse against a person having a legal title, per *Littledale*, J., in *R.* v. *Okeford Fitzpaine* (*Inh.*), 1 B. & Ad. 259.

(*b*) *Ashbrittle* v. *Wyley*, Stra. 608.

(*c*) *R.* v. *Butterton*, 6 T. R. 554.

(*d*) *R.* v. *Staplegrove*, 2 B. & Ald. 527, remarked on by *Bayley*, J., in 10 B. & C. 61.

(*e*) *Doe* d. *Shore* v. *Porter*, 3 T. R. 13, as cited by *Lawrence*, J., 6 T. R. 298; and 2 A. & E. 110.

(*f*) *R.* v. *Great Glenn* (*Inh.*), 5 B. & Ad. 188; *R.* v. *Dorstone*, 1 East, 296.

(*g*) *R.* v. *Cold Ashton*, Burr. S. C. 444; cited in *R.* v. *Canford Magna*, 6 M. & S. 355, and in *R.* v. *Okeford Fitzpaine*, 1 B. & Ad. 258.

(*h*) Per Lord *Mansfield*, in *R.* v. *St. Michael's, Bath*, Cald. 110; see *R.* v. *Cassington*, 2 B. & Ad. 877, per *Parke*, B.; 2 A. & E. 536.

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several mortgagors, he has sold his share of the equity of redemption (*i*). So the devisee of the mortgagor of the equity of redemption, although the property be devised to trustees in trust to sell and pay the mortgage and other debts, has an equitable estate before sale sufficient to confer a settlement (*k*).

When the estate is an equitable one.

Where a father devised an estate to a trustee, "in trust to let the same during his daughter's life," and, on his death, the daughter, who had lived with him, continued to reside on the premises, without interference from the trustee, for more than forty days, it was holden that she acquired a settlement (*l*); and so on a devise to a wife for life and after her death the land to be sold within six months and be equally divided among the children, one of the children who resided for forty days after the death of the wife, and before sale, acquired a settlement (*m*). So a devise of a long term of years to A. of a cottage, with an expression of testator's will that the paupers should have liberty during their life to *dwell* in it, was held *to confer a settlement* on them (*n*).

On a sale of land before the full purchase-money is paid, the vendor has a beneficial interest, and is something more than a mere trustee (*o*). Thus, where a written agreement was made for the purchase of an estate to be paid for by two instalments, the first payable within a few days after the signing the agreement, and the last in seven months, and the vendor was to make out a good title on payment of the last instalment, and to convey the premises, but the purchaser was to be let into possession on payment of the first. The purchaser paid the first, was let into possession, and continued possessed a year and a half; but the last instalment was never paid, nor any conveyance ever executed, and the purchaser afterwards gave up the contract on receiving back part of the first instalment. He was held not to acquire an equitable estate under this contract, so as to gain a settlement under 9 Geo. 1, c. 7, s. 5 (*p*); but the court in a later case has called this a doubtful authority (*q*). So where the devisee of a copyhold estate entered and occupied, and resided forty days before admittance, though he had not an actual legal or equitable estate, yet as he was an occupier who by doing an act which he might at any time do could have obtained the legal estate, he was held to have acquired a settlement (*r*).

Who may acquire such an estate.

Among the parties who may acquire this settlement by residing forty days in the parish where they occupy an estate,

(*i*) *R.* v. *Cregrina*, 2 A. & E. 536.
(*k*) *R.* v. *Aslackby*, 5 A. & E. 200; *R.* v. *Ardleigh*, 7 A. & E. 70.
(*l*) *R.* v. *Holm, East Waver Quarter*, 16 East, 127.
(*m*) *Reg.* v. *Burgate*, 3 E. & B. 323; 23 L. J., M. C. 143.
(*n*) *R.* v. *Woburn*, Burr. S. C. 785; 2 Bott, 528.
(*o*) See per *Bayley*, J., in *R.* v. *Geddington*, 2 B. & C. 134; 3 Dowl. & Ry. 403.
(*p*) *R.* v. *Geddington*, 2 B. & C. 129.
(*q*) *Reg.* v. *St. Margaret's, Leicester*, 2 Q. B. 559.
(*r*) *R.* v. *Thruscross*, 1 A. & E. 126.

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are, an infant (*t*); an executor, even before probate actually obtained (*u*); a widow, after her dower has been assigned, but not previously (*x*); a guardian in socage (*y*); but the father of a girl, to whom, at the age of sixteen, an estate came by devise, was held not settled in respect of residence on it with her for five years as her supposed guardian in socage (*z*); and it must be borne in mind that guardianship in socage only exists in legal estate (*a*); a trustee in whom estates are vested, though for the purposes of sale (*b*); an administrator or administratrix, though the administration was taken out by a widow to her husband, in order to obtain a settlement by so doing (*c*); and sole next of kin where no administration is taken out (*d*); the husband of an administratrix entitled to the trust of a term (*e*); of a parcener (*f*); of a woman, whose estate is vested in trustees for her separate use (*g*); of a woman who was a tenant from year to year of premises being under the annual value of 10*l.* (*h*); or of a woman who was a weekly tenant (*i*); but it may be considered doubtful whether a man by marrying a tenant at will merely can gain this settlement (*k*); or of a woman who, after the passing of 59 Geo. 3, c. 50, had become a yearly tenant of premises at a rent under 10*l.* per annum (*l*); and a schoolmaster appointed by trustees, and residing in the schoolhouse as part of the benefits of his office, and who was to be paid out of the rents of a farm devised to the trustee for that among other purposes (*m*).

Who may not acquire such estate.

But a settlement will not be acquired by any length of occupation which is merely permissive. Thus, where a party

(*t*) *R.* v. *Hasfield*, 2 Stra. 1131.

(*u*) *R.* v. *Stone*, 6 T. R. 295. See *R.* v. *Axbridge*, 2 A. & E. 520. In *R.* v. *Stone*, the probate was not taken out till after a lapse of three years' residence, and three days only before the removal.

(*x*) *Reg.* v. *North Weald Basset*, 2 B. & C. 724.

(*y*) *R.* v. *Oakley*, 10 East, 491.

(*z*) *R.* v. *Sherrington* (*Inh.*), 3 B. & Ad. 714.

(*a*) *R.* v. *Toddington*, 1 B. & A. 560.

(*b*) *R.* v. *Natland*, Burr. S. C. 793. See *Reg.* v. *St. Margaret's, Leicester* (*Inh.*), 2 Q. B. 459.

(*c*) *R.* v. *Great Glenn*, 5 B. & Ad. 188. See also *R.* v. *Barnard Castle*, 2 A. & E. 108. In these cases the question of fact for sessions on an occupation by a widow of a tenant after the husband's death, was whether she then commenced a new tenancy on her own account, or continued in possession entitled to take out administration to her husband, and by so doing to become tenant from year to year in his right. See *Doe* d. *Shore* v. *Porter*, 3 T. R. 13; and *R.* v. *Cregrina* (*Inh.*), 2 A. & E. 536.

(*d*) *R.* v. *Horsley*, 8 East, 405.

(*e*) *Mursley* v. *Granborough*, Stra. 97.

(*f*) *R.* v. *Dorstone*, 1 East, 296.

(*g*) *R.* v. *Offchurch*, 3 T. R. 114.

(*h*) *R.* v. *Ynyscynhanarn*, 7 B. & C. 233.

(*i*) *Reg.* v. *Thornton* (*Inh.*), 2 E. & E. 788; 29 L. J., M. C. 162; *R.* v. *Ilmington*, Burr. S. C. 566.

(*k*) See *Reg.* v. *Halifax*, 4 E. & B. 647; 24 L. J., M. C. 65.

(*l*) *R.* v. *North Cerney* (*Inh.*), 3 B. & Ad. 463.

(*m*) *R.* v. *Oversley-le-Moor*, 15 East, 356.

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erected a cottage by the licence of the lord of the manor, and enclosed a garden from the waste, rendering an annual rent of 10*s.* 6*d.* as a quit-rent, and resided upon the premises for a year and a half, and the entry of the licence on the court rolls was the only evidence of title, this possession was held to confer no settlement (*n*). The same was held where the land was taken in the character of a servant in lieu of wages (*o*).

Where, after the attainder of a party, and his discharge from imprisonment under the sign manual, he purchased a copyhold, and lived upon it for several years, the court refused to inquire into his capacity to hold it, and said that, whether the crown could have impeached his title or not, he acquired a settlement by residing on it forty days without impeachment, in fact, and communicated that settlement to his child (*p*). So, no settlement will be gained by a residence of a lessee for years, determinable on three lives, who holds over for less than twenty years, upon the pretence that the third life is still in existence (*q*).

We now come to the further questions on 9 Geo. 1, c. 7, the first of which was stated to be,

What estate is within the restriction of 9 Geo. 1, c. 7, as being acquired by "purchase?"

The term "*purchase*" in the statute is not to be taken in its legal acceptation, but in its popular sense; and, therefore, it does not extend to devises or gifts, or other methods of acquisition, but is confined (in terms) to the particular case of a purchase for money (*r*). Thus, conveyances to relatives in consideration of natural love and affection (*s*), or for a mixed consideration of natural affection and an inadequate sum of money (*t*), are not within the act, and the parties to whom the lands are conveyed derive settlements from them. But if a pecuniary consideration, however small, be the sole foundation of the grant, it is to be considered as a purchase within the statute, and not as a voluntary gift (*u*).

It appears, from many cases, that a husband may acquire a settlement by possession of an estate in right of his wife, which came to him by marriage, whatever may be its value, and even though, being purchased by her for less than 30*l.*, she could have acquired no settlement by residing on it herself, had she remained single (*x*). And so, where a man married a weekly tenant of a cottage, resided forty days, and paid the rent for

(*n*) *R.* v. *Horndon-on-the-Hill*, 4 M. & S. 562; *Reg.* v. *Cuddington*, 14 L. J., M. C. 182.
(*o*) *R.* v. *South Newton, Wilts*, 10 B. & C. 838.
(*p*) *R.* v. *Haddenham*, 15 East, 463.
(*q*) *R.* v. *Axbridge*, 2 A. & E. 520.
(*r*) 2 Nolan, 74; and *Doe* v. *Meyrick*, 3 Tyrw. 916.
(*s*) *R.* v. *Marwood*, Burr. S. C. 386.
(*t*) *R.* v. *Ufton*, 3 T. R. 251. See *R.* v. *Piddlehinton*, 3 B. & Ad. 460; *R.* v. *Hatfield Broad Oak*, *id.* 566; *R.* v. *Lydlinch*, 4 B. & Ad. 150. Whether a voluntary conveyance will discharge a certificate has not been expressly decided, *R.* v. *Cassington*, 2 B. & Ad. 874.
(*u*) *R.* v. *Warblington*, 1 T. R. 241.
(*x*) *R.* v. *Ilmington*, Burr. S. C. 566.

years, he was held to have acquired a settlement by estate, though the tenancy was not originally for forty days certain (*y*).

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The next question under 9 Geo. 1, c. 7, was stated to be,

What is the construction of 9 Geo. 1, c. 7, as to the consideration-money requisite to a "purchase" within it?

The consideration-money, where the estate is purchased, must, in fact, amount to 30*l.*; but where it was expressed in the conveyance as 28*l.*, and 30*l.* was, in fact, paid, the estate was holden to confer a settlement (*z*). If the 30*l.* be paid by the purchaser, as a consideration for the purchase, it is immaterial how it is to be distributed; so that it is no objection, where the estate is copyhold, that part was applied in payment of the fines and fees due on the transfer (*a*). But the sum paid by the purchaser of a copyhold estate to his own attorney for the transfer, is no part of the consideration for the purchase within the meaning of this act (*b*).

A lease for ninety-nine years of land, in consideration of a rent of 1*l.* 11*s.* 6*d.*, and of the lessee having built a house thereon, which did not cost 30*l.*, the whole property being of less annual value than 10*l.*, was held to be a purchase of term for less than 30*l.*, and, therefore, conferred no settlement (*c*); though the building of a house may form part of the consideration, and be treated as part of the purchase-money (*d*).

If the money be paid to the vendor, it is immaterial whether the purchaser pay it out of his own funds or borrow it on credit (*e*); or though the consideration is a debt due from the vendor (*f*); or though part of the money be given to the vendee by the parish officers; for if without fraud, it is sufficient to satisfy the statute (*g*). Nor is it any objection that the vendee mortgages the estate itself to raise part of the money which he pays; as, if he purchase for 39*l.* and borrow 30*l.* on mortgage to pay: so that the full price is paid to the vendor (*h*).

But the purchase of an estate subject to a mortgage is not sufficient for the purpose of gaining a settlement, unless the money actually paid for the equity of redemption amount to 30*l.* (*i*). And, if the original purchase be under 30*l.* no subsequent improvements will be sufficient to satisfy the statute for the purpose of gaining a settlement (*k*). But, on the grant

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(*y*) *R.* v. *Thornton* (*Inh.*), 29 L. J., M. C. 162; 2 E. & E. 788.
(*z*) *R.* v. *Scammonden*, 3 T. R. 474.
(*a*) *St. Paul's, Walden* v. *Kempston*, Foley's Poor Laws, 238; cited in *R.* v. *Warblington*, 1 T. R. 244.
(*b*) *R.* v. *Cottingham*, 7 B. & C. 603; 1 Man. & Ry. 439, 469.
(*c*) *Wendron* v. *Stithians*, 4 E. & B. 147; 24 L. J., M. C. 1.
(*d*) *Reg.* v. *Belford*, 32 L. J., M. C. 156; 3 B. & S. 662.
(*e*) *R.* v. *Chailley*, 6 T. R. 755.
(*f*) *R.* v. *Stockland*, Burr. S. C. 169.
(*g*) *St. Paul's, Walden* v. *Kempston*, Foley's Poor Laws, 238; cited 1 T. R. 244.
(*h*) *R.* v. *Tedford*, Burr. S. C. 57.
(*i*) *R.* v. *Mattingley*, 2 T. R. 12.
(*k*) *R.* v. *Dunchurch*, Burr. S. C. 553; *R.* v. *Carlton*, 19 L. J., M. C. 100.

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of a lease for three lives, in consideration of an annual rent-charge of 25*s.*, and of the building of a house at a cost of 85*l.*, the house being built at the time of granting the lease, there was held to be a *bonâ fide* payment of a consideration of 30*l.* for the purchase (*l*). But if a purchaser for less than 30*l.* improves the estate, sells it, and repurchases it again for more than 30*l.*, he may gain a settlement under the latter purchase (*m*).

If, on a purchase less than 30*l.*, the vendor allowing the rest of the purchase-money to remain on mortgage of the premises, and, after some years' residence, the purchaser sells again, his vendee paying the remainder of the original purchase-money to the original vendor, it is not sufficient (*n*).

What parties are irremovable from an estate, though they have not acquired a settlement.

Although the restrictions which we have noticed may prevent a party from acquiring such a settlement as will continue when his interest in the premises has ceased, and he has left them, yet while he "inhabits on such estate" as his own, he will be irremovable from it. This right to reside on a man's own estate is founded on Magna Charta, which enacts that no man shall be disseised of his freehold (*o*), although, as we have seen, a widow does not gain a settlement in her own right by residing on an estate out of which she is dowable before the assignment of dower (*p*), yet where she resides there with her children, who are of tender years, she, being by law their natural guardian, is not removable from the estate (*q*).

Residence necessary to a settlement by estate.

To enable a party to gain a settlement by estate, there must be a residence of at least forty days (*r*) in the parish where the estate lies (*s*); besides which it is now enacted (*t*), that no person shall be deemed, adjudged, or taken to retain any settlement gained *by virtue of any possession of any estate* or interest in any parish for any longer or further time than such person shall inhabit within ten miles thereof; and in case such person shall *cease to inhabit* within such distance, and hereafter become chargeable, such person shall be liable to be removed to the parish wherein, previously to such inhabitancy, he may have been legally settled; or, in case he may have, subsequently to such inhabitancy, gained a legal settlement in some other parish, then to such other parish.

(*l*) *Reg.* v. *Belford*, 32 L. J., M. C. 156; 3 B. & S. 662.
(*m*) *R.* v. *Stanfield*, Burr. S. C. 205.
(*n*) *R.* v. *Olney*, 1 M. & S. 387. See *R.* v. *Long Bennington*, 6 M. & S. 403, cited by *Bayley*, J., in *R.* v. *Geddington* (*Inh.*), 2 B. & C. 132.
(*o*) *R.* v. *Aythorpe Rooding*, Burr. S. C. 412.
(*p*) *Ante*, p. 947.
(*q*) *R.* v. *Wilby*, 2 M. & S. 504; *R.* v. *Matlock* (*Inh.*), 1 A. & E. 124; *R.* v. *Brington* (*Inh.*), 7 B. & C. 546; *R.* v. *Aythorpe Rooding*, Burr. S. C. 412; but see *Berkhamstead* v. *St. Mary, North Church*, 2 Sess. Ca. 182; 2 Bott, 33.
(*r*) *R.* v. *West Shefford*, Burr. S. C. 307.
(*s*) *Ryslip* v. *Harrow*, 2 Salk. 524.
(*t*) 4 & 5 Will. 4, c. 76, s. 68.

Of Settlement by Estate.

This enactment embraces a settlement claimed under 13 & 14 Car. 2, c. 12, s. 1, by "coming to settle" on a tenement of the yearly value of 10*l.* in right of the pauper's own estate in it, but such a settlement is *extinguished* by ceasing to inhabit within ten miles from the parish (*u*). However, the only settlement thus defeasible is that of the individual who possesses the interest or estate, and a settlement acquired by derivation through him is not affected. So that, where a man possessed of an estate went with his son to reside more than ten miles from the parish where it lay, the son retained the derivative settlement in that parish, he being emancipated at the time he so left it (*x*); but if the son be unemancipated at the time when his father so left the parish, he also loses the settlement of his father, and so, also, would his mother lose it (*y*). Being removed by order of two justices, under 9 Geo. 4, c. 40, to a county lunatic asylum more than ten miles off, is a "ceasing to inhabit" (*z*).

Effect of ceasing to inhabit.

The distance of ten miles must be computed, as the crow flies, from the house which the person inhabits to the boundary of the parish in which the estate is (*a*).

Residence, where.

The residence need not be actually on the estate; it may be on another person's estate, or at an inn; and the forty days' residence need not be forty successive days, if there be that amount of residence in the whole (*b*). But the estate must be vested in the party during the residence; and, therefore, where a person entitled to administration of the effects of a deceased person resided on his leasehold premises for three years, but took out administration only eighteen days before removal, it was held that this grant, though for some purposes having relation to the death, had not this effect in reference to the settlement before it was taken out; so that no settlement could be gained under the grant. And, therefore, *à fortiori*, where administration was not taken out till after the lease had expired, and the order of removal made (*c*). Where a settlement, by renting a tenement, is completed during the time that the tenant has an estate of his own, and the tenant afterwards resides upon his estate, if the time of his residence subsequent to the completion of such settlement by renting a tenement added to the time of his residence upon the estate before such completion make up forty days in the whole, the settlement by estate displaces the settlement by renting a tenement (*d*). But

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(*u*) *R.* v. *St. Giles's-in-the-Fields*, 2 Q. B. 446; 1 G. & D. 557.
(*x*) *Reg.* v. *Hendon* (*Inh.*), 2 Q. B. 455; 12 L. J., M. C. 1.
(*y*) *Reg.* v. *Llansaintfraid*, 2 E. & B. 803; 23 L. J., M. C. 5.
(*z*) *Reg.* v. *Whissendine* (*Inh.*), 2 Q. B. 450; 1 G. & D. 560; 11 L. J., M. C. 42. See 1 Ad. & E. 221.
(*a*) *Reg.* v. *Saffron Walden*, 9 Q. B. 76; 15 L. J., M. C. 115.
(*b*) *R.* v. *St. Nyott's*, Burr. S. C. 132; *R.* v. *Sowton*, Andrews, 345.
(*c*) *R.* v. *Widworthy*, Burr. S. C. 109; 2 Bott, 612; *R.* v. *Horsley*, 8 East, 405.
(*d*) *Reg.* v. *Knaresborough*, 16 Q. B. 446; 20 L. J., M. C. 147.

Of Settlement by Estate.

the administrator being entitled to the entire estate as sole next of kin, the settlement was sustained without reference to the grant (*f*). On the other hand, if an estate descend to a pauper, and he resides in the same parish forty days after, though immediately after the acquisition he contracted to sell the estate, yet, if the conveyance be not executed till after the expiration of the forty days during which he has resided, he will gain a settlement (*g*).

Certificated persons.

It was formerly thought that a person, residing in a parish under a certificate, might obtain a settlement there by estate (*h*). But in 1697 it was enacted (*i*), "that no person who shall come into any parish by certificate shall be adjudged *by any act whatsoever* to have procured a legal settlement in such parish unless he shall *bonâ fide* take a lease of a tenement of the value of 10*l.*, or shall execute some annual office in the parish, being legally placed there." Upon this act it has been decided, that the purchase of an estate for 30*l.* and upwards, by a certificated party, was such an act of his own, as under the statute debarred him from obtaining a settlement (*k*).

But where such a party became possessed of an estate in the parish where he was resident, by descent, or act, or operation of law, or for a mixed consideration, consisting partly of money and partly of love and affection, the certificate was held to be discharged, and the settlement by estate to be gained (*l*). So, where such a party came to settle on a tenement of 10*l.* a year under a contract of hiring and service (*m*).

But where a ground of appeal stating that a man to whom a certificate had been granted by the appellant to the respondent township had gained a settlement by settling upon, renting, and occupying certain tenements in the respondent township, was held not to bring the case within 9 & 10 Will. 3, c. 11, and that the sessions were right in not going into evidence of such a settlement (*n*).

9. *Of Settlement by serving an Office.*

This settlement originated in 1691, when it was enacted (*o*), "that if any person who shall come to inhabit in any parish,

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(*f*) *R.* v. *Dorstone*, 1 East, 296; *R.* v. *Great Glenn* (*Inh.*), 5 B. & Ad. 188; 2 M. & Ry. 91.

(*g*) *R.* v. *Deddington*, Stra. 1193; Burr. S. C. 220.

(*h*) *R.* v. *Deddington*, Stra. 1193.

(*i*) 9 & 10 Will. 3, c. 11.

(*k*) *R.* v. *Great Driffield*, 8 B. & C. 684.

(*l*) *Ibid.*; *R.* v. *Ufton*, 3 T. R. 251; *R.* v. *Cassington*, 2 B. & Ad. 874. See *R.* v. *Lydlinch*, 4 B. & Ad. 150; 1 Nev. & Man. 83.

(*m*) *R.* v. *Nacton* (*Inh.*), 3 B. & Ad. 543. See 4 B. & Ad. 254; 1 A. & E. 126.

(*n*) *Reg.* v. *Marton-cum-Grafton* (*Inh.*), 10 Q. B. 971; 16 L. J., M. C. 159.

(*o*) 3 & 4 W. & M. c. 11, s. 6.

shall for himself or on his own account execute any *public annual office* or charge in the said parish during one whole year, he shall be adjudged and deemed to have a legal settlement in the same;" and by a later act (*p*), the service of such office by a party *legally placed* therein will acquire a settlement, even though he be residing in the parish under a certificate.

Of Settlement by serving an Office.

But, since 14th August, 1834, no settlement can be acquired by serving an office (*q*).

The offices in respect of which a settlement may have been obtained before 14th August, 1834, must be *public*, but need not be *parochial*. The description of "public annual office," includes the following, *viz.*, the office of sexton (*r*); parish clerk (*s*); and a clerk in every church and chapel built under the Church Building Acts is an annual office (*t*), and gives a settlement (*u*); churchwarden (*x*); assistant overseer (*y*); warden for the borough (*z*); tithingman (*a*); borsholder (*b*); collector of the land tax (*c*); collector of duties on births and burials, created by 6 & 7 Will. 3, c. 6 (*d*); ale taster of a borough (*e*); hog-ringer of a parish, receiving his appointment from the parish, and not from individuals (*f*); constable elected for the year, whether for a parish or to superintend the police of a borough, and whether he serve personally or by deputy (*g*); the street-driver of a borough, chosen by the court leet of a manor (*h*); town crier and bellman of a city, appointed by the corporation (*i*); and uncertificated tithingman, who had been appointed by the proper

Offices conferring settlement.

(*p*) 9 & 10 Will. 3, c. 11.
(*q*) 4 & 5 Will. 4, c. 76, s. 64.
(*r*) *R.* v. *Liverpool*, 3 T. R. 118.
(*s*) *Gatton* v. *Milwich*, 2 Salk. 536. Approved in *R.* v. *Bobbing*, 5 A. & E. 682.
(*t*) 58 Geo. 3, c. 45; 59 Geo. 3, c. 134, s. 29; *Jackson* v. *Courtenay*, 8 E. & B. 8; 27 L. J., Q. B. 37.
(*u*) *Reg.* v. *Ossett*, 16 Q. B. 927; 20 L. J., M. C. 205.
(*x*) *St. Maurice* v. *St. Mary Kalendar*, 2 Const. 158, pl. 103; 2 Str. 1014.
(*y*) *R.* v. *Lew*, 8 B. & C. 655.
(*z*) *St. Mary* v. *St. Lawrence, Reading*, 10 Mod. 13.
(*a*) *Burliscomb* v. *Sandford Peverell*, 1 Stra. 544; *Holy Trinity* v. *Garsington*, Sett. & Rem. 72.
(*b*) *Wingham* v. *Sellindge*, 2 Stra. 1199.
(*c*) *R.* v. *Hammond*, 2 Bott, 156, pl. 199.
(*d*) *Bisham* v. *Cook*, 2 Bott, 156, pl. 200; see *R.* v. *Bicham*, 1 Str. 411.
(*e*) *R.* v. *Whitchurch*, Burr. S. C. 365; *R.* v. *Bow*, 8 T. R. 445.
(*f*) *R.* v. *Whittlesea*, 4 T. R. 807.
(*g*) *R.* v. *Hope Mansell*, Cald. 252; but not special constables appointed under 1 & 2 Will. 4, c. 41, s. 12, or constables appointed under a local act authorizing justices to appoint constables for such period as they judge expedient, *R.* v. *Middlewich*, 3 A. & E. 156.
(*h*) *R.* v. *Yalding*, 3 D. & R. 352. See as to this, Burn reports it "*not.*"
(*i*) *R.* v. *St. Nicholas, Hereford*, 10 B. & C. 832. See *R.* v. *Lew*, 8 B. & C. 655.

Of Settlement by serving an Office.

persons—a leet jury, and had executed the office, though never sworn in (*k*). In these instances, where the office is for the public benefit, the mode of appointment is immaterial; nor is it important whether it be filled up on the nomination of the parishioners or of an individual. Thus a parish clerk, orally appointed by the incumbent, obtains a settlement as having served an annual office (*l*); while a party, who officiates as parish clerk without even a colourable appointment by him, does not (*m*). And the oath of office is not necessary to enable a person to fill the office for this purpose, but is imposed with a view of adding a greater sanction to the discharge of the duties (*n*). The office must be annual; that is, the officer must be bound to serve for a year at least; but a freehold office for life, as that of sexton, confers a settlement within the statute (*o*); and indeed the office of parish clerk rather resembles a freehold office for life than an annual one (*p*).

Offices conferring a settlement.

An *employment* is not necessarily an "*office*" (*q*); and where the *employment*, however notorious, arises out of private contract, the service gains no settlement, as, *e. g.*, a curate (*r*). Thus, no settlement is gained by the governor of a workhouse appointed by virtue of 9 Geo. 1, c. 7, s. 4, at an annual salary (*s*); by the curate of a sequestrated living, when the sequestration might be determined at any time (*t*); by the deputy of a constable performing the duties for him (*u*); by the schoolmaster of an endowed school, paid by the vicar (*x*); by a pinder (or impounder) of cattle (*y*); for these are employments, not offices. So, the employments of master of a workhouse (*z*), or organist (*a*), are not "offices" within the statute.

Employments not conferring a settlement.

To enable a party to gain a settlement by serving an office, the office must exist in the parish where he lives (*b*); but it

(*k*) *R.* v. *Corfe Mullen*, 1 B. & Ad. 211.

(*l*) *Gatton* v. *Milwich*, 2 Salk. 536. Approved in *R.* v. *Bobbing*, 5 A. & E. 682, though there the clerk was sexton also.

(*m*) *R.* v. *Stogursey*, 1 B. & Ad. 795.

(*n*) *R.* v. *Corfe Mullen*, 1 B. & Ad. 211.

(*o*) *R.* v. *Liverpool*, 3 T. R. 118; *R.* v. *Bobbing*, 5 A. & E. 682; 1 N. & P. 166.

(*p*) *Gatton* v. *Milwich*, *ubi sup.*; *Reg.* v. *Stogursey*, *ubi sup.*

(*q*) There is great distinction between an *office* and an *employment*, *Field* v. *Boethby*, 2 Sid. 240, cited 5 Tyr. 367. That is an "*office*," from which a party cannot be turned away without cause shown, *Humphreys* v. *Pigot*, 1 Keble, 632; Bac. Abr. tit. *Office*.

(*r*) *R.* v. *Wantage*, 2 East, 65.

(*s*) *R.* v. *Mersham*, 7 East, 167.

(*t*) *Helsington* v. *Over*, Burr. S. C. 746.

(*u*) *R.* v. *Winterbourne*, Burr. S. C. 520.

(*x*) 1 Wils. 87; *R.* v. *Melborne*, 2 Stra. 1225; see as to this the cases in Burn's differs.

(*y*) *R.* v. *Clixby*, 4 B. & Ad. 153; *R.* v. *Newmarket St. Mary*, 3 A. & E. 151.

(*z*) *R.* v. *Mersham*, 7 East, 167. See *R.* v. *Ilminster*, 1 East, 83; *R.* v. *Hambledon*, 4 B. & C. 459.

(*a*) *R.* v. *St. George, Hanover Square*, 5 B. & Ad. 571.

(*b*) *R.* v. *Liverpool*, 3 T. R. 118; *R.* v. *Woodbridge*, 4 B. & Ad. 711.

need not extend over the whole of it (*c*), while it may extend beyond it (*d*). Thus, a man appointed clerk and sexton in L., which was merely a vill and extra-parochial, resided in the adjoining parish of A. where he had to perform part of his duties as clerk, &c., and was held to have gained a settlement in A. (*e*). And even a certificated man, elected one of the constables for a city consisting of several parishes, and "legally placed" in the office, gains a settlement in that parish of the city where he resides (*f*); for unless he is certificated, the *legal placing* is not in question (*g*). And he must have executed the office for a year; and service for a part of a year only is not sufficient (*h*); and if he had resided forty days during the year of office in more of the parishes within the office than one, the one in which he resided the last forty days will be the parish of settlement (*i*).

Of Settlement by serving an Office.

Certificated persons.

On the other hand, in order to enable a party who is certificated from another parish to gain a settlement, it must appear, but if it appear it is sufficient, that he was *legally placed* in his office: where, therefore, a certificated man had served as a borsholder for a year, but there was no evidence of his election or admission to office, or swearing to discharge its duties, he gained no settlement (*k*). And where it was the custom for the constable to be presented by the leet jury, and they having presented one man, he procured another, *residing under a certificate* (*l*), to take the office, who was accepted and sworn, but never presented, as constable in his own right, according to the custom, it was held that he gained no settlement (*m*). And though the oath of office need not be taken in the case of uncertificated persons, it may possibly be deemed essential in the case of certificated persons under the words legally placed (*n*), but probably it would be held to be unnecessary in either case for the purpose of conferring a settlement. The party must have resided in the parish where he serves the office for forty days during the year of office (*o*).

(*c*) *Fittleworth* v. *Pulborough*, 2 Bott, 167, pl. 213.
(*d*) *St. Mary* v. *St. Lawrence, Reading*, 10 Mod. 13; *St. Maurice* v. *St. Mary Kalendar, Winchester*, Burr. S. C. 27.
(*e*) *R.* v. *Amlwch* (*Inh.*), 4 B. & C. 757.
(*f*) *R.* v. *St. Mary Kalendar, Winchester*, Burr. S. C. 27. See *R.* v. *St. Nicholas, Hereford*, 10 B. & C. 832.
(*g*) *R.* v. *Corfe Mullen*, 1 B. & Ad. 211.
(*h*) *R.* v. *Fittleworth*, Burr. S. C. 238; *R.* v. *Cold Ashton*, Burr. S. C. 444; *R.* v. *Holy Cross, Westgate*, 4 B. & A. 619.
(*i*) *R.* v. *St. Nicholas, Hereford*, 10 B. & C. 832.
(*k*) *Wingham* v. *Sellindge*, 2 Str. 1199; Burr. S. C. 223; see *Holy Trinity* v. *Garsington*, Sett. & Rem. 72. *Ante*, p. 953.
(*l*) As to this Burn's differs. See *ante*, p. 953.
(*m*) *R.* v. *All Cannings*, Burr. S. C. 634.
(*n*) See *R.* v. *Corfe Mullen*, 1 B. & Ad. 211.
(*o*) *R.* v. *Woodbridge* (*Inh.*), 4 B. & Ad. 711; *R.* v. *Liverpool*, 3 T. R. 118; *R.* v. *St. Nicholas, Hereford*, 10 B. & C. 832.

Of Settlement by Acknowledgment.

10. *Of Settlement by Acknowledgment, viz. by Certificate, Relief, and Non-Appeal against Order of Removal.*

Of settlement by acknowledgment by certificate.

Certificates have fallen much into disuse since stat. 35 Geo. 3, c. 101, declared that "henceforth no poor persons should be removed from their places of residence till they should become *actually chargeable*." The substance of the acts (*p*) is, that any poor person may go to inhabit in any other place than that in which he is settled, on *delivering* (*q*) to the churchwardens and overseers of the poor of the parish where *he goes to inhabit*, a *certificate* under the hands and seals of the churchwardens and overseers, or the major part of them (*r*), or of the overseers where there are no churchwardens, attested by two credible witnesses, and allowed by two justices having jurisdiction, acknowledging the person or persons therein named to be legally settled in the parish granting such certificate. But at least *one* of the witnesses, who attest the certificate, must make oath before the justices allowing it, that he saw the churchwardens and overseers, whose names are subscribed as allowing it, actually sign and seal the same; and that the names of the witnesses are of their handwriting; and the justices shall certify that such oath was made before them, and such certificate so allowed shall be evidence in all courts whatever, and shall only be discharged by one of the modes hereafter treated of. And no person so certificated, while the certificate shall continue operative, can communicate a settlement to any apprentice or servant.

A certificate is conclusive between the parish certifying and the parish to which the certificate is granted; but as between the certifying parish and any third parish, all matters remain open to investigation and controversy, for the certificate only operates to the security of the particular parish intended; and the certificated person is not excluded by it from acquiring a settlement in *another* parish, in the same manner as if no certificate existed (*s*). It requires no particular *direction;* and therefore is effectual to its purpose, whether addressed to any particular place, or addressed in general terms, or not addressed at all, provided it contains an acknowledgment of the settlement of the persons certified (*t*). In the words of Lord *Kenyon*, however, as a certificate is not an instrument transferable from one parish to another, which, having performed its duty in one place, can be assigned to another (*u*), (for then it would operate

(*p*) 13 & 14 Car. 2, c. 12, s. 3; 8 & 9 Will. 3, c. 30; 9 & 10 Will. 3, c. 11; 12 Ann. c. 18; 3 Geo. 2, c. 29.

(*q*) That is, at the time he so goes to inhabit, *R.* v. *Wensley*, 5 T. R. 154.

(*r*) Explained, *quoad hoc*, 51 Geo. 3, c. 80; 54 Geo. 3, c. 107; 1 & 2 Geo. 4, c. 32.

(*s*) 2 Bott, 584; *R.* v. *Lubbenham*, 4 T. R. 251.

(*t*) *St. Nicholas, Harwich* v. *Woolverstone*, 2 Stra. 1163.

(*u*) *R.* v. *Lillington*, 1 East, 438.

as a licence to vagrancy), there must be a *particular parish* in contemplation at the time of granting it (*x*).

Of Settlement by Acknowledgment.

A parish certificate, dated more than thirty years back, produced by the respondent parish, is evidence without more (*y*). There may be evidence of the admission of a certificate by the conduct of the alleged certifying parish, with other proof of the existence of the document, as where upon a threat of removal of a pauper to a parish unless the parish gave a certificate, and the pauper was not removed, and the parish afterwards paid relief for years to the pauper (*z*).

Evidence of certificate.

The means by which a certificate may be wholly discharged are various: as, relief of certificated pauper by the parish to which he has delivered his certificate while he was resident in a third parish (*a*), apprenticeship, or hiring and service in *any third parish;* an order of removal by justices (*b*), or a subsequent certificate (*c*); desertion or abandonment of the certificate by the party certified; the renting of a tenement of the value of 10*l. per annum;* the purchase of an estate for 30*l.*

Discharge and abandonment of a certificate.

See as to the effect of a certificate on settlement by estate, *ante*, p. 952 (*d*).

A certificate may also be *abandoned*, though the party do not commit any of the acts which actually go to *discharge* it; as where a certificated person leaves the parish to which he is certificated for *some permanent engagement*, which manifests his having no intention of returning; for then the certificate is considered as having performed its office (*e*). And such cases are generally distinguishable from those, in which the *manner* of a person's departure conveys an intimation that it is only for a *temporary purpose*, as where his business is of a mere occasional nature, or where he leaves his family behind him, as in his *domicile* (*f*).

If a certificate be not either discharged, or abandoned by any of the modes above pointed out, it extends to "poor of all denominations; to legitimate children born of certificated persons after the granting thereof (*g*); to a second wife taken after, and to her children born after, the granting thereof" (*h*).

What persons are comprehended in a certificate.

(*x*) *R.* v. *Lubbenham*, 4 T. R. 254.

(*y*) *R.* v. *Ryton*, 5 T. R. 259; *R.* v. *Netherthong*, 2 M. & S. 337; and see 3 Geo. 2, c. 29, s. 8.

(*z*) *Reg.* v. *Basingstoke*, 19 L. J., M. C. 97.

(*a*) *R.* v. *Stanley-cum-Wrenthorpe*, 15 East, 350.

(*b*) *R.* v. *Sudbury*, Burr. S. C. 373.

(*c*) *R.* v. *Bridham*, 4 Doug. 245; *R.* v. *St. Peter, Derby*, 1 T. R. 218.

(*d*) See cases collected, 4 Burn's J., 589, 682, 30th ed.; also Burr. S. C. 85, 307. A purchase sufficient to gain a settlement will of course discharge a certificate, *R.* v. *Deddington, id.* 205.

(*e*) *R.* v. *Newington*, 1 T. R. 354.

(*f*) *R.* v. *St. Michael's, Coventry*, 5 T. R. 526; *R.* v. *Ingworth*, 8 T. R. 339; and cases collected, Burn's J., tit. *Poor*, vol. iv. 30th ed. 687.

(*g*) *R.* v. *Testerton*, 5 T. R. 258; *R.* v. *Batheaston*, 8 T. R. 446.

(*h*) *R.* v. *Sherborne*, Burr. S. C. 182, 314; 2 Bott, 580, 593.

Of Settlement by Acknowledgment.

But not to a bastard born after, except in the case of the mother being pregnant with it *at the time* of granting the certificate, such certificate referring specially to such child *en ventre sa mère* (*i*), nor to grandchildren (unless specifically under the protection of, and part of the family of, the grandfather, or themselves being individually named); nor to children grown to maturity and emancipated (*k*). The statute does not prevent a child from deriving from his father any settlement gained by him before emancipation of the former (*l*).

A certificate acknowledged paupers, with *all* their children, *born, or to be born*. One of them (already born) afterwards became the head of a *separate* family, and resided in the certificated parish. Such child so certificated under the *general words*, and so becoming the head of a family apart from his father, can communicate a settlement to his apprentice in such certificated parish (*m*).

A pauper certificated *as part of his father's family*, but not by name, was put out apprentice in the certifying parish, leaving his father's house and serving for seven years, then returning and serving with his master's consent the remainder of his term in the certified parish, but *not returning to his father's house*, arriving at twenty-one years of age, and hiring himself for a year, and serving the same in the certified parish, is emancipated, and gains a settlement in such certified parish by such hiring and service (*n*); but it is otherwise if the son is named specially in the certificate (*o*).

Relief, how far evidence of settlement.

Relief given by the officers of a parish, to a pauper or his family while resident in *another* parish, but out of any workhouse there situate (*p*), is *primâ facie* evidence of settlement in the former (*q*): for in such an instance it cannot have been given to them as casual poor resident within their parish (*r*). Such an admission, therefore, must be rebutted by strong evidence of an opposite tendency, to overturn the obvious presumption. It may be explained away, as by showing conclusively that it was given by mistake (*s*). In one case, evidence of birth being offered to rebut it, the court observed, that birth was, of all evidence of settlement, the weakest (*t*). But where relief had been once given, but had been refused afterwards, and the sessions held the settlement gained, the court, though

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(*i*) *R.* v. *Mathon*, 7 T. R. 362; Burr. S. C. 650.
(*k*) *R.* v. *Darlington*, 4 T. R. 797; *R.* v. *Hampton*, 5 T. R. 266.
(*l*) *R.* v. *Leek Wootton*, 16 East, 118.
(*m*) *R.* v. *Thwaites*, 1 M. & S. 669; *R.* v. *Heath*, 5 T. R. 583.
(*n*) *R.* v. *Morley*, 2 M. & S. 417.
(*o*) *R.* v. *Testerton*, 5 T. R. 258; *R.* v. *Bath Easton*, 8 T. R. 446.
(*p*) *Reg.* v. *St. Giles's-in-the-Fields*, 1 New Sess. C. 137.
(*q*) *R.* v. *Edwinstowe*, 8 B. & C. 671.
(*r*) *R.* v. *Colcorton*, 1 B. & Ad. 25.
(*s*) See *R.* v. *Acton*, 8 Q. B. 108; 15 L. J., M. C. 21.
(*t*) *R.* v. *Wakefield*, 5 East, 335; *R.* v. *Stanley*, 15 East, 351.

Of Settlement by Acknowledgment.

of a different opinion, refused to disturb their decision (*u*). Again, where the sessions refused effect to evidence of several instances of relief, the Queen's Bench would not interfere (*x*). However, if the sessions will not hear evidence of relief when offered, *mandamus* lies (*y*).

The bare fact of relief to paupers while resident *within* the relieving parish, does not amount to evidence of the settlement (*z*). There would be great impolicy in allowing it to have weight; for if parish officers, by giving relief, were to make evidence against themselves, as to the settlement of the pauper, they would perform their duty to casual poor with great reluctance (*a*).

The relieving officer of a union, who has reported upon the application for relief to the board of guardians, and as to the settlement of a pauper in one of the parishes of the union, and relief has been ordered by the board on account of such parish, has authority to bind the parish by such relief (*b*); but relief given by the relieving officer of the union on behalf of one of the parishes in the union, without the order of the board of guardians, is no evidence of the authority of the parish for such relief (*c*); but how far the statutes creating the common fund, and making paupers, not settled, chargeable thereto, have affected this, *quære et nota.*

Order of removal executed and unappealed against.

Acquiescence in an order of removal executed and unappealed against (*d*) is *evidence* of acknowledgment by the parish to which the removal is made, of the pauper's settlement being there at the time of the making of the order; but as it is only *evidence* of the settlement, its peculiar effect will be better considered hereafter (*e*).

Order of removal appealed against and quashed.

Evidence that at a former sessions an order of removal which had been made at the instance of the same removing parish to the same appellant parish was quashed, is conclusive between those parishes, as to the point then in issue between them; but comes more properly in the next section (*e*).

(*u*) *R.* v. *Edwinstowe*, 8 B. & C. 671. See *R.* v. *Trowbridge*, 7 B. & C. 252.

(*x*) *R.* v. *Yarwell*, 9 B. & C. 894.

(*y*) *R.* v. *Justices of Yorkshire* (*West Riding*), 2 Q. B. 331; *R.* v. *East Winch*, 615.

(*z*) Laid down by Lord *Kenyon* in *R.* v. *Chadderton*, 2 East, 27.

(*a*) *R.* v. *Chatham*, 8 East, 498. If so afforded for any length of time, the inference may either be that the recipient was a settled inhabitant, or merely that his settlement could not be known. *S. C.* per Lord *Ellenborough.*

(*b*) *Reg.* v. *Crondall*, 10 Q. B. 812; 16 L. J., M. C. 165; *R.* v. *Pott Shrigley*, 12 Q. B., 143; 18 L. J., M. C. 33.

(*c*) *Reg.* v. *Little Marlow*, 10 Q. B. 223; 16 L. J., M. C. 70.

(*d*) 2 T. R. 598; 11 East, 388.

(*e*) See *post*, p. 968, *Reg.* v. *Ruyton of the Eleven Towns*, 30 L. J., M. C. 229; 1 B. & S. 534; *Reg.* v. *Llangenny* (*Inh.*), 32 L. J., M. C. 265; 4 B. & S. 311; *Reg.* v. *Bucknell* (*Inh.*), 3 E. & B. 587; 23 L. J., M. C. 129; see *ante*, p. 900.

Of Irremovability by reason of Residence.

11. *Irremovability of Poor Persons.*

The status of irremovability now conferred by recent legislation materially diminishes the importance of the law of settlement generally.

No person shall now be removed, or shall any warrant be granted for the removal of any person, from any parish or any part of a union in which such person shall have resided for one year next before the application for the warrant (*f*). And in computing the time of such person's residence within a union, in which is comprised the parish of his settlement as well as other parishes, any period of time during which the person may have resided in the parish of his settlement is not to be excluded in the computation of the time of residence required to render him exempt from removal; that is to say, the term may be composed of residence in the parish of settlement within the union, or partly within the parish of settlement and partly within other parishes in the same union, or in different parishes, neither of which is the parish of settlement (*g*).

Unemancipated children.

An unemancipated child living with her father long enough in a parish to acquire irremovability, but whose mother was chargeable as a lunatic, and was removed to the parish of her settlement, while the father and child still continued to reside in the same parish till his death, a few months after which the child became chargeable, and then the mother died, is irremovable after the death of her mother (*h*). And now, by statute, where a child under the age of sixteen, residing with its surviving parent, shall be left an orphan, and such parent shall at the time of death have acquired an exemption from removal by reason of a continued residence, such orphan shall, if not otherwise irremovable, be exempt from removal, in like manner and to the same extent as if it had then acquired for itself an exemption from removal by residence (*i*).

A married woman deserted by her husband, who shall, after his desertion, reside for one year in such a manner as would, if she were a widow, render her exempt from removal, shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her (*k*).

Wife deserted by her husband.

A married woman living separate from her husband on account of his cohabitation with another woman, and receiving from him a weekly allowance, which he gave in order to prevent legal proceedings against him, is deserted by him within the meaning of the above section (*l*).

(*f*) 9 & 10 Vict. c. 66, s. 1; 24 & 25 Vict. c. 55, s. 1; 28 & 29 Vict. c. 79, s. 8.

(*g*) 27 & 28 Vict. c. 105, s. 1; *Reg.* v. *Bolton-le-Sands*, 35 L. J., M. C. 54.

(*h*) *Reg.* v. *Elvet* (*Inh.*), 29 L. J., M. C. 17.

(*i*) 24 & 25 Vict. c. 55, s. 2.

(*k*) 24 & 25 Vict. c. 55, s. 3; 29 & 30 Vict. c. 113, s. 17.

(*l*) *Reg.* v. *St. Mary, Islington* (*Inh.*), 39 L. J., M. C. 137; L. R., 5 Q. B. 445.

Of Irremovability by reason of Residence.

Whenever any person shall have a wife or children, having no other settlement than his or her own, such wife and children shall be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the 9 & 10 Vict. c. 66, and shall not be removable from any parish or place from which he or she would not be removable by reason of any provision of the said act (*m*). And accordingly, where a girl of nineteen having no settlement of her own, or any other than that of her mother, resided for two years in domestic service out of the union in which her mother was settled, and then became chargeable, she was held removable from the union where she had so resided to the union of her mother's settlement (*n*).

Irremovability of wife or children.

This provision operates to make a wife or children irremovable only where the husband is irremovable; therefore, where a private in the marines was quartered in barracks for the time required to make him irremovable, and his wife and children resided during that time in the same parish, and then became chargeable to it; it was held, that they were not irremovable (*o*). So, the widow of a sailor, serving her Majesty and dying at sea, is removable, subject to the 2nd section, from the parish where she has bodily resided the requisite time to make him or her irremovable, if he had been resident during the time (*p*). And the wife does not acquire irremovability by the mere fact of the husband having become irremovable, if his status is lost, as by his death, but she must also have resided a sufficient time. So that, where, at the time of her husband's death, he being then irremovable, the wife had not resided the requisite time, she was, after his death, held to be removable, subject to the 2nd section of the 9 & 10 Vict. c. 66 (*q*).

Residence as a widow.

Residence as widow will coalesce with residence as wife to complete the time required for irremovability (*r*).

But where a woman, having acquired by residence a status of irremovability, married a foreign sailor who had no settlement in England, and after they had lived together a few days he left and went to sea, and during his absence at sea she became chargeable, and upon his return from sea he came to her and found an order made for her removal to her maiden settlement; it was held, that she could not be removed, and the order was quashed (*s*).

As to what constitute "parishes" under local acts (*t*).

(*m*) 11 & 12 Vict. c. 111, s. 1.
(*n*) *Reg.* v. *Guardians of St. Olave's Union*, 43 L. J., M. C. 15.
(*o*) *Reg.* v. *East Stonehouse* (*Inh.*), 3 E. & B. 597; 23 L. J., M. C. 137.
(*p*) *Ibid.* 4 E. & B. 901; 24 L. J., M. C. 121.
(*q*) *Reg.* v. *Cudham*, 28 L. J., M. C. 105; 1 E. & E. 409.
(*r*) *Reg.* v. *Glossop*, 12 Q. B. 117; 17 L. J., M. C. 171.
(*s*) *Reg.* v. *St. George's-in-the-East*, 39 L. J., M. C. 90; L. R., 5 Q. B. 364.
(*t*) *Holy Trinity, Exeter* v. *Churchwardens of Ide*, 4 New Sess. C. 438; *Reg.* v. *Forncett St. Mary*, 12 Q. B. 160; 18 L. J., M. C. 125.

Of Irremovability by reason of Residence.

A union, under 24 & 25 Vict. c. 55, s. 1, extends to a district formed of a parish or parishes under a local act, though there is no common fund for the district (*u*).

As to break of residence.

Ubi est uxor ibi est domus is a maxim which applies to cases of residence under the statute, but must be applied with reference to the other surrounding circumstances which may countervail it (*v*). Where there has been an apparent disruption of the residence of the pauper, it becomes a question of domicile of the party, though absent; and it is an important element to ascertain whether there was an *animus revertendi*. This is a question of fact for the sessions. A sailor at sea, engaged in a packet service, is domiciled, and, therefore, resides in the place where he lived with his wife and has left her before he went to sea, he afterwards residing in the same place (*x*). A weaver, leaving his wife and family in a parish where he occupied rooms, who went to seek work or relief in another parish and obtained it for some weeks, and then returned to his wife and family, was held not to have broken his residence (*y*); and temporary absence out of the parish merely for the purpose of fulfilling a contract, and with the intention of returning, is no break (*z*); but where a tailor went out of the parish of his residence to work by the week as assistant to another tailor, at certain wages per week and board and lodging, with a view to stay as long as he and his employer could agree, and in case of disagreement to return, and he stayed for ten weeks, and then, because they could not agree, gave a week's notice and left and returned to his former parish of residence, he was held to have broken his residence and to be removable to his parish of settlement (*a*).

A pauper may continue to reside in a parish where he has had lodgings, which from want he had to give up, and afterwards wanders houseless about the parish, sleeping in the open air at night on a doorstep, and other places, though he went at night to sleep at a refuge for the houseless poor out of the parish, returning in the day to the parish (*b*).

The widow of a man who had lived with her in a parish so as to acquire irremovability, and then enlisted as a soldier and went abroad accompanied by her, and died abroad in the ser-

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(*u*) *The Guardians of the Poor of Machynlleth Union* v. *Churchwardens and Overseers of the Lower Division of the Parish of Pool*, 38 L. J., M. C. 148; L. R., 4 Q. B. 592.

(*v*) *Churchwardens and Overseers of Norwood* v. *Churchwardens and Overseers of St. Pancras*, 36 L. J., M. C. 91; L. R., 2 Q. B. 457.

(*x*) *Reg.* v. *East Stonehouse* (*Inh.*), 4 E. & B. 901; 24 L. J., M. C. 121; see *post*, p. 964.

(*y*) *R.* v. *Tacolnestone*, 12 Q. B. 157; 18 L. J., M. C. 44.

(*z*) *Reg.* v. *Overseers of Brighthelmstone*, 4 E. & B. 236; 24 L. J., M. C. 41. See *Reg.* v. *St. Ives Union*, 41 L. J., M. C. 94.

(*a*) *Reg.* v. *Worcester Poor Law Union*, 43 L. J., M. C. 102.

(*b*) *Reg.* v. *St. Leonard's, Shoreditch* (*Inh.*), 35 L. J., M. C. 48; L. R., 1 Q. B. 21.

vice, when she returned to the parish was held to be removable, as his status was lost at his death (*c*).

Of Irremovability by reason of Residence.

A pauper, seized with madness in a union where she was irremovable, and conveyed to the house of her parents in a different union for one night, and thence to the workhouse of the same union, and seven days afterwards to the county lunatic asylum, did not lose her irremovability by reason of change of residence, and the order of maintenance was made on the union of the place where she had acquired irremovability (*d*).

Break of residence, what.

A domestic servant, leaving the place of her irremovability and going into service in another union upon a month's trial, taking her clothes with her, and having no residence during the month in the former place, has broken her residence thereby, although she intended in case of being dismissed of returning there, as she in fact did afterwards (*e*).

A child, living at home with his parents, does not lose his status of irremovability by procuring admission into a school supported by charitable contributions, and continuing there until discharged by the rules of the school, he returning to his father and mother (*f*).

Exclusion from the computation of time of residence.

The time during which such person shall be a prisoner in a prison, or shall be serving her Majesty as a soldier or militiaman during training (*g*), or as a marine or sailor, or reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum, or house duly licensed, or hospital registered for the reception of lunatics, or as a patient in a hospital, or during which any such person shall receive relief from any parish (*h*), or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside not being a *bonâ fide* charitable gift, shall for all purposes be excluded in the computation of time, after which a person shall not be removable; and that the removal of a pauper lunatic to a lunatic asylum under the provision of any act relating to the maintenance and care of pauper lunatics

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(*c*) *Overseers of Easton* v. *Overseers of St. Mary's, Marlborough*, 36 L. J., M. C. 41; L. R., 2 Q. B. 128.

(*d*) *Reg.* v. *Whitby Union*, 39 L. J., M. C. 97; L. R., 5 Q. B. 325.

(*e*) *Reg.* v. *Guardians of Glossop Union*, 35 L. J., M. C. 148; L. R., 1 Q. B. 227.

(*f*) *Guardians of Kenley Union* v. *Guardians of Abingdon Union*, 39 L. J., M. C. 153; sub nom. *Reg.* v. *Abingdon Union*, L. R., 5 Q. B. 406.

(*g*) *Horton* v. *Leeds*, 25 L. J., M. C. 38.

(*h*) See 4 & 5 Will. 4, c. 76, s. 56; *Reg.* v. *St. George's, Bloomsbury*, 32 L. J., M. C. 217; *Reg.* v. *Elvet* (*Inh.*), 29 L. J., M. C. 17. The maintenance of a lunatic child over the age of sixteen in a county asylum, to which it was sent under an order of justices, at the charge of the parish in which her widowed mother had lived, and from which she was irremovable by reason of residence, is not to be deemed to be relief given to the mother, so as to exclude the time during which the child was in confinement from the computation of the time of the mother's residence. *Reg.* v. *Overseers of St. Mary, Islington*, 31 L. J., M. C. 233.

Of Irremovability by reason of Residence.

shall not be deemed a removal within the meaning of this act (*i*); and the removal of any lunatic pauper to any asylum, licensed house, or registered hospital, or of any pauper otherwise than under an order of removal from his place of abode in any parish in a union to the workhouse of such union shall not be an interruption of the residence of such pauper within 9 & 10 Vict. c. 66; but the time spent in such lunatic asylum, licensed house, or registered hospital, or workhouse, or the time during which such person shall receive relief from the common fund shall be excluded for the computation of time to exempt from removal (*j*).

Widows irremovable after husband's death.

No woman, residing in any parish with her husband at the time of his death, shall be removed from such parish for twelve calendar months next after his death, if she so long continue a widow (*k*). The wife and husband may be said to reside within this section if she lives in a house which is his home, and to which he intends to return though he is absent as a sailor at sea at the time of his death (*l*).

Unemancipated children, how far irremovable.

No child under the age of sixteen, whether legitimate or illegitimate, residing in any parish with his or her father or mother, or stepfather or stepmother, or reputed father shall be removed from such parish, in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish (*m*). An unemancipated child of eighteen who has lived with her mother while she acquired a status of irremovability by reason of the desertion of her husband under 24 & 25 Vict. c. 55, s. 3, is on the chargeability of the mother removable from her to her father's settlement (*n*).

Section 4.

Of the Trial and Determination of Appeals against Orders of Removal; and herein of Amendments by the Sessions.

The first step on the hearing of appeals against orders of removal is to prove the service of the notice of appeal, and of the statements of the grounds of appeal by the appellants; unless they are admitted. The appellants should then produce the original order, if it has been served on them, unless it is already filed at the sessions (*o*); or, if a copy only has been served on them, they should have given notice to the officers of the removing parish (and also *perhaps* to the pauper) to pro-

(*i*) 9 & 10 Vict. c. 66, s. 1.
(*j*) 12 & 13 Vict. c. 103, s. 4.
(*k*) 9 & 10 Vict. c. 66, s. 2.
(*l*) *Reg.* v. *East Stonehouse* (*Inh.*), 4 E. & B. 901; 24 L. J., M. C. 121.
(*m*) 9 & 10 Vict. c. 66, s. 3.
(*n*) *Reg.* v. *St. Mary, Islington* (*Inh.*), 39 L. J., M. C. 137; L. R., 5 Q. B. 445.
(*o*) See *ante*, p. 679.

Of the Hearing of Appeals against Orders of Removal.

duce the original order at the hearing, in which case they may produce and prove their copy at the sessions (*p*). The order or its copy is then read (*q*); and any preliminary objections may be taken to its form. In the latter event it is enacted (*r*), that on all appeals to the general or quarter sessions against the judgments or orders of any justices of the peace, the sessions shall cause *any defect of form* that shall be found in any such judgments or orders to be rectified and amended, without any costs to the parties concerned; and, after such amendment, shall proceed to hear, examine, and consider the truth and merits of all matters concerning such judgments or orders; and to examine proofs relating thereto, and make such determinations as if there had not been any defect or want of form.

Amendment of orders of removal.

If the order were defective on the face of it in any matter of substance, as, if it omitted to state that the removal was upon the complaint of the parish officers, or that the pauper was actually chargeable (*s*), thus failing to show the jurisdiction of the removing justices on the face of the order (*t*), the sessions could not formerly amend, even by facts proved before them, and the order must have been quashed (*u*). Now, by 11 & 12 Vict. c. 31, s. 6, it is enacted (*v*), that if upon the trial of any appeal against an order of removal, or upon the return to a writ of *certiorari*, any objection shall be made on account of any omission or mistake in the drawing up of such order, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the magistrates making such order to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the court upon such terms as to payment of costs as it shall think fit, to amend such order of removal, and to give judgment as if no such omission or mistake had existed: provided always, that no objection on account of any omission or mistake in an order of removal brought up upon a return to a writ of *certiorari* shall be allowed unless such omission or mistake shall have been specified in the rule for issuing such writ of *certiorari*.

Omissions or mistakes in drawing up order may be rectified.

The object which the sessions should have in view in acting upon this statute should be, that if it appeared that the pauper had been removed to his proper parish they should correct all defects in the order, so far as the language of the statute would enable them to do.

As an instance where this section might be applied, may be

(*p*) *R.* v. *Kirkby Stephen*, Burr. S. C. 664; 2 Nolan, 4th ed. 539.
(*q*) *Reg.* v. *Stayley* (*Inh.*), 3 Q. B. 357, 362.
(*r*) 11 & 12 Vict. c. 31, s. 4.
(*s*) *R.* v. *Great Bedwin*, Stra. 1150; Burr. S. C. 163; *ante*, p. 883, n. (*y*).
(*t*) See *ante*, p. 883, n. (*z*).
(*u*) *R.* v. *Great Bedwin*, Burr. S. C. 163.
(*v*) Amendments were made before this statute in *R.* v. *Harrow-on-the-Hill*, 2 Bott, 706; 2 Nolan, 4th ed. 553; *R.* v. *Carmarthenshire* 4 B. & Ad. 563; *R.* v. *Amlwch*, 4 B. & C. 757; *R.* v. *Bingley*, 4 B. & Ad. 567.

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given the case where the pauper sought to be removed was incurably blind, and the justices making the order did not consider that to be sickness within the 9 & 10 Vict. c. 66, s. 4, and so negatived chargeability from sickness; and, as a consequence, did not state that they were satisfied that the sickness would produce permanent disability. Upon appeal, such blindness being held to be sickness, it was pointed out that the order might have been amended by adding the statement that it would produce permanent disability, under this section (*w*).

The 12 & 13 Vict. c. 45, s. 7 (*x*), confers a general power of amendment of all judgments and orders in all most identical language.

Defects amendable.

Defects which formerly were fatal to the order are now amendable under the statute; thus, an order stating a complaint to have been made to two of her Majesty's justices of the peace *for* a borough was held bad, as not showing that the complaint was made to them *within* their jurisdiction (*y*); but this would now be amendable by inserting the words "in and" before "for" the borough (*z*), inasmuch as an order in that form has been held sufficient (*a*). So, an order formerly bad for describing the justices to whom the complaint was made to be justices *in* the county aforesaid, and omitting to state that they were justices for the county (*b*).

Since 4 & 5 Will. 4, c. 76, s. 81, *ante*, p. 897, the sessions cannot on appeal enter into any objection to an order of removal for defects on the face of it, whether of form or substance, which are not stated in the notice of the grounds of appeal. An order of removal for removing a father "and his children" is not necessarily void, for the children may neither have been baptized, nor acquired names by reputation; but whether such a defect might be amended by the sessions is not decided (*c*).

Matters which may be proved on hearing of the appeal.

No settlement can be relied on by the respondents, except it is stated in the grounds of removal (*d*). However, the statute does not preclude them from calling witnesses who were not examined before the removing magistrates, or bind them to call all those who were; and it is sufficient if they make out a *primâ facie* case at the sessions (*e*).

Respondents may perhaps support their order on grounds not disclosed in the depositions, provided the settlement relied on be still in substance the same as is mentioned in the grounds of removal (*f*). But where they sought to give in evidence

(*w*) *Reg.* v. *Bucknell*, 3 E. & B. 587; 23 L. J., M. C. 129; see *ante*, p. 880.
(*x*) See *ante*, p. 687.
(*y*) *Reg.* v. *Stockton-on-Tees*, 7 Q. B. 520; 14 L. J., M. C. 128.
(*z*) *Reg.* v. *Hellingley*, 28 L. J., M. C. 167.
(*a*) *Reg.* v. *Newton Ferrers*, 9 Q. B. 32.
(*b*) *R.* v. *Owlton*, 2 Salk. 474.
(*c*) *R.* v. *Withernwick*, 6 A. & E. 273; 1 N. & P. 423.
(*d*) *Reg.* v. *Clint* (*Inh.*), 11 A. & E. 624, n., *ante*, p. 887.
(*e*) *Reg.* v. *Yelvertoft* (*Inh.*), 1 New Sess. C. 476.
(*f*) Arguendo *R.* v. *Misterton*, 6 A. & E. 878; see *ante*, p. 887.

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other facts, not indeed inconsistent with those before stated, but facts which appellants had no opportunity of inquiring into, or reason to believe true (*e. g.*, that the person stated in the examination to have hired the pauper, acted in that transaction not for himself but for his father, whose name had not before appeared), the court held, that as both parties had come to the sessions to try such questions as arose on the pauper's examination, the respondents were not at liberty to introduce new facts which the appellants, if apprised of them before, might have thought true, and therefore might have forborne appealing, or might have deemed false, and prepared themselves to dispute (*g*).

If more than one settlement is set up by the grounds of removal, the incomplete statement of one will not preclude the removing parish as respondents from establishing any other which is sufficiently stated (*h*), though prior in point of date (*i*); for respondents may at the sessions confine themselves to proving any one settlement disclosed in the grounds of removal without relieving appellants from proving any fact, also averred there, which they may be desirous to use in support of their own cases; statements of this kind having no resemblance to admissions (*k*).

Effect of order of removal unappealed against.

A previous order of removal, good on the face of it, executed and unappealed against, has the peculiar effect of being conclusive of the pauper's settlement at the time it bears date, not only between the parties originally concerned, but as against all the world, though *res inter alios acta:* thus it binds a third parish on a subsequent appeal (*l*).

It is in general conclusive of the marriage of parties removed by it, and therein described as man and wife (*m*); also of the legitimacy of the children whom it names (*n*)—of the settlement of after-born children of the marriage so established (*o*)—of the settlement of the husband when it removes the wife by name, though not describing her as such (*p*); and even when it removes

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(*g*) *R.* v. *Misterton* (*Inh.*), 6 A. & E. 878. Cited *R.* v. *Justices of Derbyshire, id.* 891.

(*h*) *Reg.* v. *Justices of Carnarvonshire,* 2 Q. B. 325 (not overruled *quoad hoc*). *Reg.* v. *Camrose* (*Inh.*), 2 Q. B. 330, n.

(*i*) Thus proof of a binding apprentice may be abandoned by the removing parish, while a previous settlement, *e. g.*, by birth, may be relied on by them, *Reg.* v. *Latchford* (*Inh.*), 6 Q. B. 567; 14 L. J., M. C. 20.

(*k*) *Reg.* v. *Latchford* (*Inh.*), 6 Q. B. 567; 14 L. J., M. C. 20; *Reg.* v. *Whitwick* (*Inh.*), 14 L. J., M. C. 25; 1 New Sess. C. 23.

(*l*) *R.* v. *Corsham,* 11 East, 388; *R.* v. *Kenilworth,* 2 T. R. 599. An order of removal to a certificated parish, unappealed against, is conclusive against the latter on its removing to the certifying parish, *R.* v. *Ealing,* 4 Doug. 12; Cald. 472. See *ante,* p. 900.

(*m*) *R.* v. *Wood Chester,* Stra. 1172; Burr. S. C. 191; *R.* v. *Silchester,* Burr. S. C. 551; and cases collected, 7 A. & E. 763; 2 Nolan, 4th ed. 142. See *Reg.* v. *Wye* (*Inh.*), 7 A. & E. 761.

(*n*) *R.* v. *Northfeatherton,* 1 Sess. Cas. 154.

(*o*) *R.* v. *St. Mary, Lambeth,* 6 T. R. 615, for the precise point which is a necessary part of the proof in the second appeal, has been determined on the first, *R.* v. *Catterall,* 6 M. & S. 83.

(*p*) *R.* v. *Towcester,* Cald. 497; 2 Bott, 679.

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his wife as a widow under the supposition of his death, for it is presumed that she was removed to the place of his settlement (*q*). But it is not conclusive as to a son who is not named in the order, and did not at the time form part of his father's family, thus being emancipated (*r*), though his emancipation at the time will not be presumed (*s*). Its effect between several townships of a parish, after separation of a township, is a difficult question (*t*).

Effect of an order of removal confirmed on appeal.

Judgments of courts of competent jurisdiction, directly on the point in question, are as evidence conclusive between the same parties upon the matter directly in question in another suit. Upon this principle, a judgment of a court of sessions confirming an order of removal, is *conclusive* not only against the parish to which the removal is directed to be made, but (being a judgment *in rem*) *against all the world* (*e.g.* as between the appellant parish and a third parish on a subsequent appeal), that the pauper at the time when that order was made was settled in the parish to which he was so sent (*u*).

Effect of order of removal quashed on appeal generally (*i.e.* without special entry), and not for mere defect of form.

It should be premised, that parol evidence of the grounds of an order of sessions made for quashing an order of removal generally, *i.e.* without special entry, is admissible (*v*).

An order of sessions quashing an order of removal *generally* (*i.e.* not for mere defect of form and without special entry) is *conclusive* between the contending parishes being taken on hearing the merits (*x*) as to the point which it decides; that point being, that at the time when the order was made the appellant parish was not bound to receive the pauper (*y*); but as to any collateral issue taken on the hearing it is not evidence (*z*).

However the cases show that at least before 4 & 5 Will. 4, c. 76, such an order of sessions was, as between the same contending parishes, *primâ facie evidence* to show, that at the time the order of removal was made the pauper was *not settled* in the appellant parish (*a*); but though admissible, it is even

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(*q*) *R.* v. *Rudgeley*, 8 T. R. 620.

(*r*) *R.* v. *Southowram*, 1 T. R. 353.

(*s*) *Reg.* v. *Yeoveley* (*Inh.*), 8 A. & E. 806; *Reg.* v. *Sowe* (*Inh.*), 12 L. J., M. C. 38; 4 Q. B. 93.

(*t*) Per cur. *R.* v. *Oldbury*, 4 A. & E. 167.

(*u*) *R.* v. *Wick St. Lawrence*, 5 B. & Ad. 533; per *Coleridge*, J., *Reg.* v. *Clint*, 11 A. & E. 626, n.; 10 L. J., M. C. 151; *Reg.* v. *Knaptoft*, 2 B. & C. 883; and see *ante*, p. 967; *Reg.* v. *Evenwood and Barony*, 3 Q. B. 370, 384; 12 L. J., M. C. 10; commented on by *Patteson*, J., in *Ex parte Ackworth Overseers*, 13 L. J., M. C. 38.

(*v*) *R.* v. *Wick St. Lawrence*, 5 B. & Ad. 533, affirming *Osgathorpe* and *Diseworth*, Stra. 1256, also *Reg.* v. *Charlbury and Walcott*, 3 Q. B. 378. See per *Patteson*, J., in *S.C.* 383, 384; *Reg.* v. *Perranzabulo* (*Inh.*), *id.* 400.

(*x*) *R.* v. *Bradenham*, Burr. S. C. 394; *Reg.* v. *Clint* (*Inh.*), 11 A. & E. 624, n.

(*y*) Per *James Parke*, J., *R.* v. *Wick St. Lawrence*, 5 B. & Ad. 535.

(*z*) *R.* v. *Knaptoft*, 2 B. & C. 883; *R.* v. *Wick St. Lawrence*, 5 B. & Ad. 535.

(*a*) *R.* v. *Wick St. Lawrence* (*Inh.*), 5 B. & Ad. 535, per *James Parke*, J.; *R.* v. *Knaptoft*, 2 B. & C. 883. Probably it is admissible in

between them slight evidence of settlement, for it does not distinctly show on the face of it on what ground it proceeded (*b*).

Of Appeals against Orders of Removal.

Nor is it any *estoppel;* for to prevent injustice, it is *always* competent for the respondents to show by parol evidence that the order of sessions was not made on that particular ground (*c*); and thus to rebut any *primâ facie* presumption that the decision for quashing the order "turned on the *settlement*" (*d*), by proving that the former order of removal was *in fact* quashed on a ground foreign to the question of settlement, *e.g.*, because at the time the order was made the pauper was not actually chargeable, or not long enough resident, or irremovable from his own tenement in the removing parish, which he has since sold (*e*).

Effect of order of removal unappealed against.

However, since 4 & 5 Will. 4, c. 76, a more extensive range is given to the conclusive effect of an order of sessions, when a subsequent question arises between the same parishes. Thus, where two orders of removal had been quashed on appeal, one for variance between the examination on which the removing justices proceeded, and the proof at the hearing of the appeal in the *date* of renting a tenement laid in the former (*f*); and the other for omitting the date of the birth of the pauper's husband, through whom a settlement was derived (*g*), the sessions having thought the variance and omission material, the Court of Queen's Bench held their decisions not of form merely, but conclusive between the same parishes in appeals against subsequent removals made on amended examinations.

Effect of quashing orders of removal.

If it can be shown that an order of quarter sessions for quashing an order of removal turned on a particular point not being stated in the examinations, or, if so stated, not being proved (*e. g.*, that the pauper, at the time of the order made,

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the same way as the verbal declaration of a rated inhabitant of the removing parish would be, *R.* v. *Wooburn* (*Inh.*), 10 B. & Cr. 846; *R.* v. *Rudgeley*, 8 T. R. 620, other cases collected in *Reg.* v. *Sowe* (*Inh.*), 12 L. J., M. C. 38.

(*b*) See *R.* v. *Wick St. Lawrence* (*Inh.*), 5 B. & Ad. 535, per *James Parke*, J.; but see *R.* v. *Knaptoft*, 2 B. & C. 883, not cited in *R.* v. *Wick St. Lawrence*. In *Reg.* v. *Yeoveley* (*Inh.*), 8 A. & E. 806, 821, *Coleridge*, J., calls such evidence between the same two parishes *cogent*. *Reg.* v. *Sowe* (*Inh.*), 12 L. J., M. C. 38, is an authority the same way since the act.

(*c*) See *R.* v. *Wick St. Lawrence* (*Inh.*), 5 B. & Ad. 535, per *James Parke*, J. So whether the special ground of quashing appears on the face of the order or not, *ibid.*

(*d*) *R.* v. *Yeoveley* (*Inh.*), 8 A. & E. 806, 818, per Lord *Denman*.

(*e*) See 8 A. & E. 818, per Lord *Denman; Osgathorpe* v. *Diseworth* (or *Rex* v. *Osgathorp*), Stra. 1256; Burr. S. C. 261, approved in *R.* v. *Wick St. Lawrence* (*Inh.*), 5 B. & Ad. 526; *R.* v. *Wheelock*, 5 B. & C. 511. Explained by *Patteson*, J., 5 B. & Ad. 539; and see *Reg.* v. *Justices of Lancashire*, 12 L. J., M. C. 76; 3 Q. B. 369.

(*f*) *Reg.* v. *Clint* (*Inh.*), 11 A. & E. 624, n.

(*g*) *Reg.* v. *Charlbury and Walcott* (*Inh.*), 3 Q. B. 378; 13 L. J., M. C. 19. This case shows that where the *examination* omits some material facts, it is the same thing as if on the hearing of the appeal the parties had not brought evidence of such facts before the court. See per *Patteson*, J., 13 L. J., M. C. 39.

Effect of Order of Removal unappealed against.

was not actually chargeable to the removing parish), and new matter (*e. g.*, actual chargeability, has since arisen) (*h*), the former order of sessions is not conclusive as to such fresh ground of removal (*i*), having proved nothing as to the question of *settlement* (*k*); so that a fresh order of removal made after the new state of things, *viz.*, chargeability, existed, was held not prejudiced by the order of sessions made before.

But as between the removing parish, whose order of removal is quashed by the sessions, and any third parish, the order of sessions is only conclusive as to the parish which succeeded on that appeal; and the first parish may remove again to any third parish, not party to the former removal (*l*). Nor does it prevent a third parish to which the unsuccessful respondent afterwards removes from appealing and proving a settlement in the parish, which, as appellant, quashed the order on the first appeal (*m*); for such quashing ascertains nothing affirmatively with regard to the removing parish; and so far from proving that the settlement ever has been there, it finds the negative, *viz.*, that at a given time the pauper was not settled in the appellant parish (*n*).

Where order quashed not on the merits.

If an order of removal is *quashed*, not on the merits but for the special ground of a defect in form, or because the pauper was not actually chargeable or resident for forty days, or was irremovable; and this appears as it ought to do by special entry on the face of the order of sessions (*o*), in order to save the expense of calling witnesses on trying a second appeal; the order of sessions of course concludes nothing except the point contained in the special entry.

It has been said that where an order is quashed generally, merely because respondents decline going into their case, that is a decision on the merits (*p*), and conclusive.

Whether the first order is confirmed or quashed, if a second is made which would *primâ facie* seem to militate against the first, but which may be good from subsequent occurrences (*q*); the second order ought to recite the first, and set forth the matter on which it is founded (*r*).

(*h*) *R.* v. *Wheelock*, 5 B. & C. 511.

(*i*) See per *Patteson*, J., in *Reg.* v. *Charlbury and Walcott* (*Inh.*), 3 Q. B. 384; 13 L. J., M. C. 19.

(*k*) *Reg.* v. *Perranzabulo* (*Inh.*), 3 Q. B. 400; 13 L. J., M. C. 47.

(*l*) *St. Michael's, Bedenham, and Kingston Bowsey*, Salk. 486; see *id.* 525.

(*m*) *R.* v. *Bentley*, Burr. S. C. 425; *R.* v. *Knaptoft*, 2 B. & C. 883.

(*n*) *R.* v. *Cirencester*, Burr. S. C. 17. See 2 Phill. Ev. 9th ed. 47.

(*o*) *Ante*, p. 690. See *R.* v. *Wick St. Lawrence*, 5 B. & Ad. 539, per *Patteson*, J.

(*p*) *Reg.* v. *Church Knowle* (*Inh.*), 7 A. & E. 471; 2 N. & P. 359, per *Coleridge*, J. This may be otherwise, if they secure the appellants from being misled, by acquainting them precisely with the ground on which they withdraw the order. Per Lord *Denman*, 7 A. & E. 479.

(*q*) See *R.* v. *Wheelock*, 5 B. & C. 511.

(*r*) See *R.* v. *Bradenham*, Burr. S. C. 394, per *Foster*, J.

Of the Hearing of Appeals against Orders of Removal.

Production of paupers for examination.

In case the pauper has been actually removed to the appellant parish before the hearing, the appellants, if served in due time with the usual notice to produce him, ought now either to produce him, or to show that his absence is not occasioned by their connivance or default (*s*). But when he has not been removed, or where his evidence is required to sustain the order, it is safer to subpœna him as a witness (*t*). If he does not appear, and the appellants show that he has absconded, the court will respite the appeal to the next sessions, directing the appellants in the meantime to make diligent search after him. If after actual removal to the appellant parish he be not forthcoming, the sessions will sometimes confirm the order, considering it to be the duty of the appellants to bring him; but even if he has been removed in fact, this seems doubtful, for the appellants have not the custody of his person, and the respondents, knowing that they must support their order, ought to have subpœnaed him as a witness.

Examination of paupers as to settlement—soldiers.

In general, the *ex parte* examination of a pauper touching his settlement, though committed to writing and taken before two justices, is not admissible evidence of such settlement (*u*); but the examination of a soldier, militiaman, marine, &c., as to his settlement, is made evidence by clauses in the Annual Mutiny Act (*x*). On similar enactments it has been decided that there can be only one attested copy in each case entitled to this privilege, *viz.*, that which is delivered to the commanding officer (*y*). Next, that this examination must be authenticated before it can be received in evidence, for it is not one of those documents which proves itself (*z*); also, that it must state that the soldier at the time he was examined was billeted in the place where the justices have jurisdiction (*a*); and that, as a copy is declared to be evidence, it follows that the original examination must be admitted also (*b*).

Examination of a prisoner.

And by 59 Geo. 3, c. 12, s. 28, "in the case of any person having a wife or child, who shall be a prisoner in any gaol or house of correction, or in the custody of any constable under a warrant of commitment, a justice may take down in writing his examination on oath touching his or her last settlement, and such examination signed by such justice shall be received in evidence as to such settlement before any justices, so long as the person examined shall continue a prisoner."

Evidence of chargeability.

A certificate by a board of guardians or district board, in the form of the schedule given in 7 & 8 Vict. c. 101, to the effect

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(*s*) 2 Nolan, 539, 4th ed.
(*t*) *Id. ibid.* n. 2. See *ante*, p. 882.
(*u*) *R.* v. *Ferrybridge*, 2 East, 54.
(*x*) See 36 Vict. c. 10, s. 92. As to marines, 36 Vict. c. 11, s. 92.
(*y*) *R.* v. *Clayton-le-Moor*, 5 T. R. 704.
(*z*) *R.* v. *Bolton* (*Inh.*), 1 East, 13.
(*a*) *R.* v. *All Saints, Southampton* (*Inh.*), 7 B. & C. 785.
(*b*) *R.* v. *Warley* (*Inh.*), 6 T. R. 534.

Of the Hearing of an Appeal.

Evidence of chargeability.

that A. B. and C. D. became chargeable on a certain day to a certain parish as the union purporting to be signed by the presiding chairman of such guardians or district board, and to be sealed with their seal, and to be countersigned by their clerk, shall, unless the contrary be shown, be taken to be sufficient proof of the truth of all the statements contained in such certificate, and shall be received in evidence accordingly by and before all courts of justice and all justices, without any proof of the signatures or official character of the persons signing the same, or of such seal; and for the purpose of making an order of removal or other order, no further or other evidence of chargeability than such certificate shall be required, provided that every such order bear date within twenty-one days next after the date of such certificate (*c*); and such certificate shall be received within the space of twenty-one days from the date thereof in all courts, and before any justice or justices, and for all purposes as sufficient evidence of the chargeability of the person named therein, unless the contrary be shown (*d*); and by the above statute, 7 & 8 Vict. c. 101, s. 70, every copy of a minute, order, complaint, claim, application, or authority of a board of guardians or district board similarly authenticated, is made evidence in a similar manner.

Right to begin, and reply.

If the order be good in point of form, the burden of supporting it lies on the respondents, by showing the pauper to be settled in the parish to which the removal was made (*e*); and their leading counsel having opened his case to the bench, he with his junior calls the witnesses, subject to the ordinary rules of evidence.

When the appellant begins.

But if the settlement relied on by the order be admitted by the appellant, and they go upon a subsequently-acquired settlement, or set up the pauper's irremovability from the respondent parish, it would seem that, as the onus of giving evidence is thrown on the appellant, that they should begin; and if the respondents do not call rebutting evidence, should sum up their evidence, and the respondents would then reply; but if in such a case the respondents called rebutting evidence, the appellants would then have the right of reply.

If the respondents begin to make out a *primâ facie* case (*e. g.*, a woman's maiden settlement without anything to show that any subsequent settlement which would supersede it has been gained), or if it is admitted, and appellants begin, it is enough for them to disprove their obligation to maintain the pauper by showing him not settled in their parish, without proving the precise place of his settlement (*f*).

If the pauper is called for the respondents, the appellants'

(*c*) 7 & 8 Vict. c. 101, s. 69; and see *Reg.* v. *Beckington*, 8 Q. B. 889; 15 L. J., M. C. 157.
(*d*) 11 & 12 Vict. c. 110, s. 11.
(*e*) *R.* v. *St. Mary, Beverley* (*Inh.*), 1 B. & Ad. 201.
(*f*) *Ibid.* 1 B. & Ad. 205.

Of the Hearing of Appeals against Orders of Removal.

counsel may of course cross-examine him generally; but though the appellants will succeed if they can show the pauper to be settled in any other parish than their own, it is the more convenient course, and the practice of some sessions, not to allow the appellants to prove a subsequent settlement on such cross-examination; but, in case they rely on his evidence to prove a subsequent settlement, to require them to open their own case and call him again as their witness. The respondents' counsel has, as we have seen, the general reply, if witnesses are called or evidence opened by the advocate for the appellants; but otherwise the case closes with the address of the latter. If the respondents' counsel in his reply cites fresh cases, some courts of quarter session permit the opposite counsel to observe on them.

Right of reply.

Though the only settlement which can be supported on either side must be that which is stated in the grounds of removal or statement of grounds of appeal, it may be supported by any number of witnesses or amount of documentary evidence which either party may think fit to adduce (*g*); nor are the respondents bound to call the witnesses examined before the justices, or to rest content with their testimony if called.

If two appeals are entered against one order, and it is quashed on one of them, the other should not be tried (*h*).

Judicial power of justices.

The justices are not only the sole judges of the effect of evidence adduced on appeals, but of its admissibility: no bill of exceptions lies against their determination on any point which may arise in the course of the trial (*i*); and if they should reject evidence on a misapprehension of the practice of their own court, or on a mistaken view of a rule of law, without sending up a case to the court above, the latter court will not interpose by *mandamus* to direct a review of their decision (*k*). For that would be in fact to grant a new trial, which the court above has not jurisdiction to do (*l*). But if they hear one side, and altogether refuse to hear the other, it seems a *mandamus* may issue as if the case had not been heard at all (*m*). See on this subject more fully, *ante*, p. 732 *et seq.*

Improper rejection of evidence.

As to the adjournment of appeals, see *ante*, p. 680. And if, after an appeal against an order of removal has been entered

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(*g*) See *Reg.* v. *Ruyton of the Eleven Towns* (*Inh.*), 30 L. J., M. C. 229, *ante*, p. 959.

(*h*) *Reg.* v. *Justices of Westmoreland*, 12 L. J., M. C. 116.

(*i*) *Ante*, p. 689.

(*k*) *R.* v. *Justices of Carnarvonshire*, 4 B. & A. 86, stated *ante*, p. 735; *Ex parte Pratt*, 7 A. & E. 27; 2 N. & P. 102; a case of the strongest kind, for the appeal was against a conviction on the Game Trespass Act (1 & 2 Geo. 4, c. 32), which takes away a *certiorari*. See *Reg.* v. *Justices of Ripon*, 7 A. & E. 417; 2 N. & P. 411; and per Lord *Denman*, 8 A. & E. 400.

(*l*) *Reg.* v. *Justices of Kesteven*, 3 Q. B. 810, 819; *Ex parte Pratt*, 7 A. & E. 27.

(*m*) *R.* v. *Justices of Carnarvonshire*, 4 B. & A. 86, per *Holroyd*, J. And see *R.* v. *Justices of Cumberland*, 4 A. & E. 695.

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upon, the court think fit to adjourn the hearing to the following sessions, it should be made a part of the order that no fresh grounds of appeal should be served (*n*).

Judgment to confirm or quash the order of removal.

The only legal judgment which can be pronounced is simply, that the order be confirmed or quashed, and may be given or altered at any time during the same session, or, as it seems, by the same justices, at an adjournment of it (*o*). But they cannot supersede or suspend it, and make or add an original order of their own; *e. g.*, for removing the pauper back to the respondent parish (*p*), or to any other parish (*q*). But where they quash an order of removal for form, only a special entry should be made accordingly (*r*). A judgment for quashing an order, if so entered by mistake for any other order pronounced by the justices, can only be corrected at the same sessions, or at an adjournment of them; for the Queen's Bench, not being a court of error from that court, will not correct its judgment, though it will compel it to arrive at one by hearing and deciding on an appeal (*s*).

Form of order of sessions embodying the judgment of sessions.

In orders the margin is considered part of the order, and a clear reference to it in the body is sufficient (*t*). The order may state the judgment of sessions in terms of recital, without present adjudication (*u*). The removing justices must appear to have had jurisdiction, *i. e.*, it must appear, from the order of removal set forth in the order of sessions, that they were justices in, or of (*x*) and for, the county in which the removing parish lies. Order of removal beginning "Westmoreland, to wit, to the overseers of the township of K. L., and to the overseers of the poor of the township of C., in the said county," shows the township of K. L. to be in the county of Westmoreland. The complaint was afterwards stated as "made to us, &c., two justices in and for the said county." Held, a sufficient allegation that the justices were justices of the county of Westmoreland (*y*).

The rules of proceeding on appeals against orders of removal, on collecting the votes and on pronouncing the judgment, are similar to those in other cases of appeal.

(*n*) *Reg.* v. *Kendal*, 28 L. J., M. C. 110; 1 E. & E. 492; *Reg.* v. *Cambridge Union*, 30 L. J., M. C. 137; 1 B. & S. 61.

(*o*) See *ante*, p. 701, Index, tit. *Adjournment.*

(*p*) *R.* v. *Milverton*, 7 Mod. 10, and cases collected in *R.* v. *Bond*, 2 Shower, 503.

(*q*) *R.* v. *Oswell and Woking*, Salk. 472.

(*r*) *Ante*, p. 690.

(*s*) *R.* v. *Justices of Monmouthshire*, 4 B. & C. 844; 7 Dowl & Ry. 334; second *Monmouthshire case*, 8 B. & C. 137, *post*; *R.* v. *Justices of Leicestershire*, 1 M. & S. 442.

(*t*) *R.* v. *Holbeck*, 1 Burr. S. C. 198, per *Lee*, C. J. Approved per Cur. *Reg.* v. *Casterton* (*Inh.*), 6 Q. B. 507; 14 L. J., M. C. 5.

(*u*) *Reg.* v. *Casterton* (*Inh.*), 6 Q. B. 507; 14 L. J., M. C. 3.

(*x*) *R.* v. *Dobbyn*, Salk. 473.

(*y*) See *R.* v. *Chilverscoton*, 8 T. R. 178; *R.* v. *Moor Critchell*, 2 East, 66.

Of Appeals against Orders of Removal.

Costs of appeal.

The question of costs on these appeals have been considered generally (*z*). The special enactments with respect to costs of appeals against orders of removal are to be found in 8 & 9 Will. 3, c. 30, s. 3, by which, upon any appeal before the quarter sessions concerning the settlement of any poor person, or upon any proof before them there to be made of notice of any such appeal to have been given by the proper officer to the churchwardens or overseers of the poor of any parish or place, though they did not afterwards prosecute such appeal, the justices shall at the same quarter sessions order to the party in whose behalf such appeal shall have been determined, or to whom such notice shall appear to have been given as aforesaid, such costs and charges in the law as in their discretion shall be thought most reasonable to be paid by the churchwardens, overseers or any other person against whom such appeal shall be determined. And by 4 & 5 Will. 4, c. 76, s. 82, upon every such appeal the court before whom the same shall be brought shall and may, if they think fit, order and direct the parish against which the same shall be decided to pay to the other such costs and charges as may to such court appear reasonable, and shall certify the amount thereof. And by sect. 83, parties making frivolous or vexatious statements of grounds of removal or appeal are liable to pay the costs (*a*).

The sessions cannot give the costs of the day on a mere adjournment, though they may make their payment a condition of the adjournment (*b*).

(*z*) *Ante*, p. 694.

(*a*) See as to this 11 & 12 Vict. c. 31, s. 5, *ante*, p. 900; 12 & 13 Vict. c. 45, s. 4, *ante*, p. 697.

(*b*) *Reg.* v. *Justices of Monmouthshire*, 1 B. & Ad. 895; *R.* v. *Stansfield*, Burr. S. C. 205.

CHAPTER VI.

OF ORDERS OF MAINTENANCE AND SETTLEMENT OF LUNATIC PAUPERS.

In close connexion with orders of removal, and subject to much the same procedure, are orders adjudging the statement of lunatic paupers, and providing for their maintenance.

Power to make the order.

The power of justices to make such an order as this is derived from 16 & 17 Vict. c. 97, by which statute any two justices for the county or borough in which any asylum, registered hospital or licensed house, in which any pauper lunatic is, or has been confined, is situate, or to which such asylum, wholly or in part, belongs, or from any part of which any pauper lunatic is, or has been, sent for confinement, may at any time inquire into the last legal settlement of such pauper lunatic, and if satisfactory evidence can be obtained as to such settlement in any parish, such justices shall, by order under their hands and seals, adjudge such settlement accordingly, and order the guardians of the union to which the parish in which such lunatic is adjudged to be settled belongs, or of such parish, in case such parish be in a union or under a board of guardians, and, if not, then the overseers of such parish to pay to the guardians of any union or parish, or the overseers of any parish, all expenses incurred by or on behalf of such union or parish in or about the examination of such lunatic, and the bringing him before a justice or justices, and his conveyance to the asylum, hospital or house, and of all monies paid by such last-mentioned guardians or overseers to the treasurer, officer or proprietor of the asylum, hospital or house for the lodging, maintenance, medicine, clothing and care of such lunatic, &c. incurred within twelve calendar months previous to the date of such order, and, if such lunatic is still in confinement, also to pay to the treasurer, officer or proprietor of the asylum, hospital or house, the reasonable charges of the future lodging, maintenance, medicine, clothing and care of such lunatic; and the guardians or overseers, on whom any such order is made, shall immediately pay to the guardians or overseers, to whom the same are ordered to be paid, the amount of the expenses and monies by such order directed to be paid to them, and from time to time pay to the said treasurer, officer or proprietor of the asylum, hospital or house the future charges aforesaid (*a*).

(*a*) 16 & 17 Vict. c. 97, s. 97.

Of Orders adjudicating the Settlement of Lunatic Paupers, and as to their Maintenance.

And if any pauper lunatic be not settled in the parish by which, or at the instance of some officer or officiating clergyman of which, he is sent to any asylum, registered hospital, or licensed house, and it cannot be ascertained in what parish such pauper lunatic is settled; and if a relieving officer of such first-mentioned parish, or of the union in which the same is situate, or the overseers of such first-mentioned parish, shall give ten days' notice to the clerk of the peace of the county in which such lunatic was found, to appear for such county before two justices thereof, at a time and place to be appointed in such notice, it shall be lawful for such two justices, or any two or more justices of such county, upon the appearance of such clerk of the peace, or any one in his behalf, or, in case of his non-appearance upon proof of his having been served with such notice to inquire into the circumstances of the case, and to adjudge such pauper lunatic to be chargeable to such county, and to order the treasurer of such county to pay to the guardians of any union or parish, or the overseers of any parish, all expenses incurred by or on behalf of such union or parish, or about, &c. (*b*).

Where settlement of lunatic cannot be ascertained.

By 25 & 26 Vict. c. 111, s. 45, it is enacted, that where any pauper lunatic is not settled in the parish, by which or at the instance of some officer, &c., of which he is sent to an asylum, &c., and it cannot be ascertained in what parish such pauper lunatic is settled, and such lunatic is found in a borough which has a separate court of quarter sessions and is not liable to contribute to the county rate under 5 & 6 Will. 4, c. 76, s. 117, or is found in any borough which, under 12 & 13 Vict. c. 82, is exempt from contributing to the maintenance of pauper lunatics chargeable to the county in which such borough is, such lunatic shall be adjudged to be chargeable to the borough in which he is found, and it shall not be lawful for any justices to adjudge such lunatic to be chargeable to any county. All the provisions of the Lunacy Act, c. 97, as to determining chargeability as to orders for payment of expenses, &c., and for repayment thereof to county treasurer, shall extend to the case of a borough to which a lunatic is made chargeable under this section, and such provisions were re-enacted in this act (*c*).

Where settlement of lunatic found in a borough cannot be ascertained.

Where it is ascertained that the lunatic pauper has no settlement, or is the wife of a Scotchman, who has no settlement, an order may be made on the county under sect. 98 (*d*); and provision is made for the reimbursement to a county of monies paid on account of a lunatic, afterwards adjudged to belong to any parish (*e*); and justices may make such orders upon the

Where lunatic pauper has no settlement.

(*b*) 16 & 17 Vict. c. 97, s. 98.
(*c*) See before this act *Reg.* v. *Bacchus*, 2 E. & E. 181; 29 L. J., M. C. 56 (Exch.).
(*d*) *The Clerk of the Peace of Somersetshire* v. *Overseers of Shipham*, 32 L. J., M. C. 83; 3 B. & S. 507.
(*e*) 16 & 17 Vict. c. 97, s. 99.

Lunatic Pauper's Order of Maintenance, &c. upon whom to be made.

guardians or overseers of any union or parish, though such union or parish be out of their jurisdiction (*d*). If an order is obtained on the county under the above section, but the settlement of the lunatic is afterwards discovered, an order may be obtained by the county on the parish of settlement, and the order on the county be treated as an interim order (*e*).

Where lunatic pauper irremovable by residence.

All the expenses incurred about a pauper who would, at the time of being conveyed to such asylum, &c. have been exempt from removal to the parish of his settlement, or the country of his birth, by reason of 9 & 10 Vict. c. 66, shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption, if such parish be subject to a separate board of guardians, or by the overseers of such parish where the same is not subject to such separate board, and where such parish shall be comprised in any union, the same shall be paid by the guardians, and be charged to the common fund of such union, so long as the costs of the relief of paupers, rendered irremovable by the last-mentioned act, shall continue to be chargeable upon the common fund of unions, and no order shall be made under any provision contained in this or any other act upon the parish of settlement in respect of any such lunatic pauper during the time that the above-mentioned charges are to be paid and charged, as herein provided; and sect. 5 of 12 & 13 Vict. c. 103, shall be repealed (*f*).

In case of wife or children of pauper irremovable by reason of residence.

The order for the expenses of the maintenance, &c. of the wife of a man who had a settlement in one parish, and was irremovable, by reason of his residence, in another, ought to be made upon the parish where he was resident and irremovable (*g*); but an order adjudicating the settlement, and for the maintenance of the wife of a man irremovable by reason of residence from the parish wherein he then resided, ought to be made on the parish of the husband's settlement, and not of his irremovability, where the wife had lived separated from the husband, and in a different parish, for some years (*h*). A legitimate child, whose parents have no settlement (the father being an Irishman, and the mother having no settlement), though unemancipated, has a settlement in the parish where it is born (*i*).

The cost of the maintenance of a lunatic wife at the expense of the parish of the husband's residence is relief to the husband, and the period of such relief is to be deducted in computing the time of their residence in the parish for the purpose of inquiring into his irremovability (*k*).

(*d*) 16 & 17 Vict. c. 97, s. 100.

(*e*) *Churchwardens, &c. of All Saints, Poplar* v. *Clerk of the Peace of Middlesex*, 2 E. & E. 829; 29 L. J., M. C. 186.

(*f*) 16 & 17 Vict. c. 97, s. 102. See *Reg.* v. *Guardians' of West Ward Union*, 7 E. & B. 21; 26 L. J., M. C. 29; *Knowles* v. *Trafford*, 7 E. & B. 152; 26 L. J., M. C. 188 (Exch.).

(*g*) *Leeds* v. *Wakefield*, 26 L. J., M. C. 37; 7 E. & B. 258.

(*h*) *Reg.* v. *Guardians of East Retford*, 32 L. J., M. C. 17.

(*i*) *Reg.* v. *Newchurch* (*Inh.*), 32 L. J., M. C. 19.

(*k*) *Reg.* v. *Overseers of St. George, Bloomsbury*, 32 L. J., M. C. 217; 4 B. & S. 108; and see *ante*, p. 963, n. (*h*).

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As to unemancipated lunatic children of pauper irremovable by reason of residence.

The order in respect of a child above the age of sixteen, but unemancipated at the time of her removal to the asylum, who was removed from the workhouse of the parish from which her father was irremovable at the time of her entry into the workhouse, but who ceased to be irremovable between the time of the child's going into the workhouse and becoming lunatic, ought to be made on the parish of the father's settlement, and not of his residence, inasmuch as when he ceased to be irremovable from his parish of residence the child ceased also to be irremovable (*l*); but in such a case, where the father was residing, and where he was irremovable at the time of the child being taken as a lunatic to the asylum, and removed afterwards, the former place continued to be liable to his maintenance, and not the place of the father's settlement (*m*).

So, where a father being irremovable from a parish by reason of residence dies, and his widow and unemancipated daughter continue to reside in the same parish till the daughter is sent into the workhouse, but, whilst she is in the workhouse the widow leaves the parish of irremovability and goes to reside in another parish, and a month afterwards the daughter is sent from the workhouse to the county lunatic asylum, and three months later is discharged and sent to the widow. The widow then having no settlement, the order for maintenance was held to be rightly made on the parish of the father's settlement, as the widow had ceased, at the time of the daughter's removal to the asylum, to be irremovable from the parish of his residence, and the daughter had also ceased to be so as an unemancipated member of the widow's family (*n*); but if the widow had continued to reside in the parish of her husband's residence, that parish would have had to bear the expense (*o*).

When lunatic pauper has acquired the status of irremovability.

And so, where the status of irremovability has been acquired by residence in a union by one who becomes lunatic, and was removed by her relations from her master's house to the residence of her parents in a different union, her wages being paid in full, and her master having no intention of receiving her back in his house, and after staying with her parents for a single night was sent to the workhouse of the second union, and was seven days afterwards taken to the county lunatic asylum; inasmuch as the lunatic was not capable of exercising the intention of abandoning her residence, she therefore did not cease to reside in the union of her irremovability, by reason of the changes of her place of residence prior to her removal in the union caused by her relatives (*p*).

A woman, who was irremovable by reason of residence in a

(*l*) *Reg.* v. *St. Ann, Blackfriars*, 2 E. & B. 440; 22 L. J., M. C. 137.
(*m*) *Reg.* v. *Overseers of St. Giles*, 3 E. & E. 224; 30 L. J., M. C. 12.
(*n*) *Reg.* v. *Overseers of St. Mary Arches, Exeter*, 31 L. J., M. C. 77; 1 B. & S. 890.
(*o*) *Reg.* v. *St. Mary, Islington*, 31 L. J., M. C. 233; 3 B. & S. 46; *Reg.* v. *Overseers of St. Giles*, 30 L. J., M. C. 12; 3 E. & E. 224.
(*p*) *Reg.* v. *Whitby Union*, L. R., 5 Q. B. 325; 39 L. J., M. C. 97.

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union, took a place as domestic servant with a family residing in another union, upon the terms that she was to be a month on trial, and at the end of that time, if both parties agreed, she should continue in the service, terminable at a month's notice. She took all her clothes with her, but intended, in case she did not suit, to return to her mother's house, in which she had been previously residing. She received notice to leave at the end of a fortnight, and she returned to her mother accordingly, but her residence was held to be broken (*q*); and similarly a pauper who gave up his lodgings in a parish, and left intending to return when trade became better, and leaving some old clothes with his landlord, and returned after three months, his lodgings remaining vacant all the time, was held to have broken his residence (*r*).

Form of the order of maintenance.

An order made for the past and future maintenance of a pauper lunatic, under 8 & 9 Vict. c. 126, ss. 58, 62, by justices who described themselves as "in and for the said city," referring to the city mentioned in the margin, where the city was a county of a city, is good, though jurisdiction was given by the statute to the justices of a county, inasmuch as the court will take judicial notice that the city is also a county (*s*). And if the order be directed to the guardians of a union and to their clerk, but ordering the clerk to pay, is a sufficient order on the guardians (*t*).

Jurisdiction of justices making the order.

The jurisdiction of the justices to adjudicate on the settlement and maintenance attaches on a pauper lunatic being found confined in an asylum, and the validity of their order is not affected by the fact that the order of admission was made by a justice having no jurisdiction to make it (*u*). So the recital of an insufficient order of admission to the asylum will not affect the validity of the order adjudicating the settlement (*v*). An order of adjudication and maintenance of a pauper settled in a parish in a Gilbert Union, formed under 22 Geo. 3, c. 83, ought to be made on the guardians of the parish, and not on the guardians of the union (*w*).

Power to order overseers, &c. to sell goods, &c. of lunatic.

Power is given to justices to direct the overseers or a relieving officer of a parish or union, or the treasurer or some other officer of a county, or an officer of an asylum, to seize money or sell goods and chattels, or receive rents of lands belonging to such lunatic, as may be necessary to pay the expenses of examination and maintenance, and the receipt of the person to

(*q*) *Reg.* v. *Glossop Union*, 35 L. J., M. C. 148; L. R., 1 Q. B. 227.
(*r*) *Reg.* v. *Stourbridge Union*, 34 L. J., M. C. 179.
(*s*) *Reg.* v. *St. Maurice*, 16 Q. B. 908.
(*t*) *Reg.* v. *Crediton* (*Inh.*), 27 L. J., M. C. 265; E. B. & E. 231.
(*u*) *Reg.* v. *Overseers of Faversham*, 31 L. J., M. C. 116; 2 B. & S. 275; see *Reg.* v. *Crediton*, *ubi sup.*
(*v*) *Reg.* v. *Crediton* (*Inh.*), 27 L. J., M. C. 265; E. B. & E. 231.
(*w*) *Leatham* v. *Bolton-le-Moors* (*Inh.*), 35 L. J., M. C. 62, overruling *Reg.* v. *Bramley*, 31 L. J., M. C. 11; 1 B. & S. 732.

whom the order is directed is to be a sufficient discharge to any trustee (*x*).

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If any person feel aggrieved by any refusal of an order of any justice or justices as aforesaid, such person may appeal to the next general or quarter sessions of the peace for the county or borough where the matter of appeal has arisen, the person so appealing having given to the justice or justices against whom such appeal is made fourteen clear days' notice of such appeal, and such sessions are hereby authorized and required to hear and determine the matter of such appeal in a summary way, and their determination shall be final and conclusive (*y*).

Appeal against refusal to make such order.

The overseers of any parish, and the guardians of any union or parish, and the clerk of the peace of any county, obtaining any order under this act adjudging the settlement of any lunatic to be in any parish, shall, within a reasonable time after such order has been made, send or deliver, by post or otherwise, to the overseers or guardians of the parish in which such lunatic is adjudged to be settled, a copy or duplicate of such order, and also a statement in writing under their or his hands or hand, or, where there are guardians of a union or parish, under the hands of any three or more of such guardians, stating the description and address of the overseers, guardians or clerk of the peace obtaining such order, and the place of confinement of the lunatic, and setting forth the grounds of such adjudication, including the particulars of any settlement or settlements relied upon in support thereof; and, on the hearing of any appeal against any such order, it shall not be lawful for the respondent to go into or give evidence of any other grounds in support of such order than those set forth in such statement (*z*). A statement of the grounds of adjudication obtained by three guardians of the poor, and omitting to state the description and address of one of the guardians, is, at any rate, amendable under sect. 112. In that case, after service of notice of appeal, the respondents sent to the appellants a letter informing them of the description and address omitted to be given of the guardian, but that circumstance would not affect the power to amend (*a*).

Copy of order of maintenance, &c. to be sent to parish or union on which it is made, with particulars of settlements.

The persons on whose behalf and for whose benefit the order ultimately is, are the persons obtaining the order; thus, where an order was obtained by the guardians of a union, on behalf of the overseers of a township within the union, for the payment to the guardians of the expenses incurred by them on behalf of the township, the overseers of the township are proper persons to sign the statement of the grounds of adjudication (*b*).

The cost of the examination of any lunatic pauper, present or future, of his removal to and from and his maintenance in any asylum, licensed house and registered hospital, who would,

Costs of examination to be borne by common fund.

(*x*) 16 & 17 Vict. c. 97, s. 104.
(*y*) *Ibid.* sect. 106.
(*z*) *Ibid.* sect. 107.
(*a*) *Reg.* v. *Guardians of Manchester*, 26 L. J., M. C. 1; 6 E. & B. 919.
(*b*) *Reg.* v. *Heaton (Inh.)*, 1 E. & E. 782; 28 L. J., M. C. 181.

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under 16 & 17 Vict. c. 97, be chargeable to a parish in a union, shall be borne by the common fund of the union comprising such parish (*c*).

Who may obtain orders and appeal.

The guardians of any union may obtain orders upon the guardians or overseers of any parish not comprised in a union, or upon the treasurer of the county, and may appeal against or defend any orders in respect of any lunatic paupers hereby made chargeable upon the common fund of the union, in like manner and subject to the same incidents and provisions as are contained in the 16 & 17 Vict. c. 97, in respect of lunatic paupers chargeable to any parish in such union (*d*).

The above two sections do not affect the right of appeal given by the 16 & 17 Vict. c. 97, s. 108, to the overseers of a parish in a union, upon which an order of maintenance is made in respect of a pauper lunatic belonging to such parish (*e*).

Appeal against order adjudging settlement.

If the guardians of any union or parish or the overseers of any parish feel aggrieved by any such order as aforesaid, adjudging the settlement of any lunatic, they or he may appeal against the same to the next general quarter sessions of the peace for the county, on behalf of which such order has been obtained, or in which the union or parish obtaining such order is situate; or in case such parish or union extend into several jurisdictions, then to the next general quarter sessions of the peace for the county or borough in which the asylum, registered hospital, or licensed house so situate, and such sessions upon hearing the said appeal shall have full power finally to determine the matter (*f*).

The overseers of a parish have a right to have their appeal heard, though the guardians of the union in which the parish is have also entered an appeal (*g*). A copy of the depositions on which such order is made is to be supplied on application; but on the trial of any appeal against any such order, no such order shall be quashed or set aside, either wholly or in part, on the ground that such depositions do not furnish sufficient evidence to support, or that any matter therein contained or omitted raises an objection to the order or grounds on which the same was made (*h*).

Power of adjournment of appeal.

The court of quarter sessions have power to adjourn the hearing of the appeal to the next sessions, and further to respite it till the following sessions within this section (*i*). The appeal against an order of adjudication made by two justices of the

(*c*) 24 & 25 Vict. c. 55, s. 6.
(*d*) *Ibid.* sect. 7.
(*e*) *Reg.* v. *Guardians of Medway Union*, L. R., 3 Q. B. 383; 37 L. J., M. C. 100.
(*f*) 16 & 17 Vict. c. 97, s. 108.
(*g*) *Reg.* v. *Justices of Yorkshire* (*West Riding*), 24 L. J., M. C. 41; *Reg.* v. *Guardians of Medway Union*, 37 L. J., M. C. 100; 8 B. & S. 349.
(*h*) 16 & 17 Vict. c. 97, s. 109.
(*i*) *Reg.* v. *Guardians of Cambridge Union*, 30 L. J., M. C. 137; 1 B. & S. 61.

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borough having a separate court of quarter sessions under 5 & 6 Will. 4, c. 76, obtained by a parish situate within the borough in respect of a lunatic confined in the borough asylum, lies to the county quarter sessions (*k*); and the words "or in case such a union extends into several jurisdictions, then," &c., must be read as such jurisdictions, *i. e.* counties; and therefore when such an order was obtained by a union which was made up of parishes, some of which were within a city, which though in the county had separate quarter sessions, and some in the county without the city, the appeal lay to the quarter sessions of the county, and not to the sessions of the borough within which the asylum was situate (*l*).

Notice of appeal.

Notice in writing of appeal must be sent or delivered by post or otherwise to the party on whose application the order was obtained within twenty-one days after the sending or delivery of the copy or duplicate of the order and statement, unless within such twenty-one days a copy of the depositions shall have been applied for by the party intending to appeal; in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal (*m*).

With notice of appeal, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, the appellant shall send or deliver by post or otherwise a statement in writing to the respondent under their or his hands or hand, or where the appellants are the guardians of any union or parish under the hands of any three or more of such guardians of the grounds of such appeal; and the appellant may not go into other grounds than those set forth (*n*).

A notice of appeal by a board of guardians, whose clerk was an attorney, signed "H. H., clerk to the aforesaid guardians," was held a sufficient signature (*o*).

Criminal lunatic pauper.

The time for giving notice of appeal against an order adjudicating the settlement of and maintenance of a criminal lunatic pauper under 3 & 4 Vict. c. 54, is regulated by the 11 & 12 Vict. c. 31, s. 9 (*p*).

Defects of form not to vitiate.

Upon the hearing of any appeal against any such order no objection whatever on account of any defect in the form of setting forth the ground of any objection or appeal in any such statement shall be allowed, and no objection to the reception of legal evidence offered in support of any such ground alleged to be set forth in any such statement shall prevail, unless the court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such

(*k*) *Reg.* v. *Justices of Warwickshire*, 28 M. C. 249.
(*l*) *Reg.* v. *Justices of Kent*, 35 L. J., M. C. 201; L. R., 1 Q. B. 385.
(*m*) 16 & 17 Vict. c. 97, s. 110.
(*n*) *Ibid.* sect. 111.
(*o*) *Reg.* v. *Guardians of Newport Union*, 33 L. J., M. C. 155.
(*p*) *Reg.* v. *Justices of Glamorganshire*, 8 E. & B. 694.

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statement, and to prepare for trial: provided always, that in all cases where the court is of opinion that any such objection to any such statement, or to the reception of evidence, ought to prevail, it shall be lawful for such court, if it so think fit, to cause any such statement to be forthwith amended by some officer of the court, or otherwise, on such terms as to payment of costs to the other party, or postponing the trial to another day in the same sessions, or to the next subsequent sessions, on both payment of costs and postponement, as to such court appears just and reasonable (*q*).

Postponement of appeal.

The omission in the statement of the grounds of adjudication, of the description and address of one of the guardians obtaining the order, may be rectified under this section (*r*).

If upon the trial of any appeal against any such order, or upon the return to a writ of *certiorari*, any objection be made on account of any omission or mistake in the drawing up of such order, and it be shown to the satisfaction of the court that sufficient grounds were in proof before the justices making such order to have authorized the drawing up thereof, free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it think fit, to amend such order, and to give judgment as if no such omission or mistake had existed (*s*).

Amendment of orders.

But this does not give power to the sessions to amend an order by changing the name of the parties upon whom it is made, so as to make a new order upon new parties not before the court, as where, in a parish, there were churchwardens and overseers, and also guardians of the poor, and the order was made on the churchwardens and overseers, this section does not give power to amend the order by striking out churchwardens and overseers, and inserting guardians of the poor (*t*).

Costs of frivolous appeal.

If either of the parties to the said appeal shall have included in the statement of grounds of adjudication or of appeal sent to the opposite party any ground or grounds in support of the order or of appeal, which, in the opinion of the court determining the appeal, is or are frivolous or vexatious, such party shall be liable, at the discretion of the said court, to pay the whole or any part of the costs incurred by the other party in disputing any such ground or grounds (*u*).

Costs generally.

Upon every such appeal the court before whom the same is brought shall and may, if they think fit, order and direct the party against which the same is decided to pay to the other such costs and charges as may to such court appear just and

(*q*) 16 & 17 Vict. c. 97, s. 112.
(*r*) *Reg.* v. *Guardians of Manchester*, 26 L. J., M. C. 1; 6 E. & B. 919.
(*s*) 16 & 17 Vict. c. 97, s. 113.
(*t*) *Reg.* v. *Liverpool* (*Inh.*), 29 L. J., M. C. 137.
(*u*) 16 & 17 Vict. c. 97, s. 114.

reasonable, and shall certify the amount thereof (*x*). When an order of adjudication of settlement was confirmed on appeal by the sessions, subject to a case, and was silent as to costs, but the case was afterwards abandoned by the appellants, a subsequent sessions had no jurisdiction, upon the application of the respondents, showing the abandonment to order the payment of the costs of the appeal by the appellants (*y*).

Appeals against Orders adjudicating Settlement of Lunatic Paupers.

The decision of the court upon the hearing of any appeal against any such order as well upon the sufficiency and effect of the statement of the grounds in support of the order and appeal, and of the copy or duplicate of the order sent to the appellant parish or county, as upon the amending or refusing to amend the order as aforesaid, or the statement of grounds, shall be final, and shall not be liable to be reviewed in any court by means of a writ of *certiorari* or mandamus, or otherwise (*z*). But this applies only where the sessions have power to make the amendments (*a*).

Decisions of sessions final as to sufficiency, &c. of statement and grounds of order and appeal.

An order of maintenance adjudicating the settlement of a lunatic pauper, confirmed or quashed on appeal, as the case may be, is conclusive between the same parties as to the settlement at the time of the confirmation or quashing of the order (*b*).

In any case in which an order has been made as aforesaid, and a copy or duplicate thereof sent as herein required, it shall and may be lawful for the party who has obtained such order, whether any notice of appeal against such order has or has not been given, and whether any appeal has or has not been entered, to abandon such order by notice in writing under the hand or hands of such party; or where such order has been obtained by the guardians of any union, under the hands of any three or more of such guardians, to be sent by post or delivered to the appellant or the party entitled to appeal; and thereupon the said order, and all proceedings consequent thereon, shall become and be null and void to all intents and purposes as if the same had not been made, and shall not be in any way given in evidence, in case any other order for the same purposes shall be obtained: provided always, that, in all cases of such abandonment, the party so abandoning shall pay to the appellant or party entitled to appeal the costs which he has incurred by reason of such order and of all subsequent proceedings thereon; which costs the proper officer of the court before whom any such appeal (if it had not been abandoned) might have been brought, shall, upon application, tax and ascertain at any time, whether the court be sitting or not, upon production to him of such notice of abandonment, and upon proof to him that such

Abandonment of orders.

(*x*) *Ibid.* sect. 115.
(*y*) *Reg.* v. *Justices of Staffordshire*, 7 E. & B. 935; 26 L. J., M. C. 169.
(*z*) 16 & 17 Vict. c. 97, s. 116.
(*a*) *Reg.* v. *Liverpool* (*Inh.*), 29 L. J., M. C. 137.
(*b*) *Overseers of Heston* v. *Overseers of St. Bride's*, 1 E. & B. 583; 22 L. J., M. C. 65.

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reasonable notice of taxation, together with a copy of the bill of costs, has been given to the overseers, guardians, or clerk of the peace abandoning such order, as the distance between the parties shall in his judgment require; and thereupon the sum allowed for costs, including the usual costs of taxation which such officer is hereby empowered to charge and receive, shall be indorsed on the said notice of abandonment, and the said notice so endorsed shall be filed among the records of the said court (*c*).

Access to pauper.

Free access is given to the lunatic pauper in every case of appeal as to settlements; to the guardians, clerks of guardians, relieving officers, overseers, and any person duly authorized by them; and to any clerk of the peace of a county interested in such appeal (*d*).

Appeals against orders under 16 & 17 Vict. c. 97, other than orders adjudicating settlement.

Any person who thinks himself aggrieved by any order or determination of any justices under this act, other than orders adjudicating as to the settlement of any lunatic pauper and providing for his maintenance, may, within four calendar months after such order or determination made or given, appeal to the general or quarter sessions; the person appealing having first given at least fourteen clear days' notice in writing of such appeal, and the nature and matter thereof to the person appealed against, and forthwith after such notice entering into a recognizance before some justice of the peace, with two sufficient sureties conditioned to try such appeal, and to abide the order and award of the said court thereupon; and the said general or quarter sessions, upon proof of such notice and recognizance having been given and entered into, shall in a summary way hear and determine such appeal; or if they think proper adjourn the hearing thereof until the next general or quarter sessions; and if they see cause may reduce any penalty or forfeiture to not less than one-fourth of the amount imposed by this act, and may order any money to be returned which shall have been levied in pursuance of such order or determination, and may also award such further satisfaction to be made to the party injured, or such costs to either of the parties as they shall judge reasonable or proper; and all such determinations of the said general or quarter sessions shall be final, binding, and conclusive upon all parties to all intents and purposes whatsoever (*e*).

Where no appeal.

This section does not give an appeal, nor is any appeal given against an interim order of justices under sect. 96, directing the guardians of a union to pay the costs of maintenance to the treasurer, &c. of the asylum (*f*).

(*c*) 16 & 17 Vict. c. 97, s. 117.
(*d*) *Ibid.* sect. 119.
(*e*) *Ibid.* sect. 128.
(*f*) *Kettering Union* v. *Committee, &c. of Northampton Lunatic Asylum*, 34 L. J., M. C. 198.

CHAPTER VII.

OF APPEALS RELATING TO OVERSEERS—THEIR APPOINTMENT AND ACCOUNTS.

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Section 1.

OF APPEALS AGAINST THE APPOINTMENT OF OVERSEERS.

Jurisdiction of quarter sessions.

The court of quarter sessions has no original jurisdiction over the appointment of overseers of the poor, which takes place at petty sessions; but has a jurisdiction by way of appeal, by 43 Eliz. c. 2, s. 6, and 17 Geo. 2, c. 38, s. 4, which give a right to "any person or persons *aggrieved*" by that appointment, to appeal to the next general or quarter sessions whose jurisdiction extends over the place for which the appointment is made. The right of appeal is given not only to the appointee but the parishioners, who may appeal on any ground of unfitness in him, as his insolvency (*a*); and the sessions may make such order therein as they think convenient, the same to conclude and bind all parties. This appeal is the proper course where the party appointed overseer claims exemption on the ground of filling another office, which is not made incompatible by statute, but which, he contends, is so at common law; for till the decision of the sessions in his favour, the appointment is valid, and he is legal overseer, *de facto* (*b*); and so if the objection of the appointee be that he is not a householder, it is a matter of appeal, and a *certiorari* will not be granted to remove the appointment for the purpose of quashing it on that ground (*c*). No person is qualified to be appointed an overseer who at the time of the proposed appointment shall be an assistant overseer of any parish, and no overseer can be appointed an assistant overseer (*d*).

Who may not be overseer.

(*a*) *R.* v. *Forrest*, 3 T. R. 38; and see *R.* v. *Justices of St. Alban's*, 3 B. & C. 698; and Burn's J., 30th ed., vol. iv. p. 1123.

(*b*) Per *Coleridge*, J., *Reg.* v. *Justices of Cheshire*, 8 D. P. C. 616. Case of a registrar of births, &c. claiming exemption from office of overseer. See Jurist, No. 179.

(*c*) *Re Overseers of Pudding Norton*, 33 L. J., M. C. 136; but see *Reg.* v. *Cousins*, 33 L. J., M. C. 87; 4 B. & S. 849.

(*d*) 29 & 30 Vict. c. 113, s. 10.

Of Appointment of Overseers.

To what session the appeal is to be made.

Notice or ground of appeal.

Trial of the appeal.

The appeal should be made to the next practicable quarter sessions during the year of office; but 43 Eliz. c. 2, s. 6, fixes no time within which it is to be brought, and does not seem affected by 17 Geo. 2, c. 38, as to this appeal against the original appointment of overseers.

Nor does the act of Elizabeth make any notice of appeal or statement of the grounds of it necessary; but such reasonable notice must be given to the appointing justices within the time fixed by the practice of the particular sessions as to other appeals (*e*).

At the trial of the appeal, the parties may go into evidence of whatever can show a want of jurisdiction in the magistrates making the order, or expose the impropriety of their choice (*f*). By 54 Geo. 3, c. 91, the appointment "shall be made" on the 25th of March, or within fourteen days next after such day, but it has been held that this is only directory, and therefore an appointment made at a petty sessions held by adjournment after the fourteen days had expired was good (*g*). In determining the appeal, the sessions have a right to exercise the same latitude of discretion in judging who are fit to be nominated, as the two justices had in making the original order.

By the 43 Eliz. c. 2, s. 1, the overseers are to be four, three, or two substantial householders of the parish; and, therefore, to be liable to serve such office, the person nominated must occupy as tenant of his premises, and not as servant, and if he occupy as servant only, his appointment is bad, as it was held on a case stated to the sessions (*h*); and the appointment of one overseer only, though there was but one substantial householder in the parish, was held bad (*i*); but now, if two overseers cannot be conveniently appointed from the inhabitant householders, one may be appointed; and if there is not one capable of being appointed, then an inhabitant householder of an adjoining parish willing to serve, with or without salary, to be paid out of the poor rate, may be appointed, and such appointment shall endure till the usual appointment of overseers, and may be renewed from year to year so long as may be necessary (*k*). The same person may hold jointly the office of churchwarden and overseer (*l*).

They are not bound to assign any reason for their decision; but if they assign reasons on the face of the order which are entirely insufficient in law, it will be quashed on its removal by *certiorari* (*m*).

(*e*) See *Re Blues*, 5 E. & B. 291, 299; 24 L. J., M. C. 138, *ante*, p. 664.
(*f*) *Albrighton* v. *Skipton*, Stra. 301; cited in *R.* v. *Stotfold*, 4 T. R. 601; *R.* v. *Fisher*, 1 Bott, 67; Cald. 137.
(*g*) *Reg.* v. *Sneyd*, 5 Jur. 962.
(*h*) *Reg.* v. *Spurrell*, L. R., 1 Q. B. 172; 35 L. J., M. C. 74.
(*i*) *Reg.* v. *Cousins*, 33 L. J., M. C. 87; 4 B. & S. 849.
(*k*) 29 & 30 Vict. c. 113, s. 11.
(*l*) *Ibid.* sect. 12.
(*m*) *R.* v. *Gayer*, 1 Burr. 245.

Of Appeals against Overseers' Accounts.

The mode of trial is governed by the same rules as prevail in appeals against rates, and the appointment in question is either quashed or confirmed by the judgment. The sessions cannot award costs to either party.

Costs of appeal.

Section 2.

Of Appeals Relating to the Accounts of Parish Officers.

Nothing in the orders of the poor law commissioners or in the Poor Law Amendment Act, 4 & 5 Will. 4, respecting auditing parish accounts (*n*), takes away the ultimate power of two justices in special sessions, under 50 Geo. 3, c. 49, to allow, in the general account submitted to them under that act, items which had been disallowed by the auditor appointed by the guardians of a union (*o*), or to disallow items allowed by him (*p*). However, by 7 & 8 Vict. c. 101, s. 37, in every district for which an auditor may be appointed *under that act* (*viz.*, ss. 32, 36), the powers of justices of peace, and of all other persons, to examine, audit, allow, or disallow accounts shall, as far as relates to any accounts which such auditor is authorized to examine and audit, *cease, and the same* are hereby *repealed* (*q*).

Accounts of parish officers —allowance of them—and appeals against such allowance.

In districts where no auditors are appointed under 7 & 8 Vict. c. 101, ss. 32—36, churchwardens and overseers of the poor must yearly (*r*), within fourteen days after the appointment of their successors, deliver in to the latter a just, true, and perfect account, in writing, fairly entered in a book or books (*s*) to be kept for that purpose, and signed by them under their hands, of all sums of money by them received, or rated and assessed and not received; and also of all goods, stock, and materials that shall be in their hands, or in the hands of any of the poor, in order to be wrought, and of all monies paid by such churchwardens and overseers so *accounting* (*t*), and all other things concerning their said office; and shall also pay and deliver over all sums of money, goods, chattels, and other things as shall be in their hands, unto such succeeding overseers of the poor; which said account shall be verified by oath, or by the affirmation of persons called quakers, before one or more justices of the peace, to be administered by such justice

(*n*) See 1st order P. L. C., A.D. 1836, s. 27; 4 & 5 Will. 4, c. 76, ss. 42, 47; *Reg.* v. *Halifax*, 10 L. J., M. C. 81.

(*o*) *R.* v. *Justices of Staffordshire*, 1 New Sess. C. 123; 13 L. J., M. C. 81.

(*p*) See 4 & 5 Will. 4, c. 76, s. 89; 1st order P. L. C., A.D. 1836, s. 10.

(*q*) See Archbold's Poor Law, 4th ed. 77—91, and 29 & 30 Vict. c. 113, ss. 6, 7.

(*r*) 17 Geo. 2, c. 38, s. 1. See *Reg.* v. *Spackman*, 2 Q. B. 301.

(*s*) As to *mandamus* for inspecting them, see *R.* v. *Guardians of Farringdon*, 9 B. & C. 541; *R.* v. *Clear*, 4 B. & C. 899.

(*t*) *Viz.* Stating each particular separate disbursement, *R.* v. *Justices of Worcestershire*, 3 D. & R. 299.

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or justices, who are to sign and attest the caption of the same at the foot of the said account, without fee or reward; and the said book or books shall be carefully preserved by the churchwardens and overseers, or one of them, in some public or other place in every parish, township, or place; and they shall and are hereby required to permit any person there assessed or liable to be assessed to inspect the same at all seasonable times.

And parish officers refusing or neglecting to make and yield up such account verified as aforesaid within the time before limited, or to pay and deliver over such money, goods, &c. in their hands as before directed, may be committed by any two justices to the common gaol, till he or they shall have given such account, or paid and yielded up such money, &c. (*u*).

Right of appeal.

The act of 43 Eliz. c. 2, s. 6, gave the original right of appeal against parish officers' accounts, which was extended by 17 Geo. 2, c. 38, s. 4, giving an appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise where such parish, township, or place lies (as in the case of a poor-rate), by any person having a material objection to such account or any part thereof, or aggrieved by any neglect, act, or thing done or omitted by the churchwardens and overseers of the poor, or by any justice of peace. There is a similar remedy against the accounts of an *assistant* overseer; unless there is any limitation in his warrant of appointment to prevent his being accountable to the parish (*x*).

No such appeal lies by any but a parishioner or party interested in the matter of the objection; and if it appear in evidence that he is a mere stranger, who is in no way interested in the accounts, the sessions may refuse to hear him (*y*). An overseer, who acts as such alone for one half of a year, keeping a separate account during that time, may appeal against a similar account kept by his colleague, who has acted alone during the other half-year (*z*).

As this last enactment includes, in similar terms, appeals against accounts of parish officers and against poor's rates, the same general rules govern the notice and trial of both. We have only, therefore, to notice a few points peculiar to the appeal against the accounts of parish officers.

The accounts of overseers must be examined and allowed by

(*u*) 17 Geo. 2, c. 38, s. 2. This power remains notwithstanding 50 Geo. 3, c. 49, s. 1, which is merely cumulative, *Lester's case*, 16 East, 374.

(*x*) 17 Geo. 2, c. 38, s. 4; *Reg.* v. *Watts*, 7 A. & E. 461; 3 N. & P. 367. See *Cannell* v. *Curtis*, 2 B., N. C. 228.

(*y*) *R.* v. *Justices of Somersetshire*, 7 B. & C. 681, n., per Lord *Tenterden*, C. J. Being rated only in the last of three rates, in the respondent's year of office, may be sufficient ground of appeal, if the rate complained of is continued, *R.* v. *Gwyer*, 2 A. & E. 216; 4 N. & M. 158.

(*z*) *R.* v. *Justices of Gloucestershire*, 1 B. & Ad. 1.

Of Appeals against Overseers' Accounts.

To what sessions appeal must be made —and herein of notice of appeal, waiver of it, and hearing, &c.

two justices under the statutes, before they become the subjects of appeal (*a*).

The appeal must be to the next *practicable* sessions after allowance of the accounts and publication by deposit with the parish officers for public inspection, and after that fact of depositing *bonâ fide* made known (*b*): for 17 Geo. 2, c. 38, s. 4 repealed 43 Eliz. c. 2, s. 6, as to the time of appealing against overseers' accounts, poor's rates, and appointments made by justices under 17 Geo. 2, c. 38, s. 3, of overseers in lieu of those who die, remove from the parish, or become insolvent during their year of office (*c*); but, like those appeals, it may be respited till the ensuing session, if reasonable notice of appeal be not given (*d*). Where the accounts were delivered to the succeeding parish officers too late to enable them to appeal to the next session, *e. g.* on the first day of that session, it was held that the appeal might be entered and tried at the session next ensuing. And if, in the interval, no proper notice of appeal is given, the session may, notwithstanding, if they see fit, respite the hearing till the next session; and if they do so, the court above will not interfere by *mandamus* (*e*). Again, if the allowance did not take place till the last day for giving notice of appeal for the next session, and was not then known to the appellant, he may enter and try his appeal at the session next ensuing (*f*). The notice of appeal must be in writing, signed by the party giving it, or, as it seems, by his attorney, if expressed to act as such (*g*); and must set out not only the items objected to, but the nature and grounds of the objections which form the particular causes of appeal against them (*h*). But the notice need not state the appellant to be a parishioner or aggrieved, though we have seen that proof at the hearing that he was a stranger, without personal interest in the correctness of the accounts, would defeat the appeal (*i*). If the parish money has not been received or disbursed by churchwardens, but by the overseers alone, and the accounts are made up and passed in their names only, the notice of appeal may be directed to the overseers only, and will be good though the appeal is

(*a*) *R.* v. *Whitear*, 3 Burr. 1365.

(*b*) *R.* v. *Watts*, 7 A. & E. 461, 469 (approving *R.* v. *Thackwell*, 4 B. & C. 62). See *ante*, p. 657, *R.* v. *Justices of Worcestershire*, 5 M. & S. 457; *R.* v. *Justices of Berkshire*, 1 Bott, 308.

(*c*) *R.* v. *Thackwell*, 4 B. & C. 62; *R.* v. *Justices of Worcestershire*, 5 M. & S. 457; *R.* v. *Justices of Dorsetshire*, 15 East, 200.

(*d*) 17 Geo. 2, c. 38, s. 4, enacts, respecting this appeal when lodged at the next sessions, that "if it shall appear to the justices that reasonable notice was not given, they *shall* adjourn the appeal to the next quarter sessions, and then and there finally hear and determine the same."

(*e*) *R.* v. *Thackwell and others*, 4 B. & C. 62.

(*f*) *R.* v. *Justices of Dorsetshire*, 15 East, 200.

(*g*) As to notice of appeal, see *ante*, p. 668.

(*h*) 41 Geo. 3, c. 23, s. 4; *R.* v. *Sheard*, 2 B. & C. 856; *R.* v. *Mayall*, 3 D. & R. 383.

(*i*) *R.* v. *Justices of Somersetshire*, 7 B. & C. 681, n.

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afterwards entered as against the churchwardens as well as the overseers (*k*). But it would be advisable to direct the notice to the parties whose accounts are appealed against, naming them, and adding "now or lately" churchwardens and overseers, according to the fact, and to deliver or leave it at the places of abode of all or any two of them (*l*).

The sessions, "with consent" of the overseers, signified by them or their attorney in *open court*, may hear the appeal, though no notice has been given, and may decide on grounds of appeal not stated in the notice (*m*). But a written consent to admit certain facts, in order to waive objection to a notice bad on the face of it, will not give the sessions jurisdiction to try the appeal, unless signed in open court by the respondent's attorney (*n*). A balance sheet is not a sufficient "account" within 17 Geo. 2, c. 38, s. 1, for it will not show what sums have been rated and not received (*o*).

At the hearing, after proof or admission of service of notice, the respondents usually begin.

What sums should be allowed and disallowed to parish officers in their accounts.

Overseers may take credit in their accounts for payments which they are called on by act of parliament, or by legal process, or order, to make: *e. g.*—for payments in relief of the poor under 43 Eliz. c. 2, s. 1; 22 Geo. 3, c. 83, s. 8; 41 Geo. 3, c. 9, s. 2,—for payments made for the proportion of the county rate payable by their parish (*p*)—for salary of an assistant overseer (*q*)—for sums expended by constables on behalf of the parish, and legally repaid them (*r*), including fees paid by such constables to a justice's clerk for warrants to apprehend vagrants in a parish, though the constable was one of the rural police force (*s*)—for premiums paid with parish boys when apprenticed to the sea service (*t*)—for providing work for children of indigent parents, and for persons having no means of livelihood (*u*)—for burying the bodies of poor persons who die in the parish (*x*)—for expenses of making out, preparing, printing, and collecting the jury lists (*y*)—for expenses of perambulating the parish once in every three years, and of setting up and keeping in repair the boundary stones of the parish (*y*)—

(*k*) *R.* v. *Justices of Norfolk*, 2 B. & Ad. 944.
(*l*) *Ibid.*; 17 Geo. 2, c. 38, s. 4; 41 Geo. 3, c. 23, s. 4.
(*m*) 41 Geo. 3, c. 23, s. 5.
(*n*) *R.* v. *Justices of Somersetshire*, 2 B. & C. 856; 4 D. & R. 480.
(*o*) See *R.* v. *Justices of Worcestershire*, 3 D. & R. 299.
(*p*) *Viz.* under 12 Geo. 2, c. 29, s. 2.
(*q*) 59 Geo. 3, c. 12, s. 7. This charge had been disallowed before this act, though sanctioned by a vestry, *R.* v. *Welsh*, 1 Bott, 231; 4 Doug. 236; and see *R.* v. *Gwyer*, 2 A. & E. 216; 4 N. & M. 158.
(*r*) 18 Geo. 3, c. 19, ss. 3, 4. See *R.* v. *Bird*, 2 B. & A. 522.
(*s*) *Reg.* v. *Churchwardens of Chelmsford*, 12 L. J., M. C. 139; 5 Q. B. 66.
(*t*) 2 & 3 Ann. c. 6, s. 2.
(*u*) 43 Eliz. c. 2, s. 1.
(*x*) 7 & 8 Vict. c. 101, s. 31.
(*y*) *Ibid.* sect. 60.

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for expenses incurred in carrying into effect the act for registration of voters and certified by the revising barrister (*z*)—for money retained from the poor's rate to reimburse themselves sums advanced by them within the year for relief of the poor while there was no rate (*a*), or during an appeal brought to quash the whole rate (*b*)—for monies paid to a next preceding overseer to recompense him advances made in like manner, or in respect of rates in arrear to him at the expiration of his office (*c*)—for their own bare expenses (*d*); and, as it seems, for expenses of litigating settlements (*e*), and for such other monies as have been expended by order, or with concurrence of the vestry (*f*) in the business and for the benefit of the parish, in matters which are not part of the personal duty of overseers, as such (*g*). Certain expenses, which may be allowed by the poor law guardians of unions, may form a test of judgment by analogy in unusual cases (*h*).

On the other hand, overseers cannot take credit in their accounts for expenses incurred, not in doing the business of the parish, but voluntarily (*i*), or for payments, charges, or allowances, charged on the rates contrary to the Poor Law Amendment Act, 4 & 5 Will. 4, c. 76, or at variance with any rule of the poor law commissioners (*k*)—or for money paid to poor of a parish not registered in its books as entitled to receive collection (*l*)—or for a salary allowed to one of the overseers

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(*z*) 6 Vict. c. 18, s. 57.

(*a*) *R.* v. *Goodcheap*, 6 T. R. 159.

(*b*) 41 Geo. 3, c. 23, s. 9. See per *Holt*, C. J., *Tawney's case*, Salk. 531; *R.* v. *Rotherhithe*, 8 Mod. 338; 3 M. & S. 323.

(*c*) 17 Geo. 2, c. 38, s. 11.

(*d*) Per *Aston*, J., in *R.* v. *Ashburnham*, reported in 2 Nolan, P. L. 443, 462, 466, n. Expense of eating and drinking with companions at an inn; of rent for a man not a pauper; of sums for reimbursing former overseers; a sum borrowed by them on their rates in former years, are clearly inadmissible.

(*e*) See per *Ashurst*, J., *R.* v. *Justices of Essex*, 4 T. R. 595. See *ante*, p. 669, and 4 Vin. 530, MS. The instructions of the poor law commissioners to overseers respecting allowance of their accounts, afford much information on the subject. They bear date, 1 March, 1836, and are printed in 3 Archbold's Justice of Peace (the volume on Poor Law), 4th ed. p. 80.

(*f*) See on this principle, *Reg.* v. *Town Council of Lichfield*, 4 Q. B. 893.

(*g*) Such, perhaps, as valuing the property of the parish for a new rate, *R.* v. *Micklefield*, 1 Bott, 113; per *Taunton*, J., in *R.* v. *Gwyer and another*, 2 A. & E. 216 (cited 2 Q. B. 312); 2 Nol. 67, n. (3). However, a "vestry cannot bind a parish to an extent unauthorized by the legislature," *R.* v. *Johnson*, 5 A. & E. 342. See 1 A. & E. 836; 2 A. & E. 216, and *Reg.* v. *Fouch*, 2 Q. B. 308.

(*h*) See 7 & 8 Vict. c. 101, s. 59.

(*i*) See the expressions of the court in *Reg.* v. *Chelmsford* (*Inh.*), 12 L. J., M. C. 139; 5 Q. B. 66.

(*k*) 4 & 5 Will. 4, c. 76, s. 89. See for this order Burn's J., tit. *Poor*, 30th ed. p. 1104 *et seq.*

(*l*) 9 Geo. 1, c. 7, s. 2.

Grounds of Objection to Items in the Accounts.

themselves (*m*)—or for poundage paid to a collector of rates, employed by them in a very extensive parish, pursuant to a direction of vestry to the overseers to call in assistance (*n*)—or for expenses of defending an appeal against the allowance of their account (*o*)—or for expenses of defending an appeal against a rate heard at special sessions (*p*)—or for payments made to induce a man to marry a pregnant woman (*q*)—or for expenses of a prosecution for assaulting a constable in execution of his duty as cast on him by the overseers (*r*).

Objections to overseers' accounts must, in general, be confined to matters apparent on the face of them (*s*); and the previous order of vestry to incur the expense, followed up by its allowance by the auditor of the poor law union, will not weigh with the court if the item is not proper (*t*).

No justice, rated as occupier or inhabitant in the parish or township, can vote in determining the appeal (*u*), or even on the question whether a case shall be granted for the opinion of the court above (*v*).

Judgment, costs, &c.

If, on the hearing, the respondents do not sustain the propriety of each item to the satisfaction of the court, the judgment is, that particular items be disallowed or diminished, and that the balance becoming due thereupon from the respondents be paid over to their successors in office, the then overseers. Their judgment may also proceed to award reasonable costs to the successful party, in the same manner that they are empowered to do in settlement appeals (*w*). Even after allowing the accounts and dismissing the appeal, if they do not give costs to the respondent overseers, the vestry, though they may have authorized the expenditure, cannot indemnify the overseers and charge the parish with the payment (*x*). If the sessions disallow items, but omit to order the balance which remains due to be paid over, two justices out of sessions have power to order its payment under 43 Eliz. c. 2, s. 4, and

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(*m*) *R.* v. *Glyde*, 2 M. & S. 323.
(*n*) *R.* v. *Gwyer*, 2 A. & E. 216; 4 N. & M. 158.
(*o*) *R.* v. *Johnson*, 5 A. & E. 340.
(*p*) *Reg.* v. *Great Western Ry. Co.*, 13 Q. B. 327; 18 L. J., M. C. 143; *Reg.* v. *Fouch*, 2 Q. B. 30.
(*q*) See 4 Burn, 30th ed., p. 1107.
(*r*) *R.* v. *Bird*, 2 B. & A. 522, *ante*; and see *R.* v. *Fowler*, 1 A. & E. 836; *R.* v. *Seville*, 5 B. & A. 180.
(*s*) *R.* v. *James*, 2 M. & S. 321; 5 A. & E. 342. It seems that if it appears on overseers' accounts that a rate had been voted to meet disbursements previously made within the same year of office, that retrospective application would be matter of appeal against the *accounts*, though the *rate* was regular on the face of it. See *R.* v. *Sillifant*, 4 A. & E. 354, a church-rate case, cited 9 A. & E. 872.
(*t*) See *R.* v. *Gwyer*, 2 A. & E. 216; *Reg* v. *Fouch*, 2 Q. B. 30; also 4 A. & E. 354; and per *Patteson*, J., in *R.* v. *Johnson*, 5 A. & E. 343.
(*u*) 16 Geo. 2, c. 18, s. 3.
(*v*) *R.* v. *Gudridge*, 5 B. & C. 459.
(*w*) 17 Geo. 2, c. 38, s. 4.
(*x*) *R.* v. *Johnson*, 5 A. & E. 343, per *Littledale* and *Patteson*, JJ.

17 Geo. 2, c. 38, s. 3, as if there had been no appeal; and if they refuse to do so, will be compelled by *mandamus* (*y*).

Appeal against Overseers' Accounts.

By 50 Geo. 3, c. 49, s. 1, power was conferred on justices in special sessions to strike out and altogether disallow, or reduce, as they see fit, items charged in an overseer's account; a power which they had not previously enjoyed. In all cases where any such account is required to be made and yielded, and to be signed and attested as aforesaid, by virtue of 17 Geo. 2, c. 38, every such account is to be submitted by the churchwardens and overseers to two or more justices of the peace of the county, dwelling in or near the parish or place to which such account shall relate, at a *special sessions* for that purpose to be holden within the fourteen days appointed by 17 Geo. 2, for delivering in such account, and the justices shall, and they are hereby authorized and empowered, *if they shall so think fit* (*z*), to examine into the matter of every such account, and to administer an oath or affirmation to such churchwardens and overseers of the truth of such account, and to disallow and strike out of every such account all such charges and payments as they shall deem to be unfounded, and to reduce such as they shall deem to be exorbitant, specifying upon or at the foot of such account every such charge or payment, and its amount, so far as such justice shall disallow or reduce the same, and the cause for which the same was disallowed or reduced; and it shall be lawful for such two or more justices, and they are hereby required to signify their *allowance* and approbation of any such account under their hands, and to sign and attest the caption of the same at the foot of such account, in manner directed by 17 Geo. 2.

Appeal against disallowance of overseers' accounts.

By 50 Geo. 3, c. 49, s. 1, the special sessions may grant warrant to parish officers to levy a balance due from their predecessors by distress; and after granting it, they have no right to suspend its execution on account of a doubt whether the balance had been correctly ascertained (*a*).

By 50 Geo. 3, c. 49, an appeal is given as follows (*b*):—"If any such churchwardens and overseers, or any of them, shall feel themselves, himself, or herself aggrieved by the disallowance or reduction of any such charges or payments, and be desirous of appealing against any order in that respect, made by any such two or more justices of the peace, it shall and may be lawful for him, her, or them to *enter an appeal* against such order at the next general or quarter

(*y*) *R.* v. *Carter*, 4 T. R. 246.

(*z*) These words are held *imperative* on the justices to examine, and, if necessary, disallow or reduce the accounts, when any part of them is objected to by any rated inhabitant at the special sessions; and if, after such objection, they sign and allow them without examination, a *mandamus* lies to compel it. *Reg.* v. *Justices of Cambridgeshire* (*In re Fordham Parish*), 8 Dowl. P. C. 89.

(*a*) *Barons* v. *Luscombe*, 3 A. & E. 589.

(*b*) Sect. 2.

Appeal to Churchwardens or Overseers.

sessions (*c*) to be holden *next after the tenth day from* the making of such order, he, she, or they having first paid or delivered over to the succeeding churchwardens and overseers such sum and sums of money, goods and chattels, and other things, as, on the face of the account which shall have been submitted by him, her, or them to such two or more justices in manner aforesaid, shall appear and be admitted to be due and owing from him, her or them, or remaining in his, her or their hands, and having also entered into a *recognizance,* before one or more such justice or justices before whom such recognizance shall be acknowledged, in not less than double the sum or value in dispute, to enter such appeal at such next general or quarter sessions, and abide by such order as shall at that or any subsequent sessions be made on such appeal; and it shall and may be lawful for the justices of the peace assembled at such general or quarter sessions, on proof of the matter aforesaid, and on the production of such recognizance, and proof of the same having been duly entered into, to adjourn such appeal if they shall see occasion, or to hear the same, and to examine into and confirm or reverse such disallowance or reduction, in the whole or in part, as to such justices at such sessions shall seem just."

Requisites before entering appeal.

The balance of money, with such goods, &c. as, on the face of the account as originally submitted to the justices, appear and are admitted to be due from him, or to remain in hand, must be delivered over to the succeeding parish officers, and a recognizance must be given in double the sum in dispute, conditioned to enter the appeal at the next sessions, and to abide by such order as shall then or at any subsequent session be made on such appeal. But no notice of appeal is requisite, as the entering into recognizance is deemed sufficient notice (*d*). The best course is to enter into the recognizance before the same justices who disallowed the items, that they may have fair intimation of the party's intention to appeal against their decision, which appears to constitute them respondents. This practice is the more to be recommended, as the sessions have a general power to adjourn the hearing of the appeal, if they think that justice will not be done from the want of knowledge by the respondents that the recognizance had been given. A fair practitioner will also give due notice of appeal to the justices, and also to the existing parish officers (who are interested on behalf of their parish), either that the appeal will be entered and tried at a session named, or that it will be entered and an

(*c*) *R.* v. *Justices of London,* 15 East, 632.

(*d*) *R.* v. *Justices of Kent,* 6 M. & S. 258; and *R.* v. *Justices of Essex,* 4 B. & A. 276; and see *Re Blues,* per Lord *Campbell,* 5 E. & B. 291, 299; 24 L. J., M. C. 138, *ante,* p. 664. In neither of these cases did the statutes on which they proceed require the recognizance to be entered into before any particular justices, or the justices whose act was appealed against.

Judgment on Appeal against Overseers' Accounts.

application made to respite it. The appellant should also call on the justices who take the recognizance, to forward it to the clerk of the peace, that it may be ready to be produced at the hearing of the appeal.

Hearing and judgment.

If at the hearing the recognizance is disputed, it should be produced by the clerk of the peace. No notice of appeal need be proved. The respondents should begin by showing the reasons for disallowing the items. The judgment may be either to confirm or reverse the disallowance or reduction; and the costs incurred by parish officers on any such appeal may be given to them, payable out of the poor rates of the parish (*e*). The *certiorari* is taken away as to "orders or proceedings" of general or quarter sessions, or justices, made or had under 50 Geo. 3, c. 49 (*f*). If the sessions reserve a special case, it is not too late when it is called on for argument, to object that the order of sessions has been improperly removed, the *certiorari* having been taken away (*g*).

(*e*) 50 Geo. 3, c. 49, s. 2.

(*f*) *Ibid.* sect. 5. See *R.* v. *Bird*, 2 B. & Ald. 522. This rule was disregarded in *Reg.* v. *Fouch*, 2 Q. B. 308.

(*g*) See 2 B. & Ald. 524; also 11 A. & E. 80; Burr. S. C. 112; 2 Nolan, 601, 4th ed.

CHAPTER VIII.

APPEALS UNDER INTOXICATING LIQUORS LICENSING ACTS.

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Section 1.

OF THE LICENSING SESSIONS—GENERAL AND SPECIAL—AND HEREIN OF TRANSFERS OF LICENCES AT PETTY SESSIONS.

It must be borne in mind that as there is now no appeal against the refusal to grant new licences, the law regarding the proceedings touching that matter is passed by as being beyond the scope of this work.

The general annual licensing meeting.

By the 9 Geo. 4, c. 61, s. 1, the time and place of holding the general annual licensing meeting is prescribed in the following terms:—"In every division of every county and riding, and of every division of the county of Lincoln, and in every hundred of every county not being within any such division, and in every liberty, division of every liberty, county of a city, county of a town, city and town corporate (the words town corporate and the words county or place, in the construction of this act, include every borough in England having a separate commission of the peace, although it may not have a separate court of quarter sessions) (*a*), in that part of the United Kingdom called England, there shall be annually holden a special sessions of the justices of the peace (to be called the general annual licensing meeting), for the purpose of granting licences to persons keeping or being about to keep inns, alehouses, and victualling houses, to sell exciseable liquors by retail to be drunk or consumed on the premises therein specified; and that such meetings shall be holden in the counties of Middlesex and Surrey within the first ten days of the month of March, and in every other

(*a*) 24 & 25 Vict. c. 75, s. 4.

Renewal of Licences.

Of the general annual licensing meeting.

county on some day between the twentieth day of August and the fourteenth day of September inclusive: and that it shall be lawful for the justices acting in and for such county or place assembled at such meeting or at any adjournment thereof, and not as hereinafter disqualified from acting, to grant licences for the purposes aforesaid to such persons as they the said justices shall in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper." It is not a proper exercise of their discretion for the justices, by a general resolution, to refuse to grant or renew licences because the applicants refuse to bind themselves to accept a condition imposed by the justices, *e.g.*, one requiring them to take out an excise licence for the sale of spirits in addition to the beer licence (*b*); but they may refuse to grant fresh licences for the sale of beer on the premises, on the ground that there are already a sufficient number of licensed houses for the requirement of the district (*c*), and the same discretion seems to exist as to the renewal of licences for alehouses, or for beerhouses first licensed since 1st May, 1869 (*d*).

Adjournment of general annual meeting.

A power of adjourning such general annual licensing meeting is given by sect. 3, as follows:—"It shall be lawful for the justices acting at the general annual licensing meeting, and they are hereby required, to continue such meeting by adjournment to such day or days, and to such place or places within the division or place for which such meeting shall be holden as such justices may deem most convenient and sufficient for enabling persons keeping inns within such division or place to apply for such licence; provided, nevertheless, that the adjourned meeting to be holden next after such general annual licensing meeting shall not be so holden in or upon any of the five days next ensuing that on which such general annual licensing meeting shall have been holden as aforesaid; and that every adjournment of the said general annual licensing meeting shall be holden within the month of March, in the counties of Middlesex and Surrey, and of August and September in every other county."

Applications for renewals of licences.

Further facilities for licensed persons applying for the renewal of their licences are provided by the 42nd section of the 35 & 36 Vict. c. 94, which enacts, that "where a licensed person applies for the renewal of his licence, the following provisions shall have effect:—

(1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend:

(2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence

(*b*) *Reg.* v. *Sylvester*, 2 B. & S. 322; 31 L. J., M. C. 93.
(*c*) *Reg.* v. *Justices of Lancashire*, 40 L. J., M. C. 16; L. R., 6 Q. B. 97.
(*d*) *Ibid.*

Of Intoxicating Liquors Licensing.

has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: provided, that the licensing justices may, notwithstanding that no notice has been given on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day when the case will be heard and the objection considered, as if the notice hereinbefore described had been given:

(3.) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath:"

Subject as aforesaid, licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore.

Requisition to attend personally at renewal of licences.

And by 37 & 38 Vict. c. 49, s. 26, such requisition by the licensing justices to attend shall not be made save for some special cause personal to the licensed person to whom such requisition is sent; but it shall not be necessary to serve copies of notices of an adjournment of a general annual licensing meeting on holders of licences, or applicants for licences, who are not required to attend at such adjourned annual general licensing meeting; and a notice of intention to oppose the renewal of a licence served under sect. 42 of 35 & 36 Vict. c. 94, shall not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed.

A licence taken out in the name of a dead man is a nullity and invalid (*e*).

A licence, what.

"Licence," in the 35 & 36 Vict. c. 94, s. 74, means a licence for the sale of intoxicating liquors, granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828, including a certificate of justices granted under the Wine and Beerhouse Acts, and including a licence for the sale of sweets, which is hereby authorized to be granted in the same manner as if sweets were wine, and including a licence for the retail of spirits granted to a wholesale spirit dealer by the justices in pursuance of this act.

A new licence, what.

A "new licence" in the 35 & 36 Vict. c. 94, means a licence granted at a general annual licensing meeting, in respect to premises not theretofore licensed for the sale of intoxicating liquors.

Renewal of a licence, what.

The "renewal of a licence" means "a licence granted at a general annual licensing meeting by way of renewal," that is to say, the renewal of a licence in force during the previous year (*f*).

Transfer of a licence, what.

The "transfer of a licence" means a transfer made in special sessions under 9 Geo. 4, c. 61, s. 4.

A "new licence," under 37 & 38 Vict. c. 49, means a licence for the sale of any intoxicating liquor, granted at a general annual licensing meeting in respect of premises, in respect of

(*e*) *Cowles* v. *Gale*, 41 L. J., Ch. 14.
(*f*) *Ex parte Tarbeth*, 31 L. T., N. S. 513.

which a similar licence has not theretofore been granted to certain persons and premises disqualified.

As to the Renewal or Transfer of Licences.

By 35 & 36 Vict. c. 94, s. 44, no licence shall be granted under the Intoxicating Liquor Licensing Acts to any person or in respect of any premises declared by or in pursuance of any of the Intoxicating Liquor Licensing Acts, or in this act, to be disqualified persons or disqualified premises during the continuance of such disqualification. Any licence held by any person so disqualified or attached to premises so disqualified shall be void.

Special licensing sessions.

To facilitate the transfer of licences at any period of the year, the 4th section thus directs the appointment of special sessions auxiliary to the general meeting:—"The justices assembled at the general or quarter session, which shall be holden at Michaelmas next after the passing of this act, and at the general annual licensing meeting in every subsequent year, shall appoint *not less than four nor more than eight special sessions*, to be holden in the division or place for which each such meeting shall be holden, in the year next ensuing such general annual licensing meeting, at periods as near as may be equally distant; at which special session it shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to licence such persons intending to keep inns theretofore kept by other persons, being about to remove from such inns, as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed to sell exciseable liquors by retail to be drunk or consumed on the premises."

County justices empowered to act in corporate jurisdictions, where there are not two qualified justices (*g*).

The 7th section thus empowers the county justices to attend and act at the annual licensing meeting when holden for a corporate or inferior jurisdiction when there are not two justices present legally competent to act:—"Whenever at any of the meetings to be holden as aforesaid, for any liberty, county of a city, county of a town, city or town corporate, there shall not be present at least two justices acting in and for any such liberty, county of a city, county of a town, city or town corporate, who are not disqualified, it shall be lawful for the justices acting in and for the county or counties adjoining to such liberty, county of a city, county of a town, city or town corporate, and not disqualified from acting, to act within such

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(*g*) Since 5 & 6 Will. 4, c. 76, s. 111, this clause remains in force only as to boroughs not having a grant of a separate court of quarter sessions of the peace under that act; for, by the same section, no part of any borough in and for which a separate court of quarter sessions of the peace shall be holden, shall be within the jurisdiction of the justices of any county from which such borough *before the passing of this act was exempt*, any law, statute, letters patent, charter, grant or custom to the contrary notwithstanding.

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liberty or place, and with the justice or justices thereof, not as hereinbefore disqualified, who shall be present at any such meeting as aforesaid, for the purpose of granting or transferring licences under or of hearing complaints as to offences against this act, any law, custom or usage to the contrary notwithstanding."

County justices to have no jurisdiction in a borough for licensing purposes.

By the 35 & 36 Vict. c. 94, s. 38, it is enacted, "from and after the passing of this act the justices of a county shall not for licensing purposes, save in so far as respects the power of appointing members of a joint committee, have any jurisdiction in a borough in which the borough justices have for such purposes concurrent jurisdiction."

Cinque ports exempted.

By sect. 8, the cinque ports are exempted from this last provision (*h*).

Questions to be decided by majority present.

By sect. 9, the mode of deciding on licences is thus ascertained :—"When (at any of the meetings aforesaid) any question touching the granting, withholding or transferring any licence, or the fitness of the person applying for such licence, or of the house intended to be kept by such person, shall arise, such question shall be determined by the majority of justices not disqualified, who shall be present when such question shall arise ; and every licence granted under the authority of this act shall be signed by the majority of the justices, not disqualified, who shall be present when such licence shall be granted." This section throws light upon the extent of the discretion to be exercised under the 1st section, *ante*, p. 998 (*i*).

Notices of application for a transfer of a licence.

By the 35 & 36 Vict. c. 94, s. 40, every person intending to apply for a new licence or to apply for the transfer of a licence, shall publish notice of such application as follows : that is to say, (1) in the case of a new licence, &c. (this provision is omitted here); (2) in the case of a transfer of a licence he shall, fourteen days prior to one of the special sessions appointed by the justices for granting transfers of such licences, serve a notice of his intention to transfer the same upon one of the overseers of the parish, township or place, in which the premises, in respect of which his application is to be made, are situate, and on the superintendent of the district. This notice shall be signed by the applicant, or by his authorized agent, and shall set forth the name of the person to whom it is intended the licence shall be transferred, together with the place of his residence and his trade or calling during the six months preceding the time of serving such notice.

Grant of interim licences [deemed a transfer of licences within 35 & 36 Vict. c. 94, sched.].

The 14th section provides for the granting fresh licences in the middle of the year, under certain precautions, in cases where there is a compulsory change of tenancy ; it enacts that, "If any person, duly licensed under this act, shall (before the expiration of such licence) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall

(*h*) See 6 & 7 Will. 4, c. 105, s. 11; 5 & 6 Will. 4, c. 76, ss. 134, 135.
(*i*) *Reg.* v. *Justices of Lancashire*, 40 L. J., M. C. 16; L. R., 6 Q. B. 97.

Grant of Licences at Special Sessions.

become bankrupt, or shall take the benefit of any act for the relief of insolvent debtors: or if any person so licensed, or the heirs, executors, administrators or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house; or if any house, being kept as an inn by any person duly licensed as aforesaid, shall be, or be about to be, pulled down or occupied under the provisions of any act for the improvement of the highways, or for any other public purpose; or shall be, by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers and for the other legal purposes of an inn: it shall be lawful for the justices assembled as aforesaid at a special session, holden under the authority of this act, for the division or place in which the house so kept or having been kept, shall be situate, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt or insolvent, or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators or assigns shall, by sale or otherwise, have *bonâ fide* conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a licence to sell exciseable liquors by retail, to be drunk or consumed in such house, or the premises thereunto belonging; or to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers, or for the other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail, to be drunk or consumed therein: provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April or the 10th day of October then next ensuing, as the case may be: provided also, that every person intending to apply, in any of the above-mentioned cases, at any such special session for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house or premises thereunto belonging, in which exciseable liquors shall not have been sold by retail, to be drunk or consumed on the premises, by virtue of a licence granted at the annual licensing meeting next before such special session, shall, on some one Sunday within the six weeks next before such special session, at some time between the hours of ten in the forenoon and four in the afternoon, fix or cause to be affixed on the door of such house, and on the

Interim licences, when granted.

To whom granted.

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door of the church or chapel of the parish or place in which such house shall be situate, and where there shall be no church or chapel, on some other public and conspicuous place within such parish or place, such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house not theretofore kept as an inn, and shall in like manner serve copies of the said notice on one of the overseers of the poor, and on one of the constables or other peace officers of such parish or place."

Notices on application for interim licences.

Upon this section it appears that on the contingency of the removal or yielding up the possession of the house by the licensed person, the removal and yielding up must be during the currency of the licence (*j*), and is in the discretion of the justices in special sessions to grant or refuse the interim licence (*k*); and after an application for the renewal of a licence for the house made on behalf of the new tenant at the general annual licensing meeting held during the currency of the licence, and refusal without appeal, it is not competent for the new tenant to apply at a subsequent special sessions after the licence has expired for an interim licence for the ensuing year (*l*); but an application by the old tenant on his own behalf, and refusal to him without appeal, does not bind the new tenant, who may apply at a subsequent special sessions (*m*).

Sheriffs' officers may not have licences.

By 9 Geo. 4, c. 61, s. 16, sheriffs' officers and all officers executing process of any court are disabled from receiving or using any licence under the grant, and the grant or transfer to them of any licence is made absolutely void.

No excise licence to be granted for retailing liquor to be drunk on premises not licensed by magistrates.

By 9 Geo. 4, c. 61, s. 17, no excise licence for retailing exciseable liquors is to be granted *for consuming liquor on the premises*, unless the magistrates' licence be previously obtained; and if such excise licence be granted it is a mere nullity.

An additional retail licence to sell beer for consumption off the premises may be granted at any special sessions for licensing purposes to the holder of a strong beer dealer's wholesale excise licence in the same manner and subject to the same conditions in and subject to which it might be granted at any general annual licensing meeting (*n*).

For the purpose of facilitating the transfer of licences at any time of the year before the expiration of licence, justices in petty sessions are empowered to indorse licences, so as to give authority to the transferees till the ensuing special session appointed under the act.

(*j*) *Reg.* v. *Justices of Birmingham*, 41 L. J., M. C. 102; L. R., 7 Q. B. 482; sub nom. *Simpkin* v. *Justices of Birmingham*.

(*k*) *Reg.* v. *Rowell*, 41 L. J., M. C. 175; L. R., 7 Q. B. 490.

(*l*) *Reg.* v. *Taylor*, L. R., 7 Q. B. 487; 42 L. J., M. C. 13.

(*m*) *Reg.* v. *Justices of Middlesex*, 40 L. J., M. C. 184; L. R., 6 Q. B. 781.

(*n*) 37 & 38 Vict. c. 31.

Grant or Transfer of Licences at Petty Sessions.

By the 5 & 6 Vict. c. 44, s. 1, "at any petty session of justices of the peace holden in and for the division of every county and riding and in any hundred of every county not being within such division, and every liberty, city, town or place within which any inn, alehouse or victualling-house shall be situated, and for which the said justices shall be acting at any time when no special session shall be holden for any such division, hundred, liberty, city, town or place, it shall be lawful in those cases where justices of the peace assembled at a special session are empowered by an act passed in the ninth year of Geo. 4, intituled, 'An Act to regulate the granting of Licences to Keepers of Inns, Alehouses and Victualling-houses in England,' to transfer or grant licences before the expiration thereof to sell exciseable liquors by retail in the same house or premises in respect of which any person has been theretofore duly licensed, for the majority of the justices then present, upon application made to them at any such petty session, by indorsement under their hands and seals, on any licence which shall have been granted pursuant to the provisions of the said act at any general licensing meeting, or at any adjournment thereof, to authorize (if they shall deem proper so to do, after examining upon oath all necessary parties) any person not disqualified by the said act to whom it shall be proposed at the time of such application to transfer or grant any such licence, to use, exercise and carry on the business of a licensed victualler at the same house and on the same premises, and there to sell such exciseable liquors as might theretofore have been lawfully sold and retailed therein: and thereupon it shall be lawful for the officer of excise empowered to transfer licences by indorsement on the excise licences required to be transferred, to give the like authority to the persons so authorized by the magistrate or justices; and the authority so granted shall continue and be in force until the then next ensuing special session which shall be holden for the division, hundred, liberty, city, town or place within which such house or premises shall be situated, and no longer; at which special session then and there assembled, upon application made to them pursuant to the said act touching any transfer or grant of licence to the party or parties to whom such authority shall have been so given at petty sessions as aforesaid, shall hear and dispose of such application according to the provisions of the said act: provided always, that nothing herein contained shall be construed to empower any justices at petty sessions to give any such authority as aforesaid within any of the divisions assigned or to be assigned to any of the police courts already established or to be established within the metropolitan police district, except in the borough of Southwark; but that any such application as is hereinbefore directed to be made at petty sessions shall, when the house and premises in respect whereof any licence shall have been obtained under the said act shall be situated within any of the said police court

Transfer or grant of licences at petty sessions.

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divisions, and not in the borough of Southwark, be made to one of the police magistrates sitting at any of the said courts, and such magistrate shall in his discretion grant such authority in the manner and for the time herein mentioned: provided also, that any person who shall be authorized under the provisions of this act to continue to carry on the business of a licensed victualler shall after the obtaining such authority and so long as the same shall continue in force be subject to all the powers, regulations, proceedings, penalties and provisions declared by or contained in any act or acts in force touching the regulation, government or control of licensed keepers of inns, alehouses and victualling-houses, in like manner as if the same had been repealed and re-enacted, and that all penalties and forfeitures imposed by any such act or acts shall be applied as directed by the same respectively."

And by sect. 4, justices who are disqualified from acting at the general annual licensing meeting at the special sessions, held under 9 Geo. 4, c. 61, are disqualified from acting at the above petty session, and subject to the same penalties for so doing.

When licences are lost, mislaid, or wilfully withheld by the holder a copy may be indorsed, and such indorsement shall be valid and effectual.

Where licence has been lost or mislaid, or wilfully withheld.

By the 5 & 6 Vict. c. 44, s. 2, "whenever it shall be proved to the satisfaction of any such magistrate, *i. e.*, a metropolitan police magistrate, or justices at petty sessions, *i. e.*, petty sessions sitting under the 1st section, upon any application made as aforesaid, that any licence granted pursuant to the said act passed in 9 Geo. 4, has been lost or mislaid, it shall and may be lawful for the said magistrate or justices to receive a copy of such licence, certified to be a true copy under the hand of the clerk to the licensing justices by whom the said licence shall have been granted, and to make such indorsement thereon as he or they might make under the provisions of this act upon the original licence; and such indorsement upon the copy so certified shall be as valid and effectual as if the same had been made upon the said licence."

And by the 35 & 36 Vict. c. 94, s. 41, the above section is to "be construed as if after the words 'lost or mislaid' there were inserted the words 'or if the application is for the grant of a licence which has been wilfully withheld by the holder thereof.'"

(1) *Of Certificates of Justices.*

By the Wine and Beerhouse Act, 1869 (*o*), sect. 4, from and after the 15th July, 1869, no licence or renewal of a licence for the sale by retail of beer, cider or wine, or any of such articles

(*o*) 32 & 33 Vict. c. 27.

under the provisions of any of the said recited acts, shall (save as in this act otherwise provided) be granted except upon the production and in pursuance of the authority of a certificate granted under this act. *Grant of Justices' Certificates.*

Any licence granted or renewed in contravention of this enactment shall be void. Certificates of justices.

By 32 & 33 Vict. c. 27, s. 5, certificates under this act shall be granted by the justices assembled at the general annual licensing meeting, held in pursuance of an act of the session of 9 Geo. 4, c. 61, intituled "An Act to regulate the granting of Licences to Keepers of Inns, Alehouses and Victualling-houses in England," or at some adjournment of such meeting held in pursuance of the said last-mentioned act. Granting of certificate.

By 33 & 34 Vict. c. 29, s. 4, par. 2, where a certificate is now required to be signed by a majority of justices, it shall be sufficient if, instead of such signature, the concurrence of such majority be signified by means of an impression from an official seal or stamp, in such form as the justices may direct, affixed in the presence of the justices in sessions assembled, and verified in the case of each certificate by the signature of their clerk. Manner of granting.

Any seal purporting to be so affixed and verified shall be received in evidence without further proof; and if any unauthorized person imitate or affix an impression of a certificate, or knowingly use a certificate or imitation of a certificate falsely purporting to be sealed in pursuance of this section, he shall be guilty of forgery. Of evidence. Forging certificate.

By 33 & 34 Vict. c. 29, s. 4, par. 5, the proviso of the 5th section of 32 & 33 Vict. c. 27, and the 9th section of the same act, shall be repealed, and, subject to the provisions of this section, all the provisions of the act of the 9 Geo. 4, c. 61, and acts amending the same, relating to the *time* for which justices' licences are to be in force, and relating to the *fees* payable for such licences, and relating to the *transfer*, *removal* and *transmission* of such licences, and the *grant* of licences upon assignment, death, change of occupancy, or other contingency, and relating to copies of such licences, and relating to grants or transfers of such licences without the attendance of an applicant who is hindered by sickness, infirmity or other reasonable cause, shall have effect with regard to certificates granted, or to be granted, under the 32 & 33 Vict. c. 27, and this act. The 9 Geo. 4, c. 61, and other acts applied to these certificates.

It shall be in the discretion of the justices to whom an application for a transfer is made, *i. e.*, of a wine and beer licence under the act of 32 & 33 Vict. c. 27, either to allow or refuse the application, or to adjourn the consideration thereof (*p*). Transfer.

By 32 & 33 Vict. c. 27, s. 7, every person intending to apply Notice of application.

(*p*) 33 & 34 Vict. c. 29, s. 4, par. 4.

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to the justices for a certificate under this act, shall give notice in writing of his intention, as prescribed by that act; but where application is made to the justices for the grant of a certificate under this act, by way of renewal only, notice in pursuance of this section shall not be requisite.

No notice necessary on renewal.

Adjournment of applications for grants or renewals of certificates.

By 33 & 34 Vict. c. 29, s. 11, where any applicant for the grant or renewal of a certificate has, through inadvertence or misadventure, failed to comply with any of the preliminary requirements of the principal act, *i. e.*, 32 & 33 Vict. c. 27, or this act, or any act incorporated therewith, the justices may, if they shall so think fit, and upon such terms as they think proper, postpone the consideration of the application to an adjourned meeting; and if at such adjourned meeting the justices shall be satisfied that such terms have been complied with, they may proceed to grant or withhold such certificate, as if the preliminary requirements of the 32 & 33 Vict. c. 27, had been complied with.

Provisions of 9 Geo. 4, c. 61, applied to certificates under 32 & 33 Vict. c. 27.

By 32 & 33 Vict. c. 27, s. 8, all the provisions of the 9 Geo. 4, c. 61, as to the *terms* upon which and the *manner* in which and the *persons* [*by*] *whom grants* of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice shall, so far as may be, have effect with regard to *grants* of certificates under this act, subject to this qualification, that no application for a certificate under this act in respect of a licence to sell by retail beer, cider or wine, not to be consumed on the premises, shall be refused, except upon one or more of the following ground; *viz.*,

Certificates to sell beer, &c., not to be consumed on the premises, not to be refused except upon certain grounds.

(1.) That the applicant has failed to produce satisfactory evidence of good character:

(2.) That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes or persons of bad character:

(3.) That the applicant having previously held a licence for the sale of wine, spirits, beer or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles:

(4.) That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required.

Where an application for any such last-mentioned certificate is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision.

Where at the general annual licensing meeting a licence is refused for a house on the ground that the applicant had forfeited his licence for misconduct within the 3rd sub-section, that is a ground personal to that applicant; and that refusal

Refusal of Certificate.

would not operate to prevent another applicant if otherwise duly qualified, and able to give due notice of his application in time for the adjournment of the same licensing meeting from applying for a licence for the same house (*q*); but if the ground of refusal to the applicant in the first instance had had reference to the character of the house, the justices would not be required to adjudicate upon that matter again at the adjourned meeting by reason of its being *res adjudicatâ* (*r*).

Fresh application after refusal.

As to what constitutes a house of a disorderly character within this section, see *post*, *p.* 1023.

Grounds of refusal of licence to sell spirits not to be consumed on the premises.

By 35 & 36 Vict. c. 94, s. 69, a licence for the sale of liqueurs or spirits by retail not to be consumed on the premises may, where such licence is required by this act, be granted in the same manner in all respects in which a licence for selling wine not to be consumed on the premises may by law be granted; and an application for such a licence shall not be refused except upon one or more of the grounds on which a certificate in respect of a licence to sell by retail beer, cider or wine not to be consumed on the premises may be refused.

The 9 Geo. 4, c. 61, which is incorporated in sect. 8 of 32 & 33 Vict. c. 27, is now repealed in part, and especially as to appeals, see *ante*, *p.* 1008; but the above section, by still remaining in force, kept it all alive (*s*). Accordingly, by sect. 27 of 37 & 38 Vict. c. 49, so much of the above sect. 8 as incorporates or applies any repealed enactment is repealed, and no appeal shall be had to quarter sessions from any act of any justice with respect to the grant of new certificates under the Wine and Beerhouse Acts, 1869 and 1870.

Grounds for refusal of certificate to persons licensed to sell beer by retail to be consumed on the premises.

By 32 & 33 Vict. c. 27, s. 19, where, on the 1st of May, 1869, a licence under any of the said recited acts is in force with respect to any house or shop for the sale by retail therein of beer, cider or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider or wine to be consumed on the premises, in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this act in respect of a licence for the sale of beer, cider or wine not to be consumed on premises, may be refused in accordance with this act.

By the 33 & 34 Vict. c. 29, s. 7, this section is to "extend to licences granted by way of renewal, from time to time, of licences in force on the 1st of May, 1869, whether such licences continue to be held by the same person, or have been, or may be, transferred to any other person or persons."

(*q*) *Reg.* v. *Justices of Yorkshire* (*West Riding*), 39 L. J., M. C. 17; L. R., 5 Q. B. 33.

(*r*) *Ibid.* p. 39, per *Lush*, J.

(*s*) *Reg.* v. *Smith*, 42 L. J., M. C. 46; L. R., 8 Q. B. 146.

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The justices retain their discretion to refuse a certificate in the case of a house licensed on the 1st of May, 1869, where the licence had lapsed before application was made for renewal (*t*).

Production of licence by order of justices.

Recording of conviction on the licence.

It is further provided by the 19th section, that every holder of such licence (and by 33 & 34 Vict. c. 29, s. 7, every renewal of such licence) shall, when required by any two justices, be bound to produce his licence, under a penalty not exceeding 10*l*., to be levied in default of payment, on the order of such justices, by distraint upon his goods and chattels; and provided also, that no conviction under the powers and provisions of this act shall be deemed to affect any licence in force as aforesaid unless the justices by whom such conviction was adjudged shall have directed their clerk to record, and the clerk shall have recorded, on the licence the fact of that conviction.

(2) *Of the different Licences in respect of which Certificates are required.*

The acts relating to beerhouses and refreshment-houses recited in 32 & 33 Vict. c. 27, were 11 Geo. 4 & 1 Will. 4, c. 64; 4 & 5 Will. 4, c. 85; 3 & 4 Vict. c. 61; 24 & 25 Vict. c. 21; 26 & 27 Vict. c. 33; 23 Vict. c. 27.

Beerhouse licences.

For the better supplying the public with beer, and in order to give greater facilities for the sale thereof than were then afforded by licences to keepers of inns, alehouses and victualling-houses, it was by 11 Geo. 4 & 1 Will. 4, c. 64, s. 1, made lawful for any and every person who shall obtain a licence for that purpose, under the provisions of that act (*i. e.*, an excise licence) to sell beer, ale and porter by retail (and also cider and perry, sect. 30), in any part of England, in any house or premises specified in such licence.

By sect. 2, no licence shall be granted to any person being a sheriff's officer, or officer executing the legal process of any court of justice, nor to any person not being a householder assessed to the poor rate in the parish or place in which he shall be licensed to sell beer by retail, and that any licence granted to any such person shall be void to all intents and purposes.

Sect. 7 contains a prohibition against selling without a licence, or under a licence which has expired.

Additional licences to sellers of strong beer.

By the 26 & 27 Vict. c. 33, s. 1, any person who shall have taken out an excise licence to sell strong beer in casks containing not less than four and a half gallons, or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on the premises, may take out an additional excise licence to authorize such person to sell

(*t*) *Reg.* v. *Curzon*, 42 L. J., M. C. 155; L. R., 8 Q. B. 400.

beer in any less quantity, and in any other manner, than as aforesaid, but not to be drunk or consumed on the premises where sold. *Certificates of Justices.*

And by 33 & 34 Vict. c. 29, s. 10, a certificate for an additional licence to the holder of a strong beer dealer's licence to retail beer under 26 & 27 Vict. c. 33, shall not, after the passing of this act, except by way of renewal from time to time, of a certificate in force at the time of the passing of this act, be granted, unless upon the like proof of qualification according to rating as is required in the case of licences to retail beer for consumption on the premises, under the provisions of the acts recited in the Wine and Beerhouse Act, 1869, for permitting the general sale of beer and cider by retail in England. Certificates for additional licences to holders of strong beer dealer's excise licence.

But by 37 & 38 Vict. c. 49, s. 31, an additional licence to sell beer for consumption off the premises may be granted at any special sessions for licensing purposes to the holder of a strong beer dealer's wholesale excise licence, in the same manner, and subject to the same conditions in and subject to which it might be granted, at any general annual licensing meeting.

The rent or annual value of the house required by the 3 & 4 Vict. c. 61, see *post*, p. 1013, is dispensed with by sect. 18 with respect to any house, at the time of the passing of that act, duly licensed for the sale by retail of beer or cider, under the 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, or either of them, but it is lawful for the officers of excise, duly authorized to grant licences, to renew and continue to grant licences to such person (being in other respects properly qualified), so long as the person then occupying the house shall continue to be the resident holder and occupier of the same house, anything in this act to the contrary notwithstanding. Annual value of beerhouse licence before 1840.

By 11 Geo. 4 & 1 Will. 4, c. 64, s. 2, in every application for such (*i.e.* excise) licence there shall be specified, set forth, and inserted the christian name and surname of the party applying for such licence, and a description of the house or premises in which beer, ale and porter is intended to be sold by retail by such person. Form of application for beerhouse licence.

By 11 Geo. 4 & 1 Will. 4, c. 64, s. 30, it shall be lawful for any person desirous of selling cider and perry by retail to apply for and to obtain an excise licence for that purpose, under the same regulations in all respects as are prescribed with respect to persons desirous of selling beer, ale and porter by retail, and of being licensed for the purpose, &c.

By 23 Vict. c. 27, s. 3, every person who shall keep a shop for the sale of any goods or commodities other than foreign wine, or who shall have taken out a licence as a dealer in wine (except persons expressly disqualified by this act), shall, without producing or having any other licence or authority, be entitled to take out a licence under this act to sell by retail, and As to refreshment-houses.

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in reputed quart or pint bottles only, in such shop, foreign wine not to be consumed on the premises where sold, anything in any former act to the contrary notwithstanding.

Refreshment-houses, what.

And by 23 Vict. c. 27, s. 6, all houses, rooms, shops or buildings kept open for public refreshment, resort and entertainment, at any time between ten at night (24 & 25 Vict. c. 91, s. 8) and five o'clock of the following morning, not being licensed for the sale of beer, cider, wine or spirits respectively, shall be deemed refreshment-houses within this act, and the resident owner, tenant or occupier thereof shall be required to take out a licence under this act to keep a refreshment-house; and every person who shall keep any house, room, shop or building for the purpose of selling therein any victual or refreshment to be consumed on the premises where the same shall be sold (except beer, cider, wine and spirits sold respectively under a proper licence in that behalf), and every person who shall keep any house, room, shop or building for the consumption therein by the public of any refreshment (except as aforesaid), although the same shall not be sold therein, may, if he shall think fit, take out a licence under this act to keep a refreshment-house, and in all proceedings, and upon all occasions whatever, it shall be sufficient to describe by the term refreshment-house any house, room, shop or building in which such article as aforesaid (except as aforesaid) is sold to be consumed as aforesaid, or is consumed as aforesaid without further or otherwise designating or describing the same.

Wine licences to refreshment-house keepers, &c.

By sect. 7, every person who shall be licensed to keep a refreshment-house, and shall pursue therein the trade or business of a confectioner, or shall keep open such house as an eating-house for the purpose of selling to be consumed therein animal food, or other victuals wherewith wine or other fermented liquors are usually drunk, shall be entitled (subject to the terms and conditions of this act, and not being expressly disqualified thereby) to take out a licence to sell foreign wine by retail in such refreshment-house, to be consumed on the premises where the same shall have been sold without producing or having any other licence or authority than as aforesaid, and every confectioner and eating-house keeper respectively, who shall have taken out such licence to retail wine under this act, shall not be subject or liable to any penalty or forfeiture under any other act or acts, by reason or on account of his selling wine by retail, or having the same in his possession in his entered premises, anything in any other act or acts to the contrary notwithstanding.

Annual value of premises for a wine licence.

By sect. 8, provided always, that no licence to sell foreign wine by retail, to be consumed on the premises, shall be granted for any refreshment-house which, with the premises belonging thereto and occupied therewith, shall be under the rent and value (now annual value) of 10*l.* a year, nor for any refreshment-house situated in any city, borough, town or place containing a population exceeding 10,000, according to the then

last parliamentary census, if such refreshment-house, with the premises belonging thereto and occupied therewith, shall be under the rent and value (now annual value) of 20*l.* a year. *Annual Value of Premises for Wine Licence.*

And no sheriff's officer, or officer executing the legal process of any court of justice, shall be capable of receiving or using any licence under this act to sell wine by retail, to be consumed on the premises; and every licence which shall be granted contrary hereto shall be void to all intents and purposes. Refreshment-house licences.

No licence, under 35 & 36 Vict. c. 94, is required for the sale of wine by retail, not to be consumed on the premises, by a wine merchant, in pursuance of a wine dealer's licence granted by the commissioners of inland revenue, or for the sale of liqueurs or spirits by retail not to be consumed on the premises by a wholesale spirit dealer whose premises are exclusively used for the sale of intoxicating liquors, in pursuance of a retail licence granted by the commissioners of inland revenue, under 24 & 25 Vict. c. 21 (*u*).

(3) *Of the requisite Value of Licensed Premises.*

The qualification in value of premises licensed for beer-houses before the 35 & 36 Vict. c. 94, is fixed by the 3 & 4 Vict. c. 61, s. 1, which recites the prior beerhouse acts, and enacts, that no licence to sell beer or cider by retail, under the said acts or this act, shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed; nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township or place, in which such house and premises are situate, on a rent or annual value of 15*l.* per annum at the least if situate in the cities of London or Westminster, or within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish or place, the population of which, according to the last parliamentary census, shall exceed 10,000, or within a mile, to be measured by the nearest public street or path from any polling place used at the last election for any town having the like population and returning a member or members of parliament; nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township or place, in which such house or premises are situate, on a rent or annual value of 11*l.* per annum, if situated within any city, cinque port, town corporate, parish or place, the population of which, according to such last parliamentary census, shall exceed 2,500, and shall not exceed 10,000, or Annual value of beerhouse premises.

(*u*) 35 & 36 Vict. c. 94, s. 73.

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within one mile, to be measured, as aforesaid, from any polling place used at the last election for any town having the like population as last aforesaid, and returning a member or members of parliament: nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township or place, in which such house and premises are situate, on a rent or annual value of 8*l.*, if situated elsewhere than as aforesaid; and every licence granted contrary hereto shall be null and void.

Value of beer-house premises.

By the 35 & 36 Vict. c. 94, s. 46, the above section is to be read as if "annual value" were therein substituted for "rent," "value," or "rent or annual value;" and a definition of annual value and a mode of ascertaining it is provided by that act, see *post*, pp. 1015, 1016.

But a house licensed for the sale of table beer, at a price not exceeding three halfpence a quart, not to be drunk on the premises, need not be rated to the relief of the poor to any amount (*x*).

Under the 3 & 4 Vict. c. 61, s. 1, the population of the parish in which the premises are situate is to govern the value, and the population of the townships, hamlets or villages of which it is composed, and in one of which the premises are situated may be disregarded (*y*). A house and shop used as a grocery shop communicating internally with one another and occupied together, are to be taken as one house and premises (*z*).

Licensed premises must be of a certain annual value.

By 35 & 36 Vict. c. 94, s. 45, premises to which at the time of the passing of this act no licence under the acts recited in the Wine and Beerhouse Act of 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force, prescribing a certain rent or value or rating as a qualification for receiving any such licence.

Premises not at the time of the passing of this act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied:—

(a.) The premises, unless such premises are a railway refreshment-room, shall be of not less than the following annual value:

If situated within the City of London, or the liberties thereof, or any parish or place subject to the jurisdiction of the Metropolitan Board of Works, or within the four mile radius from Charing Cross, or within the limits of a town containing a population of not less than 100,000 inhabitants, 50*l.* per annum;

(*x*) 24 & 25 Vict. c. 21, s. 3.

(*y*) *Preston* v. *Buckler*, 39 L. J., M. C. 105; L. R., 5 Q. B. 391; *Smith* v. *Redding*, 35 L. J., M. C. 202; L. R., 1 Q. B. 489.

(*z*) *Garatty* v. *Potts*, 40 L. J., M. C. 1; L. R., 6 Q. B. 86.

Annual Value of Beerhouse Premises.

or, if the licence do not authorize the sale of spirits, 30*l.* per annum;

If situated elsewhere, and within the limits of a town containing a population of not less than 10,000 inhabitants, 30*l.* per annum; or, if the licence do not authorize the sale of spirits, 20*l.* per annum;

Annual value of licensed premises.

If situated elsewhere, and not within any such town as above mentioned, 15*l.* per annum; or, if the licence do not authorize the sale of spirits, 12*l.* per annum:

(b.) The premises shall be, in the opinion of the licensing authority, structurally adapted to the class of licence for which a certificate is sought: provided, that no house not licensed at the time of the passing of this act for the sale of any intoxicating liquor for consumption on the premises, shall be qualified to have a licence attached thereto authorizing such sale, unless such house shall contain, exclusive of the rooms occupied by the inmates of such house if the licence authorize the sale of spirits, two rooms; and if the licence do not authorize the sale of spirits, one room, for the accommodation of the public.

Structural character of the house.

By 35 & 36 Vict. c. 94, s. 46, which recites that "in certain cases a licence under the Wine and Beerhouse Acts, 1869 and 1870, is not to be granted, unless the house and premises in respect of which such licence is granted are of such rent and value, or are rated to the poor rate on a rent or annual value of such amount as is respectively in that behalf stated in the acts recited in the Wine and Beerhouse Act, 1869; and it is expedient to substitute in such cases annual value for the said rent value or rating, and to provide for the ascertaining the annual value of such house and premises: it is enacted, that in cases not provided for by the last preceding section, a licence under the Wine and Beerhouse Acts, 1869 and 1870, shall not be granted in respect of any premises which are not, in the opinion of the licensing justices who grant such licence, of such annual value as is mentioned in that behalf in the acts recited by the Wine and Beerhouse Act, 1869; and those acts shall be construed as if 'annual value' were therein substituted for 'rent,' 'value,' 'rated on a rent or annual value,' and other like expressions."

If, at the first general annual licensing meeting after the passing of this act, the licensing justices are of opinion that any premises which are licensed for the sale of intoxicating liquors at the passing of this act are not of such annual value as authorizes the grant of a licence for such premises, they may, notwithstanding, renew such licence upon the condition to be expressed in the licence that the holder thereof before the next general annual licensing meeting improves the premises, so as to make them of sufficient annual value; and if the holder fail to comply with such condition, the licence shall not be renewed at such next general annual licensing meeting.

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A mode of ascertaining the annual value is appointed.

By 35 & 36 Vict. c. 94, s. 47, the licensing justices shall take such means as may seem to them best for ascertaining the annual value of any premises for the purposes of this act, and may, if they think fit, order a valuation to be made of such premises by a competent person appointed by them for the purpose, and may order the costs of such valuation to be paid by the applicant for a licence. The annual value of premises for the purposes of this act shall be the annual rent which a tenant might be reasonably expected, taking one year with another, to pay for the same, if he undertook to pay all tenant's rates and taxes and tithe commutation rent (if any), and if the landlord undertook to bear the cost of the repairs, insurance and other expenses (if any) necessary to maintain the premises in a state to command the said rent, and if no licence were granted in respect thereof; but no land shall be included in such premises, other than any pleasure grounds, or any flower or kitchen garden, yard or curtilage usually held and occupied and used by the persons residing in and frequenting the house.

These provisions do not apply to houses licensed under 9 Geo. 4, c. 61, and the justices cannot impose a condition as in *Reg.* v. *Justices of Exeter* (*a*).

Section 2.

Of appeals against refusal to renew licences or certificates, or transfer or grant interim licences, &c.

Power to appeal.

The effect of the statutes 9 Geo. 4, c. 61, s. 27; and 35 & 36 Vict. c. 94, s. 25, and Sched. 2, is to give *an appeal to the quarter session against the refusal of the licensing magistrates to grant a licence by way of renewal at a general annual licensing meeting, or transfer a licence, under sects.* 4 *and* 14.

The words of the 27th section of 9 Geo. 4, c. 61, are—"That any *person who shall think himself aggrieved* by *any act* of any justice done in or concerning the execution of this act, may appeal *against such act* to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen, unless such session shall be holden within twelve days next after such act shall have been done, and in that case to the next subsequent session holden as aforesaid, and not afterwards; provided that such person shall give to such justice notice in writing of his intention to appeal, and of the cause and matter thereof, within five days next after such act shall have been done, and seven days at the least before such session, and shall, within such five days, enter into a recognizance with two sufficient sureties,

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(*a*) 42 L. J., M. C. 35.

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before a justice acting in and for such county or place as aforesaid, conditioned to appear at the said session, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody, for any offence in reference to which the act intended to be appealed against shall have been done; and the court at such sessions shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the said court shall seem meet; *and in case the act appealed against shall be the refusal to grant or to transfer any licence, and the judgment under which such act was done be reversed, it shall be lawful for the said court to grant or to transfer such licence in the same manner as if such licence had been granted at the general annual licensing meeting, or had been transferred at a special session;* and the judgment of such court shall be final and conclusive to all intents and purposes: and in case of the dismissal of such appeal, or of the affirmance of the judgment on which such act was done, and which was appealed against, the said court shall adjudge and order the said judgment to be carried into execution, and costs awarded to be paid, and shall, if necessary, issue process for enforcing such order; provided that no justice shall act in the hearing or determination of any appeal to the general or quarter sessions as aforesaid, from any act done by him in or concerning the execution of this act: provided also, that when any cause of complaint shall have arisen within any liberty, county of a city, county of a town, city, or town corporate, it shall be lawful for the person who shall think himself so as aforesaid aggrieved to appeal against any such act as aforesaid, if he shall think fit, to the quarter sessions of the county within or adjoining to which such liberty or place shall be situate, subject to all the provisions hereinbefore contained:" but section 27 is now confined to the renewal of licences or to the transfer of licences under sections 4 and 14 of the same act (*b*).

Power to appeal in respect of licences.

Power of appeal under 9 Geo. 4, c. 61, s. 27, is restricted.

The appellant must be a person immediately aggrieved by the act of the justice, *e. g.*, by the refusal of a licence, or a fine, &c., and not one who is merely consequentially aggrieved: thus, the grant of a licence to a house to sell excisable liquors which had not before been so licensed, is not a subject of appeal to the quarter sessions in respect of the possible injury to a neighbouring house which had been similarly licensed for sixteen years, and the sessions were held right in refusing to hear the appeal (*c*).

Who may appeal.

(*b*) 35 & 36 Vict. c. 94, ss. 74, 75, Sched., and 37 & 38 Vict. c. 49, s. 27, *ante*, p. 1009.

(*c*) *Reg.* v. *Justices of Middlesex*, 3 B. & Ad. 938.

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Appeals from the judgment of borough justices lie to the county quarter sessions, and not to the borough quarter sessions (*d*). The quarter sessions must hear and determine the appeal at the next session of the court, and must not adjourn it (*e*); but if the judgment of the court is given at the next sessions and the order made for the costs, the amount of such costs may be ascertained and inserted in the order at an adjournment of the same sessions (*f*); and the next following sessions have jurisdiction to order the estreat of the recogizance to pay such costs (*g*).

To what sessions.

Evidence on appeal.

Upon an appeal against the refusal of justices to renew a certificate for the sale of beer not to be consumed on the premises, on the ground that the applicant had failed to produce satisfactory evidence of good character under 32 & 33 Vict. c. 27, s. 8, after being required by the justices so to do, the appellant is not limited to the evidence given before the justices in licensing sessions, but may produce fresh evidence (*h*).

By 9 Geo. 4, c. 61, s. 28, the justices before whom the recognizances of appeal are entered into may summon and bind over witnesses to appear at the hearing of the appeal; and in case of refusal to be bound over, such witnesses may be committed until they enter into such recognizances, or shall be otherwise discharged by due course of law.

Costs of appeal.

By sect. 29, where notice of appeal has been given, if appeal dismissed, or judgment affirmed, or appeal abandoned, the court is required to adjudge that the appellant, or intended appellant, shall pay to the justices to whom notice was given the costs of the appeal, and if the appellant refuses or neglects forthwith to pay such sum, the court may order his committal until such sum be paid; and if the judgment is reversed, the court may order the treasurer of the county or place in which the justice acted to indemnify such justice.

Form of order for costs.

The above section 29 must now, however, be read in connection with the 11 & 12 Vict. c. 43, s. 27, but an order, made under the 29th section, directing the costs to be paid to the justices instead of the clerk of the peace, as it should have been, under the 27th section of 11 & 12 Vict. c. 43, is not void for want of jurisdiction so as to be capable of removal by *certiorari*, where the *certiorari* is taken away (*i*); though if such an order were removed under 12 & 13 Vict. c. 45, s. 18, into the superior court for the purpose of being enforced, it might be set aside as erroneous by the superior court (*k*).

(*d*) *Reg.* v. *Deane*, 2 Q. B. 96; 10 L. J., M. C. 126; *Reg.* v. *Recorder of Bristol*, 4 E. & B. 265; 24 L. J., M. C. 43.

(*e*) *Reg.* v. *Belton*, 17 L. J., M. C. 70; 11 Q. B. 379.

(*f*) *Rawnsley* v. *Hutchinson*, 40 L. J., M. C. 97; L. R., 6 Q. B. 305; *Reg.* v. *Justices of Ely*, 5 E. &. B. 489; 25 L. J., M. C. 1.

(*g*) *Reg.* v. *Justices of Ely*, 5 E. & B. 489; 25 L. J., M. C. 1.

(*h*) *Reg.* v. *Pilgrim*, 40 L. J., M. C. 3; L. R., 6 Q. B. 89.

(*i*) *Reg.* v. *Binney*, 1 E. & B. 810; 22 L. J., M. C. 127.

(*k*) *Reg.* v. *Hellier*, 17 Q. B. 219; 21 L. J., M. C. 37.

The general power given by 12 & 13 Vict. c. 45, s. 5, to quarter sessions, to order costs to the successful party on all appeals, such costs to be recoverable under 11 & 12 Vict. c. 43, has been held to be cumulative (*l*). *Hearing of Appeals.*

Section 3.

OF SUMMARY ORDERS AND CONVICTIONS, AND OF APPEALS AGAINST THEM.

Offences against licensing acts.

The Licensing Acts of 1872 and 1874, now for the most part regulate the sale of intoxicating liquors, and the conduct of houses wherein they are sold.

As to illicit sales.

By 35 & 36 Vict. c. 94, s. 3, no person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorized by his licence to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorized by his licence to sell the same, shall be subject to the following penalties; that is to say,

First offence.

(1.) For the first offence he shall be liable to a penalty not exceeding fifty pounds, or to imprisonment with or without hard labour for a term not exceeding one month:

Second offence.

(2.) For the second offence he shall be liable to a penalty not exceeding one hundred pounds, or to imprisonment with or without hard labour for a term not exceeding three months, and he may, by order of the court by which he is tried, be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors:

Third offence.

(3.) For the third and any subsequent offence he shall be liable to a penalty not exceeding one hundred pounds, or to imprisonment with or without hard labour for any term not exceeding six months, and may by order of the court by which he is tried be disqualified for any term of years or for ever from holding any licence for the sale of intoxicating liquors:

In addition to any other penalty imposed by this section any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a licence, forfeit such licence, and in the case of a conviction for any offence under

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(*l*) *Reg.* v. *Huntley*, 3 E. & B. 172; 23 L. J., M. C. 106; *Reg.* v. *Justices of Ely*, 5 E. & B. 489, 492; 25 L. J., M. C. 1.

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this section, the court may, if it thinks expedient so to do, declare all intoxicating liquor found in the possession of any such person as last aforesaid, and the vessels containing such liquor, to be forfeited.

Of illicit sales.

No penalty shall be incurred under this section by the heirs, executors, administrators or assigns of any licensed person who dies before the expiration of his licence, or by the trustee of any licensed person who is adjudged a bankrupt, or whose affairs are liquidated by arrangement before the expiration of his licence in respect of the sale or exposure for sale of any intoxicating liquor, so that such sale or exposure for sale be made on the premises specified in such licence, and take place prior to the special sessions then next ensuing, or (if such special session be holden within fourteen days next after the death of the said person or the appointment of a trustee in the case of his bankruptcy, or the liquidation of his affairs by arrangement) take place prior to the special session holden next after such special session as last aforesaid.

A man, *bonâ fide* acting under a magistrate's licence appearing to be properly signed, cannot be fined, because it may appear that the signatures of the magistrates were not properly obtained (*m*).

Occupiers of premises when illicit sale takes place liable.

By 35 & 36 Vict. c. 94, s. 4, the occupier of any unlicensed premises on which any intoxicating liquor is sold, or if such premises are occupied by more than one person, every occupier thereof shall, if it be proved that he was privy or consenting to the sale, be subject to the penalties imposed upon persons for the sale of intoxicating liquors without licence.

Penalty when liquor illicitly sold is drunk on the premises.

By sect. 5, if any purchaser of any intoxicating liquor from a person who is not licensed to sell the same to be drunk on the premises drinks such liquor on the premises where the same is sold, or on any highway adjoining or near such premises, the seller of such liquor shall, if it shall appear that such drinking was with his privity or consent, be subject to the following penalties; (that is to say,)

For the first offence he shall be liable to a penalty not exceeding ten pounds:

For the second and any subsequent offence he shall be liable to a penalty not exceeding twenty pounds.

Premises, what.

For the purposes of this section the expression "premises where the same is sold" shall include any premises adjoining or near the premises where the liquor is sold, if belonging to the seller of the liquor or under his control, or used by his permission.

Evading licence for the sale of liquors not to be drunk on the premises.

By sect. 6, if any person having a licence to sell intoxicating liquors not to be drunk on the premises, himself takes or carries, or employs or suffers any other person to take or carry, any

(*m*) *R.* v. *Minshull*, 1 N. & M. 277.

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intoxicating liquor out of or from the premises of such licensed person for the purpose of being sold on his account, or for his benefit or profit, and of being drunk or consumed in any other house, or in any tent, shed or other building of any kind whatever, belonging to such licensed person, or hired, used or occupied by him, or on or in any place, whether enclosed or not, and whether or not a public thoroughfare, such intoxicating liquor shall be deemed to have been consumed by the purchasers thereof on the premises of such licensed person, with his privity and consent, and such licensed person shall be punished accordingly in manner provided by this act.

Illicit sales.

Consumption on the premises, what.

In any proceeding under this section it shall not be necessary to prove that the premises or place or places to which such liquor is taken to be drunk belonged to, or were hired, used or occupied by the seller, if proof be given to the satisfaction of the court hearing the case that such liquor was taken to be consumed thereon or therein with intent to evade the conditions of his licence.

Selling spirits to young persons.

By 35 & 36 Vict. c. 94, s. 7, every holder of a licence who sells or allows any person to sell, to be consumed on the premises, any description of spirits to any person apparently under the age of sixteen years, shall be liable to a penalty not exceeding twenty shillings for the first offence, and not exceeding forty shillings for the second and any subsequent offence.

Sale to be in standard measures.

By sect. 8, every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, in measures marked according to the imperial standards.

Every person who acts or suffers any person under his control or in his employment to act in contravention of this section shall be liable to a penalty not exceeding, for the first offence, ten pounds, and not exceeding for any subsequent offence twenty pounds, and shall also be liable to forfeit the illegal measure in which the liquor was sold.

Using internal communication with unlicensed premises.

By sect. 9, every person who makes or uses, or allows to be made or used, any internal communication between any licensed premises and any unlicensed premises which are used for public entertainment or resort, or as a refreshment-house, shall be liable to a penalty not exceeding ten pounds for every day during which such communication remains open.

In addition to any penalty imposed by this section any person convicted of an offence under this section shall, if he be the holder of a licence, forfeit such licence; and see *post*, 37 & 38 Vict. c. 49, s. 15.

Licensed person having possession of liquor not authorized by his licence.

By sect. 10, if any licensed person has in his possession on the premises in respect of which his licence is granted, any description of intoxicating liquor which he is not authorized to sell, unless he shall account for the possession of the same to the satisfaction of the court by which he is tried, he shall forfeit such liquor and the vessels containing the same, and shall be liable to a penalty not exceeding for the first offence

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ten pounds, and not exceeding for any subsequent offence twenty pounds.

Illicit sales.

Evidence of sale.

By sect. 62, in proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under this act, it shall not be necessary to show that any money actually passed or any intoxicating liquor was actually consumed, if the court hearing the case be satisfied that a transaction in the nature of a sale actually took place, or that any consumption of intoxicating liquor was about to take place; and proof of consumption or intended consumption of intoxicating liquor on premises to which a licence under this act is attached, by some person other than the occupier of or a servant in such premises, shall be evidence that such liquor was sold to the person consuming, or being about to consume, or carrying away the same by or on behalf of the holder of such licence.

Keeping name painted on door.

By 35 & 36 Vict. c. 94, s. 11, every licensed person shall cause to be painted or fixed, and shall keep painted or fixed on the premises in respect of which his licence is granted, in a conspicuous place and in such form and manner as the licensing justices (*n*) may from time to time direct, his name, with the addition after the name of the word "licensed," and of words sufficient, in the opinion of the said justices, to express the business for which his licence has been granted, and in particular of words expressing whether the licence authorizes the sale of intoxicating liquor to be consumed on or off the premises only, as the case may be; and no person shall have any words or letters on his premises importing that he is authorized as a licensed person to sell any intoxicating liquor which he is not in fact duly authorized to sell. Every person who acts in contravention of the provisions of this section shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds. As to early-closing licences, see p. 1028; and as to six-day licences, see p. 1030.

Offences against public order.

By 35 & 36 Vict. c. 94, s. 12, every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding ten shillings, and, on a second conviction within a period of twelve months, shall be liable to a penalty not exceeding twenty shillings; and, on a third or subsequent conviction within such period of twelve months, be liable to a penalty not exceeding forty shillings.

Drunkenness.

Every person who in any highway or other public place, whether a building or not, is guilty while drunk of riotous or disorderly behaviour, or who is drunk while in charge on any highway or other public place of any carriage, horse, cattle or steam-engine, or who is drunk when in possession of any loaded fire-arms, may be apprehended, and shall be liable to a penalty

(*n*) 37 & 38 Vict. c. 49, s. 28.

not exceeding forty shillings, or, in the discretion of the court, to imprisonment with or without hard labour for any term not exceeding one month. *Of Offences punishable summarily.*

Where the court commits any person to prison for non-payment of any penalty under this section, the court may order him to be imprisoned with hard labour.

Drunkenness or riotous conduct.

By 35 & 36 Vict. c. 94, s. 13, if any licensed person permits drunkenness, or any violent, quarrelsome or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence 10*l.*, and not exceeding for the second and any subsequent offence 20*l.*

A conviction for permitting drunkenness and riotous conduct is not double; for the offence is the permission which may, at one and the same time, be both of drunkenness and riotous conduct (*n*), and the names of the drunkards, &c. need not be set out.

Permitting prostitutes to meet on premises.

By 35 & 36 Vict. c. 94, s. 14, if any licensed person knowingly permits his premises to be the habitual resort of, or place of meeting of, reputed prostitutes, whether the object of their so resorting or meeting is or is not prostitution, he shall, if he allow them to remain thereon longer than is necessary for the purpose of obtaining reasonable refreshment, be liable to a penalty not exceeding for the first offence 10*l.*, and not exceeding for the second and any subsequent offence 20*l.*

Harbouring thieves or stolen property.

The 34 & 35 Vict. c. 112, s. 10, every person who occupies or keeps any lodging-house, beer-house, public-house, or other house or place where intoxicating liquors are sold, or any place of public entertainment or public resort, and knowingly lodges, or knowingly harbours, thieves or reputed thieves, or knowingly permits or knowingly suffers them to meet or assemble therein, or knowingly allows the deposit of goods therein, having reasonable cause for believing them to be stolen, shall be guilty of an offence against this act and liable to a penalty not exceeding 10*l.*, and in default of payment to be imprisoned for a period not exceeding four months, with or without hard labour, and the court before which he is brought may, if it think fit, in addition to or in lieu of any penalty, require him to enter into recognizances, with or without sureties, for keeping the peace or being of good behaviour for twelve months. Provided that (1) No person shall be imprisoned for not finding sureties, in pursuance of this section, for a longer period than three months; and (2) The security required from a surety shall not exceed 20*l.* And any licence for the sale of intoxicating liquors, or for keeping any place of public entertainment or resort, which has been granted to the occupier or keeper of any such house or place as aforesaid, may, in the discretion of the court, be forfeited on his first conviction of an

(*n*) *Wray* v. *Toke*, 2 Q. B. 508; 17 L. J., M. C. 183.

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offence under this section, and on his second conviction for such an offence his licence shall be forfeited, and he shall be disqualified for a period of two years from receiving any such licence; moreover, when two convictions under this section have taken place within a period of three years, in respect of the same premises, whether the persons convicted were or were not the same, the court shall direct that, for a term not exceeding one year from the date of the last of such convictions, no such licence as aforesaid shall be granted to any person whatever in respect of such premises, and any licence granted in contravention of this section shall be void.

Non-production of licences.

Any licensed person brought before a court in pursuance of this section shall produce his licence for examination, and if such licence is forfeited shall deliver it up altogether; and if such person wilfully neglects or refuses to produce his licence, he shall, in addition to any other penalty under this section, be liable, on summary conviction, to a penalty not exceeding 5*l*. Provided that any person convicted under this section shall have a right to appeal against such conviction in the same manner in all respects as if the said conviction had been for an offence committed against the provisions of 9 Geo. 4, c. 61.

A meeting known as a friendly "lead," for the purpose of collecting money for an accused person, is within this section, if the persons assembling are thieves or reputed thieves (*o*).

Evidence of what took place on previous occasions, for instance, as to the character of the persons assembled, is evidence to prove the defendant's knowledge of their character (*p*).

Brothels.

By 34 & 35 Vict. c. 94, s. 15, if any licensed person is convicted of permitting his premises to be a brothel, he shall be liable to a penalty not exceeding 20*l*., and shall forfeit his licence, and he shall be disqualified for ever from holding any licence for the sale of intoxicating liquors.

Harbouring constables on duty.

By sect. 16, if any licensed person—

(1.) Knowingly harbours, or knowingly suffers to remain on his premises, any constable during any part of the time appointed for such constable being on duty, unless for the purpose of keeping or restoring order, or in execution of his duty; or

Supplying liquor to constables on duty.

(2.) Supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable; or

Bribing constables.

(3.) Bribes, or attempts to bribe, any constable,

he shall be liable to a penalty not exceeding for the first offence 10*l*., and not exceeding for the second or any subsequent offence 20*l*. Any conviction for an offence under this section shall, unless the convicting magistrate or justices shall otherwise direct, be recorded on the licence of the person convicted.

(*o*) *Maskell* v. *Fox*, 40 L. J., M. C. 142; L. R., 6 Q. B. 370.
(*p*) *Parker* v. *Green*, 6 L. T., N. S. 46.

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A licensed person is liable to be convicted of supplying liquor, under the 2nd subsection, though he were not present at the time when the liquor was supplied, and though it was not supplied by his express authority, if his servant, in the ordinary performance of her duty of supplying liquor, so supplied it to a constable in uniform and on duty (*q*).

Supplying liquor to constable on duty.

By 35 & 36 Vict. c. 94, s. 17, if any licensed person—

Gaming on premises.

(1.) Suffers any gaming or any unlawful game to be carried on on his premises; or

Betting.

(2.) Opens, keeps, or uses, or suffers his house to be opened, kept, or used in contravention of the act of the session of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and nineteen, intituled "An Act for the Suppression of Betting Houses,"

he shall be liable to a penalty not exceeding for the first offence 10*l.*, and not exceeding for the second and any subsequent offence 20*l.*

"Unlawful games," what.

Any playing at cards for money in any part of the licensed premises is within this section; therefore, a friendly game of cards among the private friends of the innkeeper for a small stake, in the bar parlour, is an offence (*r*); but a game of dominoes is not an unlawful game, and, unless money is staked upon it, is not gaming so as to bring it within the section (*s*).

Power to refuse to admit drunken persons.

By sect. 18, any licensed person may refuse to admit to and may turn out of the premises in respect of which his licence is granted any person who is drunken, violent, quarrelsome or disorderly, and any person whose presence on his premises would subject him to a penalty under this act.

Power to turn out drunken persons, &c.

Any such person who, upon being requested in pursuance of this section by such licensed person, or his agent or servant, or any constable, to quit such premises, refuses or fails so to do, shall be liable to a penalty not exceeding 5*l.*, and all constables are required on the demand of such licensed person, agent or servant to expel, or assist in expelling, every such person from such premises, and may use such force as may be required for that purpose.

The court committing any person to prison for nonpayment of any penalty under this section, may order him to be imprisoned with hard labour.

Closing licensed premises in case of riot.

By 35 & 36 Vict. c. 94, s. 23, any two justices of the peace acting for any county or place where any riot or tumult happens, or is expected to happen, may order every licensed person in or near the place where such riot or tumult happens, or is expected to happen, to close his premises during any time which the justices may order; and any person who keeps open his premises for the sale of intoxicating liquors during any time at

(*q*) *Mullens* v. *Collins*, 43 L. J., M. C. 67; L. R., 9 Q. B. 292.
(*r*) *Patten* v. *Rhymer*, 29 L. J., M. C. 189; 3 E. & E. 1.
(*s*) *Reg.* v. *Ashton*, 1 E. & B. 286; 22 L. J., M. C. 1.

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which the justices have ordered them to be closed shall be liable to a penalty not exceeding fifty pounds; and it shall be lawful for any person acting by order of any justices to use such force as may be necessary for the purpose of closing such premises. A conviction under this section must state the time fixed by the justices at which houses may be kept open, and the hour at which the liquor was consumed, and it is not enough to say "at a time declared to be unlawful by an order of the justices" (*t*); but if the proof before the convicting justices was sufficient, such a defect as this may be amended under 12 & 13 Vict. c. 45, s. 7 (*u*).

Closing licensed premises in case of riot.

Hours of closing licensed premises.

By 37 & 38 Vict. c. 49, s. 3, all premises in which intoxicating liquors are sold by retail shall be closed as follows (that is to say):—

(1.) If situate within the metropolitan district:

(*a*) On Saturday night from midnight until one o'clock in the afternoon on the following Sunday; and

(*b*) On Sunday night from eleven o'clock until five o'clock on the following morning; and

(*c*) On all other days from half an hour after midnight until five o'clock on the same morning; and

(2.) If situate beyond the metropolitan district and in the metropolitan police district or in a town or in a populous place as defined by this act:

(*a*) On Saturday night from eleven o'clock until half an hour after noon on the following Sunday; and

(*b*) On Sunday night from ten o'clock until six o'clock on the following morning; and

(*c*) On the nights of all other days from eleven o'clock until six o'clock on the following morning; and

(3.) If situate elsewhere than in the metropolitan district or the metropolitan police district or such town or populous place as aforesaid:

(*a*) On Saturday night from ten o'clock until half an hour after noon on the following Sunday; and

(*b*) On Sunday night from ten o'clock until six o'clock on the following morning; and

(*c*) On the nights of all other days from ten o'clock until six o'clock on the following morning.

Sundays.

Such premises wherever situate shall, save as hereinafter mentioned, be closed on Sunday afternoon from three or half-past two according as the hour of opening shall be one o'clock in the afternoon or half an hour after noon until six o'clock.

(*t*) *Newman* v. *Hardwicke*, 8 A. & E. 124.

(*u*) See *ante*, p. 687, and see *post*, p. 1040.

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Such premises wherever situate shall be closed on Christmas Day and Good Friday and on the days preceding Christmas Day and Good Friday respectively, as if Christmas Day and Good Friday were respectively Sunday, and the preceding days were respectively Saturday, but this provision shall not alter the hours during which such premises shall be closed on Sunday when Christmas Day immediately precedes or succeeds Sunday. Hours of closing.

By 37 & 38 Vict. c. 49, s. 32, if not inconsistent with the context, the following expressions have the meanings hereinafter respectively assigned to them; that is to say,

"The metropolitan district" means the area in that behalf mentioned in the schedule hereto (that is to say), the city of London or the liberties thereof, or any parish or place for the time being subject to the jurisdiction of the metropolitan board of works, or within the area contained within a circle the radius of which is four miles from Charing Cross. "Metropolitan district," what.

"Town" means an urban sanitary district as described for the purposes of the Public Health Act, 1872; and any collection of houses adjacent to a town as so defined shall, for the purpose of the provisions of this act with respect to the closing of premises, be deemed to be part of such town after it has been declared so to be by an order of the county licensing committee having jurisdiction in the place where such houses are situated: provided that no urban sanitary district, whether including such adjacent houses or not, shall be deemed a town, unless it contains one thousand inhabitants. "Town," what.

"Populous place" means any area with a population of not less than one thousand, which by reason of the density of such population the county licensing committee may, by order, determine to be a populous place, at a meeting especially convened for that purpose in manner provided by any regulations in that behalf, or in default of such regulations by the clerk of the peace, as soon as may be after the passing of this act, and not later than the first day of September, one thousand eight hundred and seventy-four, the county licensing committee shall consider all the cases within their jurisdiction with respect to which it is incumbent upon them to make orders in pursuance of this section, and they shall make orders accordingly, and shall specify therein the boundaries of such towns or populous places. "Populous place," what.

The county licensing committee may adjourn any meeting held in pursuance of this section, and may also at any subsequent meeting especially convened for that purpose make with respect to any town or populous place within their jurisdiction any like order not restrictive of any order previously made.

Provided that as soon as may be after the publication of each census the county licensing committee shall, at a meeting to be specially convened for the purpose, revise the orders then in force within their jurisdiction, constituting areas either parts of towns or populous places, and may alter or cancel any of

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the said orders or may make such further orders, if any, as they shall deem necessary to give effect to the provisions of this act.

Hours of closing.

Special order as to hours on Sunday.

By 37 & 38 Vict. c. 49, s. 6, notwithstanding anything in this or in any local act contained, the licensing justices may, if they think fit, as respects premises in which intoxicating liquors are sold, when situate in any place beyond the metropolitan district, for the purpose of accommodating the hours of closing on Sunday, Good Friday, and Christmas Day to the hours of public worship in such place, by order direct that such premises shall remain closed until one o'clock in the afternoon instead of half an hour after noon, and in that case such premises shall be closed in the afternoon from three until six o'clock, instead of from half-past two until six o'clock.

Any order made by the licensing justices under this section shall not come into operation until the expiration of one month after the date thereof, and shall be advertised in such manner as the licensing justices direct, and shall be in force until the same is revoked; the expense of any such advertisement may be defrayed in like manner as the expenses of advertising the sittings of such justices are defrayed.

Early-closing licences.

By sect. 7, where on the occasion of any application for a new licence, or the removal or renewal of a licence which authorizes the sale of any intoxicating liquor for consumption on the premises, the applicant applies to the licensing justices to insert in his licence a condition that he shall close the premises in respect of which such licence is or is to be granted one hour earlier at night than that at which such premises would otherwise have to be closed, the justices shall insert the said condition in such licence.

The holder of a licence in which such condition is inserted (in this act referred to as an early-closing licence) shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of this act, and the provisions of this act and the principal act shall apply to the premises as if such earlier hour were the hour at which the premises are required to be closed.

The holder of an early-closing licence may obtain from the commissioners of inland revenue any licence granted by such commissioners which he is entitled to obtain in pursuance of such early-closing licence, upon payment of a sum representing six-sevenths of the duty which would otherwise be payable by him for a similar licence not limited to such early closing as aforesaid. In calculating the six-sevenths fractions of a penny shall be disregarded.

Notice of early closing to be painted on door.

The notice which a licensed person is required by sect. 11 of the principal act to keep painted or fixed on his premises shall, in the case of an early-closing licence, contain such words as the licensing justices may order for giving notice to the public that an early-closing licence has been granted in respect of such premises.

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Opening licensed premises during hours of closing.

By 37 & 38 Vict. c. 49, s. 9, any person who—

During the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises,—

shall, for the first offence, be liable to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds.

Facts (such as persons found drinking in the house when closed) which may be evidence from which the justices may infer a sale in prohibited hours, may, nevertheless, not be sufficient to support a charge of opening or keeping open such house for the sale of liquors during prohibited hours (*v*); and the keeping open alone will not justify a conviction without evidence of some facts to justify the inference that it was for the sale of liquors (*x*). The hours should be regulated according to the mean time of the place where the offence is committed (*y*).

By 37 & 38 Vict. c. 49, s. 30, no person keeping a house licensed under this or the principal act shall be liable to any penalty for supplying intoxicating liquors, after the hours of closing, to private friends *bonâ fide* entertained by him at his own expense.

As to *bonâ fide* travellers.

Six-day licences.

Railway stations.

By 37 & 38 Vict. c. 49, s. 10, nothing in this act or in the principal act contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to *bonâ fide* travellers or to persons lodging in his house: provided, that no person holding a six-day licence shall sell any intoxicating liquor on Sunday to any person whatever not lodging in his house.

Nothing in this act contained as to hours of closing shall preclude the sale at any time, at a railway station, of intoxicating liquors to persons arriving at or departing from such station by railroad.

Proof as to *bonâ fide* traveller.

If in the course of any proceedings which may be taken against any licensed person for infringing the provisions of this act or the principal act, relating to closing, such person (in this section referred to as the defendant) fails to prove that the person to whom the intoxicating liquor was sold (in this section referred to as the purchaser) is a *bonâ fide* traveller, but the justices are satisfied that the defendant truly believed that the purchaser was a *bonâ fide* traveller; and further, that the

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(*v*) *Tennant* v. *Cumberland*, 1 E. & E. 401.

(*x*) *Cates* v. *South*, 1 L. T., N. S. 365; *Overton* v. *Hunter*, 1 L. T., N. S. 366; *French* v. *Blundell*, 5 L. T., N. S. 672; *Smith* v. *Vaux*, 5 L. T., N. S. 46.

(*y*) *Curtis* v. *March*, 23 J. P. 663.

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defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant, and if they think that the purchaser falsely represented himself to be a *bonâ fide* traveller, it shall be lawful for the justices to direct proceedings to be instituted against such purchaser under the twenty-fifth section of the principal act.

Who not to be deemed a *bonâ fide* traveller.

A person, for the purposes of this act and the principal act, shall not be deemed to be a *bonâ fide* traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare.

The term "travellers" includes persons who travel abroad for pleasure or recreation as well as those on business (*z*), but if he went abroad merely because he desired to go to a public-house, he would not (*a*). The circumstances under which the guest was admitted and supplied would be a matter for consideration in deciding whether the publican *bonâ fide* believed that his customer was a traveller; the length of his stay over liquor at first supplied him would be relevant with reference to subsequent supplies (*b*).

A person who has taken a ticket at a railway station, and is about to start by a train from the station, is a traveller before the train starts (*c*).

This section seems to assume that the onus of proving the exception lies on the defendant, and so alters the law as it stood before (*d*).

Persons found on premises during hours of closing.

By 35 & 36 Vict. c. 94, s. 25, if, during any period during which any premises are required under the provisions of this act to be closed, any person is found on such premises, he shall, unless he satisfies the court that he was an inmate, servant, or a lodger on such premises, or a *bonâ fide* traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this act with respect to the closing of licensed premises, be liable to a penalty not exceeding forty shillings.

Any constable may demand the name and address of any person found on any premises during the period during which they are required by the provisions of this act to be closed, and if he has reasonable ground to suppose that the name or address given is false, may require evidence of the correctness of such name and address, and may, if such person fail upon such

(*z*) *Taylor* v. *Humphreys*, 30 L. J., M. C. 242; *Atkinson* v. *Sellers*, 28 L. J., M. C. 12.
(*a*) *Ibid.*
(*b*) *Ibid.*
(*c*) *Fisher* v. *Howard*, 34 L. J., M. C. 42.
(*d*) *Taylor* v. *Humphries*, 34 L. J., M. C. 1; 17 C. B., N. S. 539; *Davis* v. *Scrace*, 38 L. J., M. C. 74; L. R., 4 C. P. 172; *Morgan* v. *Hedger*, 40 L. J., M. C. 13.

demand to give his name or address, or such evidence, apprehend him without warrant, and carry him, as soon as practicable, before a justice of the peace. *Of Offences punishable summarily.*

Any person required by a constable under this section to give his name and address who fails to give the same, or gives a false name or address, or gives false evidence with respect to such name and address, shall be liable to a penalty not exceeding five pounds. Persons giving false name or address.

By 35 & 36 Vict. c. 94, s. 25, every person who by falsely representing himself to be a traveller or a lodger buys or obtains, or attempts to buy or obtain at any premises any intoxicating liquor, during the period during which such premises are closed in pursuance of this act shall be liable to a penalty not exceeding five pounds. Persons falsely representing themselves to be travellers or lodgers.

By 35 & 36 Vict. c. 94, s. 49, where, on the occasion of an application for a new licence or transfer or renewal of a licence which authorizes the sale of any intoxicating liquor for consumption on the premises, the applicant, at the time of his application, applies to the licensing justices to insert in his licence a condition that he shall keep the premises in respect of which such licence is or is to be granted closed during the whole of Sunday, the justices shall insert the said condition in such licence. As to six-day licences.

The holder of a licence in which such condition is inserted (in this act referred to as a six-day licence) shall keep his premises closed during the whole of Sunday, and the provisions of this act with respect to the closing of licensed premises during certain hours on Sunday shall apply to the premises in respect of which a six-day licence is granted as if the whole of Sunday were mentioned in those provisions instead of certain hours only.

The holder of a six-day licence may obtain from the commissioners of inland revenue any licence granted by such commissioners, which he is entitled to obtain in pursuance of such six-day licence, upon payment of six-seventh parts of the duty which would otherwise be payable by him for a similar licence not limited to six days; and if he sell any intoxicating liquor on Sunday he shall be deemed to be selling intoxicating liquor without a licence.

The notice which a licensed person is required to keep painted or fixed on his premises shall, in the case of a licence under this section, contain words indicating that such licence is for six days only. In calculating the amount to be paid for a six-day licence any fraction of a penny shall be disregarded.

By 35 & 36 Vict. c. 94, s. 26, the local authority of any licensing district, upon the production of such evidence as such authority may deem sufficient to show that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market, or following any lawful trade or calling [or attending any theatre], may grant, if such authority think fit, to any licensed victualler or licensed keeper of a refreshment-house, in respect of premises in the Order granting extension of time for closing.

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Special orders of exemption from closing hours.

immediate neighbourhood of such market, or of the place where the persons follow such lawful trade or calling [or of any such theatre], an order exempting such person from the provisions of this act, with respect to the closing of his premises on such days and during such time, except between the hours of one and two of the clock in the morning, as may be specified in such order.

The holder of an order under this section shall not be liable to any penalty for not closing his premises on such days and during such times as may be specified in such order; but he shall not be exempt from any other penalty under this or any other act, or otherwise.

A notice in such form as may be prescribed by the local authority, stating the day and hours during which the premises are permitted to be open under such order of exemption shall be affixed and kept affixed in a conspicuous position outside the premises; and if the holder of the order of exemption make default in affixing or in keeping affixed such notice in manner aforesaid, during any part of the time for which his exemption is granted, he shall be liable to pay a penalty not exceeding five pounds.

Every person who keeps affixed to his premises any such notice when he does not hold an order under this section, shall be liable to a penalty not exceeding ten pounds.

Any such local authority as aforesaid may at any time, if it seem fit to them, withdraw an order under this section, or alter the same by way of extension or restriction, as such authority may deem necessary or expedient, so however as not to render any person liable to any penalty for anything done under such order before the holder was informed of such withdrawal or alteration.

Local authorities of licensing districts, who.

The following persons and bodies of persons shall be deemed to be local authorities of licensing districts for the purposes of this act; that is to say,

(1.) In the metropolitan police district, the commissioner of police for the metropolis, subject to the approbation of one of her Majesty's principal secretaries of state:

(2.) In the city of London and the liberties thereof, so far as they are not included in the metropolitan police district, the commissioner of city police, subject to the approbation of the lord mayor of the said city:

(3.) In any other place, two justices of the peace in petty sessions assembled.

This section is amended by 37 & 38 Vict. c. 49, s. 4, by striking out the words between brackets.

By 37 & 38 Vict. c. 49, s. 5, the grant of an order of exemption under the said twenty-sixth section amended as aforesaid may be made to any person licensed to sell beer or cider by retail, to be consumed upon the premises, as well as to any licensed victualler or licensed keeper of a refreshment-house.

The grant of a licence under the twenty-ninth section of the principal act may be made to any person licensed to sell beer

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or cider by retail, to be consumed upon the premises, as well as to any licensed victualler or keeper of a refreshment-house in which intoxicating liquors are sold.

Hours of closing for refreshment-houses.

By 35 & 36 Vict. c. 94, s. 27, no intoxicating liquor shall be consumed upon premises licensed as a refreshment-house but not for the sale of any intoxicating liquor during the hours during which the same premises would, if they were the licensed premises of licensed victuallers, be closed by law for the sale and consumption of intoxicating liquor.

If any person licensed to keep such refreshment-house allows any intoxicating liquor to be consumed on the premises in contravention of this section, he shall be liable for the first offence to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds.

By 35 & 36 Vict. c. 94, s. 28, every refreshment-house in respect of which a licence is granted for the sale therein by retail of foreign wine, upon which licence an abatement of duty has been allowed under section nine of the act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter ninety-one, intituled "An Act to amend the Laws relating to the Inland Revenue," shall be closed every night at ten of the clock, and where other licensed premises in the same place are required by or in pursuance of this act to close at nine o'clock at night, at nine of the clock; and if any person keeping any such refreshment-house as is mentioned in this section sells or exposes for sale in such refreshment-house, or opens, or keeps open any such refreshment-house for the sale of intoxicating liquors during the time that such house is directed to be closed by this section, or during such time as aforesaid allows any intoxicating liquor to be consumed on such premises, he shall for the first offence be liable to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds.

Special occasional licences.

By sect. 29, if any licensed victualler or keeper of a refreshment-house in which intoxicating liquors are sold applies to the local authority of a licensing district for a licence exempting him from the provisions of this act relating to closing of premises on any special occasion or occasions, it shall be lawful for such local authority, if in his discretion he thinks fit so to do, to grant to the applicant an occasional licence exempting him from the provisions of this act relating to closing of premises during certain hours, and on the special occasion or occasions to be specified in the licence; and no licensed victualler or keeper of a refreshment-house to whom an occasional licence has been granted under this section shall be subject to any penalty for the contravention of the provisions of this act relating to the closing of premises during the time to which his occasional licence extends, but he shall not be exempted by such occasional licence from any penalty to which he may be subject by any other provision of this or any other act of parliament.

By 37 & 38 Vict. c. 49, s. 11, whereas by the act of the session of the twenty-seventh and twenty-eighth years of the

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reign of her present Majesty, chapter sixty-four, it is provided that no persons within the limits of that act shall open or keep open any refreshment-house, to which that act so far as it is unrepealed applies, or sell or expose for sale or consumption in any such refreshment-house any refreshments or any article whatsoever between the hours of one and four o'clock in the morning: and whereas it is expedient to amend the provisions of the said act: be it therefore enacted, that the said act, so far as it is unrepealed, shall be construed as if there were substituted therein for the hour of one o'clock in the morning the hour of the night or morning at which premises licensed for the sale of intoxicating liquors by retail situate in the same place as such refreshment-house are required to be closed, and as if the whole of England were within the limits of the act, and as if the expression "district" in the act included any place in which such refreshment-house is situate.

Hours of closing refreshment-houses.

Record of convictions and penalties.

By 37 & 38 Vict. c. 49, s. 12, the sixty-seventh section of the principal act is hereby repealed, and in lieu thereof be it enacted, that where any person holding a licence under this or the principal act is convicted of any offence against this or the principal act, or against any of the acts recited or mentioned therein, the court may not, except in the case of a first offence, reduce the penalty to less than twenty shillings, nor shall the penalty, whether of excise or police, be reduced in any case to less than the minimum authorized by any other act.

Mitigation of penalties limited.

By sect. 13, where any licensed person is convicted of any offence against the principal act which by such act was to have been or might have been indorsed upon the licence, or of any offence against this act, the court before whom the offender is brought shall cause the register of licences (*e*) in which the licence of the offender is entered, or a copy of the entries therein relating to the licence of the offender, certified in manner prescribed by sect. 58 of the principal act, to be produced to the court before passing sentence, and after inspecting the entries therein in relation to the licence of the offender, or such copy thereof as aforesaid, the court shall declare, as part of its sentence, whether it will or will not cause the conviction for such offence to be recorded on the licence of the offender, and if it decide that such record is to be made, the same shall be made accordingly.

Production of registers of licences in court.

Appeal against order to record an offence on a licence.

A declaration by the court that a record of an offence is to be made on a licence shall be deemed to be part of the conviction or order of the court in reference to such offence, and shall be subject accordingly to the jurisdiction of the court of appeal.

A direction by the court that a conviction for an offence is to be recorded on the licence of the offender shall, for the purposes of the principal act, be deemed equivalent to a direction or requirement by the act that such conviction is to be recorded; and all the provisions of the principal act importing that con-

(*e*) See *post*, p. 1036.

victions are required or directed by the act to be recorded on the licence of an offender shall be construed accordingly.

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By sect. 14, where a licensed person is convicted of any offence against the provisions of any act for the time being in force relating to the adulteration of drink, such conviction shall be entered in the proper register of licences, and may be directed to be recorded on the licence of the offender in the same manner as if the conviction were for an offence against this act, and when so recorded shall have effect as if it had been a conviction for an offence against this act.

Recording conviction for adulterating, &c. drink.

By 35 & 36 Vict. c. 94, s. 30, if any licensed person on whose licence two convictions for offences committed by him against this act have been recorded is convicted of any offence which is directed by this act to be recorded on his licence, the following consequences shall ensue; that is to say,

Repeated convictions.

(1.) The licence of such licensed person shall be forfeited, and he shall be disqualified for a term of five years from the date of such third conviction from holding any licence; and

(2.) The premises in respect of which his licence was granted shall, unless the court having cognizance of the case in its discretion thinks fit otherwise to order, be disqualified from receiving any licence for a term of two years from the date of such third conviction:

Provided that nothing in this section contained shall prevent the infliction by the court of any pecuniary penalty or any term of imprisonment to which such licensed person would otherwise be liable, or shall preclude the court from exercising any power given by any other section of this act of disqualifying such licensed person or such premises for a longer period than the term mentioned in this section.

By sect. 31, the following additional provisions shall be enacted with respect only to convictions of persons who may hereafter become licensed in respect of premises, and shall not apply to a conviction of any person licensed for any premises at the passing of this act so long as he is licensed in respect of the same premises; viz.,

Convictions to be recorded against the premises.

(1.) The second and every subsequent conviction recorded on the licence of any one such person shall also be recorded in the register of licences against the premises;

(2.) When four convictions (whether of the same or of different licensed persons) have within five years been so recorded against premises, those premises shall during one year be disqualified for the purposes of this act;

(3.) If the licences of two such persons licensed in respect of the same premises are forfeited within any period of two years, the premises shall be disqualified for one year from the date of the last forfeiture:

Provided that, where any premises are disqualified under this section, notice of such disqualification shall be served upon the

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owner of the premises in like manner as an order of disqualification is required to be served under this act, and the regulations for the protection of the owner of premises in case of an order of disqualification shall, so far as the same are applicable, extend to the case of disqualification under this section.

Conviction after five years not to affect penalty.

By 35 & 36 Vict. c. 94, s. 32, a conviction for any offence under this act shall not after five years from the date of such conviction be receivable in evidence against any person for the purpose of subjecting him to an increased penalty or to any forfeiture.

By sect. 33, where a conviction for an offence is by this act directed to be recorded on the licence of any person, the fact of no such record having been made shall not, if such conviction be otherwise proved to the satisfaction of the court having cognizance of any case under this act, exempt such person or the premises occupied by him from any penalty to which such person or premises would have been subject if such record had been duly made. And on such proof being given the omitted conviction may be recorded accordingly, and shall be deemed to have been duly recorded in accordance with this act. See 37 & 38 Vict. c. 49, s. 13, *ante*, p. 1034.

By sect. 34, if any person defaces or obliterates, or attempts to deface or obliterate, any record of a conviction on his licence, he shall be liable to a penalty not exceeding five pounds.

Registers of licences.

By sect. 36, there shall be kept in every licensing district by the clerk of the licensing justices of that district a register, to be called the register of licences, in such form as may be prescribed by such justices, containing the particulars of all licences granted in the district, the premises in respect of which they were granted, the names of the owners of such premises, and the names of the holders for the time being of such licences. There shall also be entered on the register all forfeitures of licences, disqualifications of premises, records of convictions, and other matters relating to the licences on the register.

Names of owners of premises.

Every person applying for a new licence, or the renewal of a licence, shall state the name of the owner of the premises in respect of which such licence is granted or renewed, and such name shall be endorsed on the licence, and the person whose name is so stated shall, subject as hereinafter mentioned, be deemed for the purposes of this act to be the owner of the premises.

A court of summary jurisdiction may, on the application of any person who proves to the court that he is entitled to be entered as owner of any premises in place of the person appearing on the register to be the owner, make an order substituting the name of the applicant, and such order shall be obeyed by the clerk of the licensing justices, and a corresponding correction may be directed to be made on the licence granted in respect of the premises of which such applicant claims to be the owner.

Any ratepayer, any owner of premises to which a licence is

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attached, and any holder of a licence within a licensing district, shall, upon payment of a fee of one shilling, and any officer of police, and any officer of inland revenue in such district, without payment, shall be entitled at any reasonable time to inspect and take copies of or extracts from any register kept in pursuance of this section for such district; and the clerk of the licensing justices and every other person who prevents the inspection or taking copies of or extracts from the same, or demands any unauthorized fee therefor, shall be liable to a penalty not exceeding five pounds for each offence.

As to the register of licences.

The licensing justices may, if they think fit, cause the register kept in pursuance of this section to be divided into parts and assign a part to any portion of the licensing district; and there shall be paid by each licensed person to the clerk in respect of such registration the sum or fee of one shilling for every licence granted or renewed. These registers and indorsements on licences are made evidence by sect. 58, see *post*, p. 1044.

By 37 & 38 Vict. c. 49, s. 15, where any licensed person is convicted for the first time of any one of the following offences,—

(1.) Making an internal communication between his licensed premises and any unlicensed premises;

(2.) Forging a certificate under the Wine and Beerhouse Acts, 1869 and 1870;

(3.) Selling spirits without a spirit licence;

(4.) Any felony;

Owner of premises may apply for temporary authority to carry on business, when.

and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act, 1828, with respect to the grant of a temporary authority and to the grant of licences at special sessions, shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee.

Who entitled to be registered as owner.

By sect. 29, any person possessing an estate or interest in premises licensed for the sale of intoxicating liquors, whether as owner, lessee or mortgagee, prior or paramount to that of the immediate occupier, shall, on payment of a fee of one shilling to the clerk of the licensing justices, be entitled to be registered as owner or one of the owners of such premises: provided, that when such estate or interest is vested in two or more persons jointly, one only of such persons shall be registered as representing such estate or interest.

The commissioners of inland revenue may alter the form of any licence granted by them for the sale of intoxicating liquors, in such manner as they may think expedient, for the purposes of bringing such form into conformity with the law for the time being in force.

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By 37 & 38 Vict. c. 49, s. 16, any constable may, for the purpose of preventing or detecting the violation of any of the provisions of the principal act or this act which it is his duty to enforce, at all times enter on any licensed premises, or any premises in respect of which an occasional licence is in force.

Regulations as to entry on premises.

Every person who, by himself, or by any person in his employ or acting by his direction or with his consent, refuses or fails to admit any constable in the execution of his duty demanding to enter in pursuance of this section, shall be liable to a penalty not exceeding for the first offence five pounds, and not exceeding for the second and every subsequent offence ten pounds.

Refusing to admit constable.

An outhouse used as a cellar at one side of a yard adjoining to the house and occupied therewith, though without any internal occupation, would be deemed part of the premises within this section (*e*).

By 37 & 38 Vict. c. 49, s. 17, any justice of the peace, if satisfied by information on oath that there is reasonable ground to believe that any intoxicating liquor is sold by retail or exposed or kept for sale by retail at any place within his jurisdiction, whether a building or not, in which such liquor is not authorized to be sold by retail, may in his discretion grant a warrant under his hand, by virtue whereof it shall be lawful for any constable named in such warrant, at any time or times within one month from the date thereof, to enter, and if need be by force, the place named in the warrant, and every part thereof, and examine the same and search for intoxicating liquor therein, and seize and remove any intoxicating liquor found therein which there is reasonable ground to suppose is in such place for the purpose of unlawful sale at that or any other place, and the vessels containing such liquor; and in the event of the owner or occupier of such premises being convicted of selling by retail or exposing or keeping for sale by retail any liquor which he is not authorized to sell by retail, the intoxicating liquor so seized and the vessels containing such liquor shall be forfeited.

Warrant to search for intoxicating liquors.

When a constable has entered any premises in pursuance of any such warrant as is mentioned in this section, and has seized and removed such liquor as aforesaid, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on such premises for the purpose of illegally dealing in intoxicating liquor, and be liable to a penalty not exceeding forty shillings.

Any constable may demand the name and address of any person found on any premises on which he seizes or from which he removes any such liquor as aforesaid, and if he has reasonable ground to suppose that the name or address given is false may examine such person further as to the correctness of such name and address, and may, if such person fail upon such demand to give his name or address, or to answer satisfactorily the questions put to him by the constable, apprehend him without

(*e*) See *Reg.* v. *Tott*, 30 L. J., M. C. 177, decided on 4 & 5 Will. 4, c. 85, s. 7, now repealed.

warrant and carry him as soon as practicable before a justice of the peace. *Of Offences punishable summarily.*

Any person required by a constable under this section to give his name and address who fails to give the same, or gives a false name or address, or gives false information with respect to such name and address, shall be liable to a penalty not exceeding five pounds.

Selling liquors in booths, tents, at fairs or races.

By 37 & 38 Vict. c. 49, s. 18, any person selling or exposing for sale any intoxicating liquor in any booth, tent or place within the limits of holding any lawful and accustomed fair or any races without an occasional licence authorizing such sale shall, notwithstanding anything contained in any act of parliament to the contrary, be deemed to be a person selling or exposing for sale by retail intoxicating liquor at a place where he is not authorized by his licence to sell the same, and be punishable accordingly.

Provided that this section shall not apply to any person selling or exposing for sale intoxicating liquors in premises in which he is duly authorized to sell the same throughout the year, although such premises are situate within the limits aforesaid.

Hours of closing for occasional licences.

By sect. 19, whereas by the twentieth section of the act of the session of the twenty-sixth and twenty-seventh years of the reign of her present Majesty, chapter thirty-three, it is provided that the hours during which an occasional licence shall authorize the sale of any beer, spirits or wine shall extend from sunrise until one hour after sunset: it is enacted, that the said section shall be construed as if in place of the words "sunrise until one hour after sunset" there were inserted the words "such hour not earlier than sunrise until such hour not later than ten o'clock at night as may be specified in that behalf in the consent given by the justice for the granting of such occasional licence."

By sect. 20, for the purpose of so much of the principal act as relates to offences against public order, that is to say, sections twelve to eighteen, both inclusive, and the sections for giving effect to the same, a person taking out an occasional licence shall be deemed to be a licensed person within the meaning of the said sections, and the place in which any intoxicating liquors are sold in pursuance of the occasional licence shall be deemed to be licensed premises, and to be the premises of the person taking out such licence.

"Occasional licence," what.

"Occasional licence" means a licence to sell beer, spirits or wine granted in pursuance of the thirteenth section of the act passed in the twenty-fifth and twenty-sixth years of the reign of her present Majesty, chapter twenty-two, and section five of the act of the twenty-seventh year of the reign of her present Majesty, chapter eighteen, and the acts amending the same in relation to the licences therein mentioned, or of any of such acts.

Proceedings before court of summary jurisdiction.

By 35 & 36 Vict. c. 94, s. 51, except as in this act otherwise expressly provided, every offence under this act may be prosecuted, and every penalty and forfeiture may be recovered and

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enforced, in manner provided by the Summary Jurisdiction Act, 1848, subject to the following provisions:—

Court of summary jurisdiction defined.

(1.) The court of summary jurisdiction, when hearing and determining an information or complaint, other than in a case where the offence charged is that of being found drunk in any highway or other public place, or any licensed premises, shall be constituted either of two or more justices of the peace in petty sessions sitting at a place appointed for holding petty sessions [*i. e.* of the county, and need not be residing in the petty sessional division] (*d*), or of a stipendiary magistrate, or some other officer for the time being empowered by law to do alone any act authorized to be done by more than one justice of the peace, and sitting alone or with others at some court or other place appointed for the administration of justice:

Judgment of the court.

(2.) Where the court of summary jurisdiction orders that a distress shall be made in default of payment of any penal sum exceeding five pounds, including under that expression costs actually adjudged in respect of an offence, the court may order that in default of the said sum being paid as directed, the person liable to pay the same shall be imprisoned for any term not exceeding the period specified in the following scale:

For any sum exceeding five pounds but not exceeding ten pounds, three months;

For any sum exceeding ten pounds but not exceeding thirty pounds, four months;

For any sum exceeding thirty pounds but not exceeding fifty pounds, six months;

For any sum exceeding fifty pounds, one year:

Mode of describing the offence.

(3.) The description of any offence under this act in the words of such act, or in similar words, shall be sufficient in law:

Proof of exceptions, &c. to lie on the defendant.

(4.) Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence in this act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant; and in all cases of summary proceedings under this act, the defendant and his wife shall be competent to give evidence:

Defendant and his wife to be competent witnesses.

(5.) All forfeitures shall be sold or otherwise disposed of in such manner as the court may direct, and the proceeds of such sale or disposal (if any) shall be applied in the

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(*d*) See *Reg.* v. *Shaw*, 34 L. J., M. C. 169; L. & C. 579.

like manner as penalties, but the court may direct that such proceeds may be applied in the first instance in paying the expenses of and incidental to any search and seizure which resulted in such forfeiture: *Of Offences punishable summarily.*

(6.) Penalties and forfeitures under this act shall not, for the purpose of any act respecting the application of such penalties, or the costs, charges and expenses attending proceedings for recovery of such penalties or of forfeitures be deemed to be penalties or forfeitures under any act relating to the inland revenue.

Any officer appointed by the commissioners of inland revenue may sue for any penalties under this act, and when so sued for any penalties which may be recovered shall be applied in the manner in which excise penalties are for the time being applicable by law.

Where under this act any sum for costs (other than costs upon a conviction or order of dismissal of an information) or for compensation, or both, is ordered or awarded to be paid by any person, the amount thereof shall be recovered in manner directed by "The Summary Jurisdiction Act, 1848," for the recovery of costs awarded upon the dismissal of an information or complaint.

By 35 & 36 Vict. c. 94, s. 52, if any person feels aggrieved by any order or conviction made by a court of summary jurisdiction, the person so aggrieved may appeal therefrom, subject to the conditions and regulations following:— Of appeals against orders or summary convictions.

(1.) The appeal shall be made to the next court of quarter sessions for the county or place in which the cause of appeal has arisen, holden not less than fifteen days after the decision of the court from which the appeal is made: To what sessions.

(2.) The appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and of the ground thereof: Notice and grounds of appeal.

(3.) The appellant, immediately after such notice, shall enter into a recognizance before a justice of the peace, with two sufficient sureties, conditioned personally to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as may be awarded by the court, or shall give such other security by deposit of money or otherwise as the justice may allow: Recognizance of appeal.

(4.) Where the appellant is in custody the justice may, if he think fit, on the appellant entering into such recognizance or giving such other security as aforesaid, release him from custody:

(5.) The court of appeal may adjourn the appeal, and upon the hearing thereof may confirm, reverse, or modify the decision of the court of summary jurisdiction, or remit the matter to the court of summary jurisdiction with the opinion of the court of appeal thereon, or Adjournment of appeal, and judgment of the court.

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make such other order in the matter as the court thinks just. The court of appeal may also make such order as to costs to be paid by either party as the court thinks just.

Costs on appeal from summary conviction.

By 35 & 36 Vict. c. 94, s. 53, where the justices refuse to renew a licence, and an appeal against such refusal is duly made, and such licence expires before the appeal is determined, the commissioners of inland revenue may, by order, permit the person whose licence refused to carry on his business during the pendency of the appeal upon such conditions as they think just; and, subject to such conditions, any person so permitted may, during the continuance of such order, carry on his business in the same manner as if the renewal of the licence had not been refused.

When appeal against refusal to renew a licence or against a conviction, commissioners of inland revenue may relieve pending the appeal.

Where a licence is forfeited on or in pursuance of a conviction for an offence, and an appeal is duly made against such conviction, the court by whom the conviction was made may, by order, grant a temporary licence to be in force during the pendency of the appeal upon such conditions as they think just.

By sect. 54, no conviction or order made in pursuance of this act, originally or on appeal, relative to any offence, penalty, forfeiture, or summary order, shall be quashed for want of form, or, if made by a court of summary jurisdiction, be removed by *certiorari* or otherwise, either at the instance of the crown or of any private party, into any superior court. Moreover, no warrant of commitment in any such matter shall be held void by reason of any defect therein, provided that there is a valid conviction to maintain such warrant, and it is alleged in the warrant that the party has been convicted.

Certiorari taken away.

Procedure as to recording convictions.

By sect. 55, with respect to the record of convictions of licensed persons for offences under this act committed by them as such, the following provisions shall have effect in cases where this act requires the conviction to be recorded on the licence; that is to say,

(1.) The court before whom any licensed person is accused shall require such person to produce and deliver to the clerk of the court the licence under which such person carries on business, and the summons shall state that such production will be required:

(2.) If such person is convicted, the court shall cause the short particulars of such conviction, and the penalty imposed, to be indorsed on his licence before it is returned to the offender:

(3.) The clerk to the licensing justices shall enter the particulars respecting such conviction, or such of them as the case may require, in the register of licences, kept by him under this act:

(4.) If the clerk to the court be not the clerk to the licensing justices, he shall send forthwith to the last-mentioned clerk notice of such conviction, and of the particulars thereof:

(5.) Where the conviction of any such person has the effect of forfeiting the licence, or of disqualifying any person or premises for the purposes of this act, the licence shall be retained by the clerk of the court, and notice of such forfeiture and disqualification shall be sent to the licensing officer of the district, and if the clerk to the court is not the clerk to the licensing justices to such last-mentioned clerk, together with the forfeited licence.

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Procedure on recording convictions.

By 35 & 36 Vict. c. 94, s. 56, where any tenant of any licensed premises is convicted of an offence against this act, and such offence is one the repetition of which may render the premises liable to be disqualified from receiving a licence for any period, it shall be the duty of the clerk of the licensing justices to serve, in manner provided by this act, notice of every such conviction on the owner of the premises.

Notice of conviction to be given to owner of premises.

Where any order of a court of summary jurisdiction declaring any licensed premises to be disqualified from receiving a licence for any period has been made, the court shall cause such order to be served on the owner of such premises, where the owner is not the occupier, with the addition of a statement that the court will hold a petty sessions at a time and place therein specified, at which the owner may appear and appeal against such order on all or any of the following grounds, but on no other grounds:

Order disqualifying premises to be served on the owner.

(*a.*) That notice, as required by this act, has not been served on the owner of a prior offence which on repetition renders the premises liable to be disqualified from receiving a licence at any period; or

(*b.*) That the tenant by whom the offence was committed held under a contract made prior to the commencement of this act, and that the owner could not legally have evicted the tenant in the interval between the commission of the offence, in respect of which the disqualifying order was made, and the receipt by him of the notice of the immediately preceding offence which on repetition renders the premises liable to be disqualified from receiving a licence at any period; or,

c.) That the offence in respect of which the disqualifying order was made occurred so soon after the receipt of such last-mentioned notice that the owner, notwithstanding he had legal power to evict the tenant, could not with reasonable diligence have exercised that power in the interval which occurred between the said notice and the second offence.

If the owner appear at the time and place specified, and at such sessions, or any adjournment thereof, satisfy the court that he is entitled to have the order cancelled on any of the grounds aforesaid, the court shall thereupon direct such order to be cancelled, and the same shall be void.

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By 35 & 36 Vict. c. 94, s. 57, where a licensed person is convicted of more offences than one committed on the same day, the convictions for which are by this act directed to be recorded on his licence, the court by whom he is convicted may, in their discretion, order that one or some only of such convictions shall be so recorded.

Registers of licences to be evidence.

By sect. 58, the registers of licences kept in pursuance of this act shall be receivable in evidence of the matters required by this act to be entered therein. Every indorsement upon a licence, and every copy of an entry made in the registers of licences in pursuance of this act, purporting to be signed by the clerk to the licensing justices and (in the case of a copy) to be certified to be a true copy, shall be evidence of the matters stated in such indorsement and entry, without proof of the signature or authority of the person signing the same.

By sect. 59, nothing in this act shall prevent any person from being liable to be indicted or punished under any other act, or otherwise, so that he be not punished twice for the same offence.

Disqualification of justice from acting.

By sect. 60, no justice shall act for any purpose under this act, or under any of the Intoxicating Liquor Licensing Acts, except in cases where the offence charged is that of being found drunk in any highway or other public place, whether a building or not, or on any licensed premises, or of being guilty while drunk of riotous or disorderly conduct, or of being drunk while in charge, on any highway or other public place, of any carriage, horse, cattle, or steam-engine, or of being drunk when in possession of loaded fire-arms, who is or is in partnership with or holds any share in any company which is a common brewer, distiller, maker of malt for sale, or retailer of malt or of any intoxicating liquor in the licensing district, or in the district or districts adjoining to that in which such justice usually acts; and no justice shall act for any purpose under this act, or under any of the Intoxicating Liquor Acts, in respect of any premises in the profits to which such justice is interested, or of which he is wholly or partly the owner, lessee or occupier, or for the owner, lessee or occupier of which he is manager or agent.

Penalty on disqualified justice who acts.

Any justice hereby declared not to be qualified to act under this act who knowingly acts as a justice for any of the purposes of this act shall for every such offence be liable to a penalty not exceeding one hundred pounds, to be recovered by action in one of her Majesty's superior courts at Westminster.

Provided that—

(1.) No justice shall be disqualified under this section to act in respect of any premises by reason of his having vested in him a legal interest only, and not a beneficial interest, in such premises or the profits thereof:

(2.) No justice shall be liable to a penalty for more than one offence committed by him under this section before

the institution of any proceedings for the recovery of such penalty:

Of Offences punishable summarily.

(3.) No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid.

Places within the jurisdiction of justices, &c.

By 35 & 36 Vict. c. 94, s. 61, for all the purposes of this act any pier, quay, jetty, mole, or work extending from any place within the jurisdiction of any licensing justices or court of summary jurisdiction into or over any part of the sea, or any part of a river within the ebb and flow of the tide, shall be deemed to be within the jurisdiction of such justices and court.

For the purpose of jurisdiction in any proceedings under this act, any river or water which runs between or forms the boundary of two or more licensing districts, or of the jurisdiction of two or more courts of summary jurisdiction, shall be deemed to be wholly within each such licensing district and the jurisdiction of each of such courts.

Production of licence by holder or his servant on demand.

By sect. 64, every holder of a licence, or of an order of exemption made by a local authority in pursuance of this act, shall, by himself, his agent, or servant, produce such licence or order within a reasonable time after the production thereof is demanded by a justice of the peace, constable, or officer of inland revenue, and deliver the same to be read and examined by him. Any person who acts in contravention of this section shall be liable to a penalty not exceeding ten pounds.

Notices may be sent by post.

By sect. 70, all notices and documents required by this act to be served or sent may, unless otherwise expressly provided, be served and sent by post, and, until the contrary is proved, shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post; and in proving such service or sending it shall be sufficient to prove that the letter containing the notice or document was prepaid, and properly addressed.

Where any officer or other person interested in any licensed premises is entitled to receive notice of a conviction under this act, he shall supply his address to the clerk or other person required to send such notice, and any notice sent to such address shall be deemed to be duly served; and where no notice is supplied in pursuance of this section, all notices shall be deemed to be duly served if sent to any address which such clerk or other person in the exercise of his discretion believes to be the address of the person to whom the notice was so sent.

Service of notice on owner of licensed premises.

Provided that any notice of any offence required by this act to be sent to the owner of licensed premises shall be either served personally or sent by registered letter.

By sect. 72, nothing in this act shall affect or apply to—

(1.) The privileges at the date of the passing of this act enjoyed by any university in England, or the respective chancellors or scholars of the same, or their successors:

Intoxicating Liquors Licensing.

Matters excluded from the Licensing Act, 1872.

(2.) The privileges at the date of the passing of this act enjoyed by the mayor or burgesses of the borough of St. Alban's, in the county of Hertford, or their successors, or the exemption from the obligation to take out a licence as defined by this act, or a licence from the commissioners of inland revenue enjoyed by the company of the master, wardens, and commonalty of vintners of the city of London:

(3.) The sale of spruce or black beer:

(4.) The sale of intoxicating liquor by proprietors of theatres in pursuance of the acts in that behalf:

(5.) The sale of intoxicating liquor in packet boats, in pursuance of the acts in that behalf:

(6.) The sale of intoxicating liquor on special occasions in pursuance of the provisions in that behalf enacted:

(7.) The sale of spirits in canteens, in pursuance of any act regulating the same:

(8.) The sale of medicated or methylated spirits, or spirits made up in medicine and sold by medical practitioners or chemists and druggists:

(9.) The sale of intoxicating liquor by wholesale:

(10.) Any penalties recoverable by or on behalf of the commissioners of inland revenue, or any laws relating to the excise.

Definitions in the Licensing Act, 1872.

By 35 & 36 Vict. c. 94, s. 74, in this act, if not inconsistent with the context, the following expressions have the meanings hereinafter respectively assigned to them; that is to say,

"Intoxicating Liquor Licensing Act, 1828," means the act of the ninth year of the reign of King George the Fourth, chapter sixty-one, intituled "An Act to regulate granting of Licences to keepers of Inns, Alehouses and Victualling Houses in England," and includes the acts amending the same:

"Wine and Beerhouse Acts" means the Wine and Beerhouse Act, 1869, and the Wine and Beerhouse Act Amendment Act, 1870:

"Intoxicating Liquors Licensing Acts" means the Intoxicating Liquor Licensing Act, 1828, and the Wine and Beerhouse Acts:

"Intoxicating liquor" means spirits, wine, beer, porter, cider, perry, and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without a licence from the commissioners of inland revenue:

"Licence" means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828, including a certificate of justices granted under the Wine and Beerhouse Acts, and including a licence for the sale of sweets which is hereby authorized to be granted in the same manner as if sweets were wine, and including a licence for the retail of spirits granted to

Definition Clause in Licensing Act, 1872.

a wholesale spirit dealer by the justices in pursuance of this act:

"A new licence" means a licence granted at a general annual licensing meeting in respect of premises not heretofore licensed for the sale of intoxicating liquors:

"The renewal of a licence" means a licence granted at a general annual licensing meeting by way of renewal:

"The transfer of a licence" means a transfer made in special sessions in exercise of the power granted to justices by the fourth section of the said act of the ninth year of the reign of King George the Fourth, chapter sixty-one, intituled "An Act to regulate granting of Licences to keepers of Inns, Alehouses, and Victualling Houses in England:"

"Licensed person" means a person holding a licence as defined by this act:

"Licensed premises" means premises in respect of which a licence as defined by this act has been granted and is in force:

"Unlicensed premises" means premises in respect of which a licence as defined by this act has not been granted or is not in force:

"Owner of licensed premises" means the person for the time being entitled to receive, either on his own account or as mortgagee or other incumbrancer in possession, the rack-rent of such premises:

"Licensing district" means the area for which a general annual licensing meeting is held in pursuance of the Intoxicating Liquor Licensing Act, 1828:

"Licensing justices" means the justices having jurisdiction in respect of the grant of new licences in a licensing district under the last-mentioned act as amended by this act:

"Licensing officer" means any officer appointed by the commissioners of inland revenue to issue or superintend the issue of licences under this act in any place:

"Sale by retail" in respect of any intoxicating liquor means the sale of that liquor in such quantities as is declared to be sale by retail by any acts relating to the sale of intoxicating liquors:

"County" does not include a county of a city or a county of a town, but means any county, riding, parts, division or liberty of a county having a separate commission of the peace and a separate court of quarter sessions:

"Borough" means a county of a city, county of a town, city, municipal borough, cinque port and its liberties, town corporate or other place in which a general annual licensing meeting is held in pursuance of the Intoxicating Liquors Licensing Act, 1828, exclusive of a petty sessional division of a county:

Where a liberty of a county, as defined by this act, is not divided into petty sessional divisions, such liberty shall, so far as respects the provisions of this act with respect to

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the grant of new licences, stand in the same position as if it were a petty sessional division of the county in which it is geographically situate, or with which it has the longest common boundary:

"Clerk of the licensing justices" means, where the licensing district is a county or a petty sessional division of a county, the clerk of the petty sessions for such division; and where the licensing district is a county of a city, county of town, city, municipal borough, town corporate, or other place not a county or a petty sessional division of a county, means the clerk to the justices of such county of a city, county of a town, city, borough, town corporate, or place, or other person performing analogous duties to such clerk; and where there are more persons than one in any county, petty sessional division, or other place filling the office of clerk of the licensing justices as hereinbefore defined, the licensing justices shall determine by which of such persons the register of licences shall be kept:

"Town" means any parliamentary or municipal borough, Improvement Act district, local government district, or other place having a known legal boundary, and wherever two or more of the above-mentioned places occupy portions of the same area, "town" shall be taken to mean such one of such places as is the largest in area; and any premises situate in more than one town shall, for the purposes of this act, be deemed to be in such one of the towns as is the largest in area (*a*):

"Local government district" means any area subject to the jurisdiction of a local board constituted in pursuance of the Local Government Act, 1858:

"Improvement Act district" means any area for the time being subject to the jurisdiction of any commissioners, trustees, or other persons intrusted by any local act, not being a Turnpike Act or Highway Act, with powers of improving, cleansing, or paving any part of such district:

"Court of summary jurisdiction" means any justice or justices of the peace, metropolitan police magistrate, stipendiary or other magistrate, or officer, by whatever name called, to whom jurisdiction is given by the act of the session of the eleventh and twelfth years of the reign of her present Majesty, chapter forty-three, intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders," in this act referred to as "The Summary Jurisdiction Act, 1848," and any acts amending the same:

"Quarter sessions" includes general sessions:

(*a*) This is repealed so far as respects the closing, and of a new licence.

Definition Clause in Licensing Act, 1872.

"Police district" means,—

1. The city of London and the liberties thereof;
2. The metropolitan police district;
3. Any county, riding, part, division, or liberty of a county, borough, city, town, place, or union, or combination of places maintaining a separate police force; and all the police under one chief constable shall be deemed to constitute one force for the purposes of this definition:

"Police authority" means,—

1. In the city of London and the liberties thereof, the commissioner of city police;
2. In the metropolitan police district, the commissioner of police of the metropolis;
3. Elsewhere, the chief constable, or head constable, or other officer, by whatever name called, having the chief command of the police in the police district in reference to which such expression occurs:

Any act or thing by this act authorized to be done by the police authority may be done by any person authorized by him in that behalf:

"Secretary of state" means one of her Majesty's principal secretaries of state.

Notices of intention to apply for billiard licences, or transfer such licences.

By 35 & 36 Vict. c. 94, s. 75, it is provided, that in the case of persons intending to apply for billiard licences under the act of the eighth and ninth years of the reign of her present Majesty, chapter one hundred and nine, intituled "An Act to amend the law concerning games and wagers," or for the transfer of such licences, the same notices shall be given as are by this act required in the case of licences as defined by this act, or as near thereto as circumstances admit; and any person convicted of an offence against the tenor of a billiard licence, or of any offence declared by the last-mentioned act to be an offence against the tenor of a licence as defined by this act, shall be punished under this act in the same manner in all respects as a licensed person within the meaning of this act is punishable under this act for suffering any gaming or any unlawful game to be carried on on his premises; and in construing the last-mentioned act any reference to the Intoxicating Liquor Licensing Act, 1828, shall be construed to refer to that act as amended by this act.

As to the form of licences.

By 35 & 36 Vict. c. 94, s. 48, the following regulations shall be made with respect to licences:—

Every licence granted after the commencement of this act shall be in such form as may from time to time be prescribed by a secretary of state: provided that licences granted at any general annual licensing meeting or adjournment thereof, between the 20th of August and end of September, 1872, shall be in the forms heretofore in use, but any conditions contained in any licence so granted which are contrary to the provisions of this act shall be of no effect.

(2.) A renewal of a licence may be made by an indorsement

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on the licence, or by the issue of a copy of the old licence, but in the latter case there shall be indorsed on such copy all convictions made within the previous five years which are indorsed on the old licence.

The commissioners of inland revenue may alter the form of any licence granted by them for the sale of intoxicating liquors in such manner as they may think expedient for the purposes of bringing such form into conformity with the law for the time being in force.

Form of renewal of a licence.

The ordinary form of a renewal of an alehouse licence is as follows:—

Licensing Act, 1872.

At the general annual licensing meeting [*or*, an adjournment, *as the case may be*], holden at ———, on the ——— day of ———, for the division of ———, in the county of ——— [*or* for the borough of ———].

We, being ——— of the justices acting for the said division, and being the majority at the said meeting assembled [*or*, *if a borough state so*], hereby grant unto A. B. of [being a licensed victualler, &c.], this renewal licence authorizing him to apply for and hold [*if an alehouse licence*], any of the excise licences that may be held by a publican for the sale by retail at a house situated at ———, known by the sign of the ———, of ——— intoxicating liquor, to be consumed either on or off the premises.

The owner of the premises in respect of which this licence is granted is M. N., of ———.

This licence shall be in force from the ——— day of ——— until the ——— day of ———.

[*Signature or official seal of justices.*]

CHAPTER IX.

OF BILLIARD LICENCES—AND OFFENCES AGAINST THE GAMING ACT RELATING THERETO—AND APPEALS THEREUNDER.

Of Billiard Licences.

Billiard licences to be granted at the general annual licensing meeting with respect to intoxicating liquors.

By the 8 & 9 Vict. c. 109, s. 10, it is enacted, that the justices in every division, district and place in England for which a special sessions of the justices of the peace (called the general annual licensing meeting) is holden annually for granting licences to persons keeping, or being about to keep, inns, alehouses and victualling-houses to sell exciseable liquors by retail to be drunk or consumed on the premises therein specified, shall have authority at such general annual licensing meeting, or at any adjournment thereof, to grant billiard licences to such persons as the said justices shall in their discretion deem fit and proper to keep public billiard tables and bagatelle boards, or instruments used in any game of the like kind; and at the special sessions holden for transferring licences to keep inns shall have authority to transfer such billiard licences to such other persons as they in their discretion shall deem fit and proper to continue to hold the same; and who, in each case, shall be required to give the like notice of their intention to apply for such billiard licence, and entitled to receive the like notice of the licensing days, as is required in the case of persons intending to apply for a licence or the transfer of a licence to sell exciseable liquors by retail to be drunk or consumed on the premises, or as near thereto as the case will allow. And every such billiard licence shall be in the form given in the third schedule annexed to this act, and shall continue in force in the counties of Middlesex and Surrey from the 5th day of April, and elsewhere from the 10th day of October, after the granting thereof, for one whole year thence respectively next ensuing, and no longer. And the clerk of the justices shall be entitled to demand and receive from every person licensed under this act, for the petty constable or other peace officer for serving notices and other services required of him the sum of one shilling, and for the clerk of the justices for the licence the sum of five shillings; and every clerk who shall demand or receive from any person for such fees more than the said sums, being together six shillings, shall for every such offence, on conviction before one justice, forfeit and pay the sum of five pounds.

Transfers at transfer special sessions.

Like notices required.

Provided also (by 35 & 36 Vict. c. 94, s. 75), that, in the case of persons intending to apply for billiard licences under

Of Billiard Licences.

Transfers of licences.

Offences against the tenor of a billiard licence.

8 & 9 Vict. c. 109, or for the transfer of such licences, the same notices shall be given as are by this act required in the case of licences as defined by this act, or as near thereto as circumstances admit; and any person convicted of an offence against the tenor of a billiard licence, or of any offence declared by the last-mentioned act to be an offence against the tenor of a licence as defined by this act, shall be punished under this act in the same manner in all respects as a licensed person within the meaning of this act is punished under this act for suffering any gaming or any unlawful game to be carried on on his premises; and in construing the last-mentioned act any reference to the Intoxicating Liquor Licensing Act, 1828, shall be construed to refer to that act as amended by this act.

What houses require a billiard licence.

By 8 & 9 Vict. c. 109, s. 11, every house, room or place kept for public billiard playing, or where a public billiard table or bagatelle board, or instrument used in any game of the like kind, is kept, at which persons are admitted to play, except in houses or premises specified in any licence granted under the 9 Geo. 4, c. 61, hereinafter called a victualler's licence, shall be licensed under this act; and every person keeping any such public billiard table or bagatelle board, or instrument used in any game of the like kind for public use, without being duly licensed so to do, and not holding a victualler's licence for the house or premises where such billiard table, bagatelle board or other instrument as aforesaid is kept or used, and also every person licensed under this act who shall not during the continuance of such billiard licence put and keep up the words "licensed for billiards" legibly printed in some conspicuous place near the door and on the outside of the house specified in the licence, shall be liable to be proceeded against as the keeper of a common gaming-house, and besides any penalty or punishment to which he may be liable, if convicted of keeping a common gaming-house, shall, on conviction of keeping such unlicensed billiard table, bagatelle board or other instrument as aforesaid, by his own confession or by the oath of one or more credible witnesses before any police magistrate or any two justices of the peace, be liable to pay such penalty, not more than ten pounds for every day on which such billiard table, bagatelle board or instrument as aforesaid shall be used, as shall be adjudged by the magistrate or justices before whom he shall be convicted; or, in the discretion of the magistrate or justices, may be committed to the house of correction, with or without hard labour, for any time not more than one calendar month; and on nonpayment of any penalty so adjudged, and of the reasonable costs and charges of the conviction, the same shall be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand and seal of the magistrate or one of the convicting justices; but no person who shall have been summarily convicted of any such offence shall be liable to be further proceeded against by indictment for the same offence.

Appeals against Summary Convictions.

By 8 & 9 Vict. c. 109, s. 12, every person licensed under this act who shall be convicted before a police magistrate, or two justices acting in and for the division or place in which shall be situated the house kept or heretofore kept by such person, of any offence against the tenor of the licence to him granted, shall be liable to the same penalties and punishments in the case of a first, second, or third offence respectively, to which persons licensed under 9 Geo. 4, c. 61, are respectively liable, on conviction of a first, second, or third offence against the tenor of the licence granted to them under the last-recited act, or as near thereunto as the nature of the case will allow (subject now to 35 & 36 Vict. c. 94, s. 75, *ante*, p. 1049); and all the provisions of the last-recited act, with respect to convictions and penalties for offences against the last-recited act (as amended by 35 & 36 Vict. c. 94 (*a*)), and the proceedings for enforcing the same, and the expenses of prosecution and penalties on witnesses for not attending, and the recovery and application of penalties, and the proceedings on appeals against convictions, and the award of costs on appeals and in actions against justices, constables, or other persons for anything done in the execution of the last-recited act, shall be deemed to apply, so far as they are applicable, to convictions for offences against the tenor of the licences granted under this act, and to the proceedings consequent thereupon or connected therewith, as if they were herein enacted.

Appeal against summary convictions under this act.

An appeal is given to quarter sessions by sect. 20, which enacts, that "any person who shall be summarily convicted under this act may appeal to the next general or quarter sessions of the peace to be holden for the county or place wherein the cause of complaint shall have arisen, provided that such person at the time of the conviction, or within forty-eight hours thereafter, shall enter into a recognizance with two sufficient sureties, conditioned personally to appear at the said sessions to try such appeal, and to abide the further judgment of the court at such sessions, and to pay such costs as shall by the last-mentioned court be awarded; and it shall be lawful for the magistrate or justices by whom such conviction shall have been made, to bind over the witnesses who shall have been examined in sufficient recognizances to attend and be examined at the hearing of such appeal: and that every such witness, on producing a certificate of being so bound, under the hand of the said magistrate or justices, shall be allowed compensation for his or her time, trouble, and expenses in attending the appeal, which compensation shall be paid, in the first instance, by the treasurer of the county or place in like manner as in cases of misdemeanour under 7 Geo. 4, c. 64, and in case the appeal shall be dismissed, and the order of conviction affirmed, the reasonable expenses of all such witnesses attending as afore-

Recognizances to be entered into.

(*a*) See sect. 75, *ante*, p. 1049.

Of Billiard Licences.

said, to be ascertained by the court, shall be repaid to the said treasurer by the appellant.

No appeal against a refusal to grant a billiard licence.

The above appeal clause does not, however, give an appeal against a refusal by justices to grant a billiard licence, nor can the 9 Geo. 4, c. 61, be so read with it as to give such appeal (*b*).

Form of Billiard Licence.

At the general annual licensing meeting (or an adjournment of the general annual licensing meeting, or at a special session) of her Majesty's justices of the peace, acting for the division [*or* "liberty," &c., *as the case may be*] of ——, in the county of ———, holden at ———, on the ——— day of ———, in the year ——, for the purpose of granting billiard licences, we being —— of her Majesty's justices of the peace acting for the said county [*or* "liberty," &c., *as the case may be*], and being the majority of those assembled at the said sessions, do hereby authorize and empower A. L., now dwelling at ———, in the parish of ———, to keep a house for public billiard playing at [*here specify the house*], provided that he [*or* she] put and keep up the words "licensed for billiards," legibly printed on some conspicuous place near the door, and on the outside of the said house, and do not knowingly permit drunkenness or other disorderly conduct in the said house, and do not knowingly allow the consumption of *exciseable liquors* therein, by the persons resorting thereto, and do not knowingly suffer persons of notoriously bad character to assemble and meet together therein, and do not open the said house for play, or allow any play therein, after one and before eight o'clock in the morning, or keep it open or allow any play therein on Sundays, Christmas day, or Good Friday, or on any day appointed for a public fast or thanksgiving, but do maintain good order and rule therein. And this licence shall continue in force from the ——— day of ——— next, until the ——— day of ——— then next following, and no longer.

Given under our hands and seals on the day and at the place first written.

J. S. (L S.)
G. R. (L S.)

Beer is not exciseable liquor within the licence.

Beer is not an exciseable liquor within the meaning of the prohibition against allowing the consumption of exciseable liquors in the house (*c*).

(*b*) *Ex parte Chamberlain*, 8 E. & B. 646.

(*c*) *Jones* v. *Whittaker*, 39 L. J., M. C. 139; L. R., 5 Q. B. 541; *Lancashire* v. *Justices of Stafford*, 26 L. J., M. C. 171, sub nom. *Reg.* v. *Lancashire*, 7 E. & B. 839.

CHAPTER X.

APPEALS AGAINST CONVICTIONS OR ORDERS.

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Section 1.

OF SUMMARY CONVICTIONS AND ORDERS BY JUSTICES IN GENERAL.

A SUMMARY conviction is a record of the proceedings had under the authority of a penal statute, before some justice or commissioner duly authorized to receive information, and proceed to judgment. But the term "conviction" is *verbum equivocum* (*a*); that is, in common parlance it is taken to mean the verdict at the time of trial; though in strict legal sense it is used to denote the judgment of the court.

Distinction between convictions and orders.

The distinction between orders and convictions has, since the 11 & 12 Vict. c. 43, which statute has placed them almost completely on the same footing so far as it applies, ceased to be of importance. One of the marks of distinction formerly was, that an order did not require to have the evidence set out in the body of it, whilst a conviction did (*b*). So an order did not require the allegation that the party had been summoned, and the evidence taken in his presence, and upon oath, but the court would intend in favour of the order, that all that had duly happened, whilst it required that all should be expressly averred in a conviction (*c*); so that the effect of the 11 & 12 Vict. c. 43, is to assimilate convictions to orders as they have always been construed.

The following is a sketch of the principal features of the law respecting convictions. The framing them still requires great attention, for they are construed strictly, because the jurisdiction exercised is summary (*d*): accordingly no one subject relating to a magistrate's duty requires more care, although

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(*a*) Per *Tindal*, C. J., *Burgess* v. *Boetefour and Brown*, 13 L. J., M. C. 126.

(*b*) *R.* v. *Lloyd*, 2 Str. 996; Paley on Conv., 4th ed. 127.

(*c*) Paley on Conv., 4th ed. 127, and cases cited.

(*d*) *R.* v. *Green*, Cald. 391, 396, per *Ashhurst*, J.

Of Summary Convictions and Orders.

defects in form are now, to a certain extent, cured by 11 & 12 Vict. c. 43, and amendable under 12 & 13 Vict. c. 45, s. 7 (*e*).

Jurisdiction must appear.

The authority to convict, being special, and in restraint of the common law, must appear, on the face of the proceedings, to have been strictly pursued according to the letter of the act by which it was created, so as *to show* the most material point, *viz. that the justice has jurisdiction in the case* (*f*); for those who act under a jurisdiction given by act of parliament, must show that jurisdiction; since in a matter of jurisdiction the court will intend nothing (*g*); but notwithstanding that summary jurisdiction over an offence created by a statute be not conferred by express words upon a justice, it may be implied from the general tenor of the statute; thus, under the Contagious Diseases (Animals) Act, 1869, an offence was created by one section, and by another a penalty was attached to it, and by another an appeal was given to a person aggrieved by the adjudication of justices with regard to any penalty to the quarter sessions; and it was held, that, by implication, a summary jurisdiction was conferred on justices by the several sections read in connection with one another (*h*). It must, also, appear in like manner, that rules similar to those adopted by the common law in judicial proceedings, and founded in natural justice, have been observed; as, for instance, the necessity that the defendant should have notice of the proceedings (*i*); unless the statute (as is the case in some instances) should expressly dispense with the necessity of so stating them. Indeed, it is reasonable that summary convictions should be construed with strictness; because, if regular on the face of them, and unappealed against by the defendant where remedy by appeal is given, they are taken to be true in fact against him, and conclude him from ever bringing an action for maliciously prosecuting them, unless when questioned by him on appeal (*k*). "Convictions" said Lord *Holt*, "ought to be certain, and not taken upon collection" (*l*); for they are in the nature of a verdict and judgment (*m*).

Summary jurisdiction may be conferred by implication.

The rules of natural justice must be observed.

An adjudication in a conviction is entire; one part of it cannot be given at one time, and another at a subsequent period (*n*). Nor can it be split; so that if it is not good

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(*e*) *Post*, p. 1102.

(*f*) Boscawen, 10, cited Paley on Conv., 4th ed. 147.

(*g*) *R.* v. *Holbeck-in-Leeds*, Burr. S. C. 198; *R.* v. *Stepney*, *id.* 23; other cases, 1 Burn's J., 30th ed. 1147; *Gossett* v. *Howard*, 10 Q. B. 411, 452.

(*h*) *Cullen* v. *Trimble*, 41 L. J., M. C. 132; L. R., 7 Q. B. 416.

(*i*) *Gill* v. *Bright*, 41 L. J., M. C. 22; *Reg.* v. *Cheshire Lines Committee*, 42 L. J., M. C. 100; L. R., 8 Q. B. 344.

(*k*) *Mellor* v. *Baddeley*, 4 Tyrw. 962; 2 C. & M. 675; 6 C. & P. 374.

(*l*) Ld. Raym. 510. See cases collected, Burn's J., 30th ed. 1146.

(*m*) *R.* v. *Harris*, 7 T. R. 238.

(*n*) *R.* v. *Dimpsey*, 2 T. R. 96, *per Cur.*

throughout, it cannot be severed so as to be bad in a material part and good as to the rest, even though the several parts are in their nature distinct (*o*). But it seems that by consent a conviction may be set aside as to a part only (*p*); but an order may be good in part and bad for the residue (*q*).

Contents of the Conviction.

A warrant of commitment under an act which treats conviction and commitment as one matter must be construed as a conviction whether it recites a conviction or not (*r*), and comes within 11 & 12 Vict. c. 43. A commitment reciting a conviction, which fails to set forth an offence over which the committing magistrate had jurisdiction, is bad, and the defendant will be discharged on habeas corpus (*s*).

Commitment reciting a conviction is to be treated as a conviction.

By the 11 & 12 Vict. c. 43, the several statutes and parts of statutes relating to the duties of justices of the peace out of sessions in respect of summary convictions and orders were consolidated, with such additions and alterations as were deemed necessary, and such duties clearly defined, and the provisions of which statute must always now be borne in mind in dealing with questions arising on convictions and orders, but nothing in that act extends (1) to any warrant or order for the removal of poor persons; or (2) with respect to any lunatic; nor (3) to any information or complaint under any of the revenue statutes relating to the excise, customs, stamps, taxes or post office; nor (4) to any bastardy orders (except as to this latter to certain exceptions referring to the mode of executing them) (*t*). Proceedings under the Factory Acts were formerly excepted, but the exception was repealed by the Factory and Workshop Act, 1871 (*u*). The first exception, however, does not include an order for the payment of the costs of the maintenance of a pauper for the twenty-one days between the time of the making of an order of removal, and giving notice of chargeability, and the removal where no notice of appeal is given, to which order the act, therefore, applies (*x*). Nor does a conviction upon an enactment in a revenue statute, but relating to a matter of police, fall within the third exception; and, therefore, a conviction, under the 4 & 5 Will. 4, c. 85, s. 8, for signing a false certificate, in order to obtain a licence for the sale of beer under one of the Beerhouse Acts, may be drawn up in the form given

What 11 & 12 Vict. c. 43, does not extend to.

An order for the payment of costs of maintenance of pauper is within the act.

A conviction on a revenue statute relating to a police matter is within the act.

(*o*) *R.* v. *Dimpsey*, 2 T. R. 96; *R.* v. *Patchett*, 5 East, 344; 1 Smith, 543; *R.* v. *Catherall*, 2 Stra. 900.
(*p*) *R.* v. *Hale*, Cowper, 728.
(*q*) *R.* v. *Maulden*, 1 M. & R., M. C. 38; *R.* v. *Robinson*, 17 Q. B. 466; *R.* v. *Green*, 20 L. J., M. C. 168.
(*r*) *In re Gray*, 1 New Sess. C. 354; 14 L. J., M. C. 26; *Lindsay* v. *Leigh*, 11 Q. B. 459; *Re Geswood*, 2 E. & B. 952; *Bailey's case*, 3 E. & B. 607; *Re Hammond*, 7 Q. B. 92.
(*s*) *Reg.* v. *King*, 13 L. J., M. C. 43.
(*t*) 11 & 12 Vict. c. 43, s. 35.
(*u*) 34 & 35 Vict. c. 104, Sched. 2.
(*x*) *Hill* v. *Thorncroft*, 3 E. & E. 257; 30 L. J., M. C. 52.

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in the schedule to the statute (*y*); the word statutes in that exception is to be read enactments (*z*).

The record of a conviction then (except when a concise form is prescribed in case of the magistrates, by the statute creating the offence, or by the general statute 11 & 12 Vict. c. 43), must set forth the following particulars:—

1st. An information or charge against the defendant.
2nd. A summons, or notice of such information, in order that he may make his defence.
3rd. His appearance or non-appearance.
4th. His confession or defence.
5th. The evidence against him, in the event that he do not confess; and,
6th. The judgment or adjudication.

And even where a concise form is given by statute, it is well to bear in mind these particulars, as affording a guide in the statement of the offence in the general form; for, though in such forms the information itself is not set out, the information must be examined, in order to ascertain what the charge is upon which the judgment takes place, and the conviction should follow the information as supported by the evidence (*a*).

However, where an act directs that all convictions shall be made out *in the form or to the effect following* (giving a particular form), a conviction containing all the substantial parts of the form prescribed will be good, although it be not in the express words thereof, or may contain something more than is directed; but more on this part of the subject hereafter.

Of the information.

The information is the foundation of every proceeding not directed to be merely on the view of the offence by a justice; and should contain four circumstances, correctly stated: *viz.*,

The day and year when,
The place where,
The name and style of the justice or justices before whom it is exhibited; and lastly,
The charge preferred (*b*).

Objections on account of defects in the information, or for variances between the information and the evidence.

It must, however, not now be forgotten that no objection can be taken or allowed to any information, complaint or summons to which the 11 & 12 Vict. c. 43 applies, for any alleged defect therein in substance or in form, or for any variance between such information, complaint or summons, and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the justice or justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or

(*y*) *Reg.* v. *Bakewell*, 7 E. & B. 848; 26 L. J., M. C. 150.
(*z*) *Ibid.*
(*a*) *Reg.* v. *Deny*, 2 L. M. & P. 230; 20 L. J., M. C. 184; *Martin* v. *Pridgeon*, E. & E. 778; 28 L. J., M. C. 179; *Reg.* v. *Brickhall*, 33 L. J., M. C. 179.
(*b*) Paley on Convictions, 5th ed. 172, 196.

misled, it shall be lawful for such justice or justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day (*d*). This provision does not extend to the case where the information has been laid, and the party summoned for one offence, and the justices have convicted him of another and different offence, and under a different act of parliament (*e*). Where, on a charge of absenting from service, the contract of service was laid with B. and others, and it appeared at the hearing that the contract was with an incorporated company, consisting of B. and others, this was held to be a variance (*f*). And further, by 11 & 12 Vict. c. 43, s. 9, in all cases of informations for any offences or acts punishable upon summary conviction any variance between such information, and the evidence adduced in support thereof as to the time at which such offence or act shall be alleged to have been committed, shall not be deemed material if it be proved that such information was, in fact, laid within the time limited by law for laying the same. And in variance between such information and the evidence adduced in support thereof as to parish or township in which the offence shall be alleged to have been committed shall not be deemed material, provided that the offence or act be proved to have been committed within the jurisdiction of the justice or justices by whom such information shall be heard and determined.

Of the Information.

Variances between the information and the evidence.

Variances as to time when immaterial as to place.

If the information appear on the face of the conviction it should contain the day and year when it was taken; if it does not, the conviction itself should show it; as well that it may appear to have been given subsequently to the offence, and before all the other proceedings (*g*), as also that the prosecution may be fixed to be begun within, and not before (*h*), the time limited by the statute (*i*); but the statute imposing the limitation of time may do so in such terms as to make the being out of time a matter of defence (*j*). A mistake in the day, if the information was in truth taken in proper time, will not be material, and the fact may be alleged to have happened between such a day and such a day, if the last day is within the proper time (*k*), but any objection on this

Allegation of time when information was exhibited.

(*d*) 11 & 12 Vict. c. 43, s. 1.

(*e*) *Martin* v. *Pridgeon*, 28 L. J., M. C. 179; 1 E. & E. 778.; *Reg.* v. *Brickhall*, 33 L. J., M. C. 156.

(*f*) *Whittle* v. *Frankland*, 2 B. & S. 49; 31 L. J., M. C. 81.

(*g*) *R.* v. *Kent*, Ld. Raym. 1546; Paley, 3rd ed. 84. For if the conviction state evidence of witnesses to facts as given on a day *subsequent* to the information, it will be quashed as being a conviction without an information.

(*h*) Instance of 9 Geo. 3, c. 50, s. 2, appointing an interval to elapse before any prosecution.

(*i*) *R.* v. *Fuller*, 1 Ld. Raym. 509. See *id.* 582.

(*j*) *Wray* v. *Toke*, 12 Q. B. 492.

(*k*) 2 Hawk. c. 25, s. 82; Paley, 5th ed. Macnamara, 190. See *post*, p. 1067.

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ground is met, as to cases under 11 & 12 Vict. c. 43, by sect. 1, *ante*, p. 1059. If the time limited by a statute be "within one (or more) months," or the like, without expressing that they shall be calendar ones, the limitation formerly was computed according to *lunar* months of twenty-eight days each; and not according to the calendar months in our almanacs (*l*). Therefore, if the statute limited a prosecution to twelve months in the plural number, such prosecution must have been commenced within forty-eight weeks, and not afterwards; but if it expressed a twelvemonth in the singular number, this is to be intended a whole year; it being generally understood that, by the space of time, called thus in the singular number a "twelvemonth," is meant a whole calendar year. But now, and since 13 & 14 Vict. c. 21, s. 4, the word month in all acts means calendar month, unless words be added showing lunar month to be intended; and in all cases within 11 & 12 Vict. c. 43, where no time is already or shall hereafter be specially limited for making any such complaint, or laying any such information in the act or acts of parliament relating to each particular case, such complaint must be made and such information laid within six calendar months from the time when the matter of such complaint or information respectively arose (*m*). A complaint for the nonpayment of the costs under an order for the costs of the maintenance of a pauper, consequent on the making an order of removal, unappealed against, has been held to be within this section (*n*). Upon a complaint under the Vagrant Act, 5 Geo. 4, c. 83, s. 4, for deserting a wife, whereby she became chargeable to the parish, the time runs from the time of her chargeability, and not from the desertion (*o*).

Allegations as to time.

Month means calendar month.

Limitation of time for laying informations.

Matter of complaint, what.

A complaint under the Metropolitan Building Act, 1855 (*p*), against the owner of a dangerous structure for nonpayment of the expenses incurred by the commissioners in pulling it down in consequence of his default so to do, after demand of the amount and refusal to pay, was held to be within time when made within six months of the demand of the money, though more than six months after the completion of the works (*q*). The proceedings to be taken by a poor law auditor to recover the amount of a surcharge against overseers under 7 & 8 Vict. c. 101, and 12 & 13 Vict. c. 103, are expressly excluded from the operation of 11 & 12 Vict. c. 43, and nine months are allowed for such proceedings; and it has been held that the 2 & 3 Vict. c. 71, s. 14, giving jurisdiction over such cases within the metropolitan police district to a single magistrate by enacting that all "offences" must be heard and determined

(*l*) *Lacon* v. *Hooper*, 6 T. R. 224.
(*m*) 11 & 12 Vict. c. 43, s. 11.
(*n*) *Hill* v. *Thorncroft*, 3 E. & E. 257; 30 L. J., M. C. 52.
(*o*) *Reaves* v. *Yates*, 1 H. & C. 435; 31 L. J., M. C. 241.
(*p*) 18 & 19 Vict. c. 122, s. 73.
(*q*) *Labalmondiere* v. *Addison*, 1 E. & E. 41; 28 L. J., M. C. 25.

within six calendar months, does not apply to reduce the limit of nine months given by the prior act (*r*).

Of the Contents of the Conviction or Order.

If a statute requires an offence to be prosecuted within a certain time, it is sufficient if the information is laid within that time (*s*).

Limitation of time for making complaint.

An adjudication of justices settling the amount of compensation (under 50*l.*) to be paid by the promoters of an undertaking under the Railways Clauses Act, 1845, and the Lands Clauses Act, sects. 22, 24, 140, in respect of compensation for the injurious affecting of lands, has been held to be an order for the payment of money within 11 & 12 Vict. c. 43, and required to be made within six months after the cause of complaint arose (*t*); but this case has been reflected upon and distinguished from the case of an adjudication to settle the amount of the value of the interest in premises required for the purposes of the undertaking, which the parties were unable to agree upon under the Lands Clauses Act, sects. 22, 24 (*u*).

An application for a distress warrant to enforce local rates under a local act, is not within the above 11th section (*v*).

An information against a tenant under 2 & 3 Vict. c. 71, s. 38 (The Metropolitan Police Court Act), must be laid within one month after the damage done to the premises (*x*).

It may be taken as a general rule, although there may be special exceptions according to the context and subject-matter of the enactment or contract, that where time is to be counted from an act done, or from a particular day, that day shall be excluded from, and the last day of the time to be computed shall be included in, the time allowed (*y*).

Allegation of place where information was exhibited.

If the information appears in the conviction the place where the information is stated to be given should be stated, so as to show that the magistrate was acting at the time within his jurisdiction.

Stating the name of the county by way of venue in the margin of a conviction or information will not be sufficient to show that the justices who made it were acting within the county named when they made it, or that the offence was committed there, but there must be an allegation to that effect in the body of the conviction, either by express words of reference to it or otherwise (*z*).

(*r*) *Reg.* v. *Tyrwhitt*, 15 Q. B. 249; 19 L. J., M. C. 249.
(*s*) *R.* v. *Barrett*, 1 Salk. 383; *R.* v. *Willace*, 1 East, P. C. 186. See *Reg.* v. *Mainwaring*, E. B. & E. 474.
(*t*) *Re Edmundson*, 17 Q. B. 67.
(*u*) *Reg.* v. *Hannay*, 44 L. J., M. C. 27.
(*v*) *Sweetman* v. *Guest*, L. R., 3 Q. B. 262; 37 L. J., M. C. 59.
(*x*) *Dowell* v. *Beningfield*, 1 C. & M. 9.
(*y*) *Isaacs* v. *Royal Insurance Co.*, 39 L. J., Ex. 189, 192, per *Kelly*, C. B.
(*z*) *Reg.* v. *Casterton* (*Inh.*), 6 Q. B. 517; *R.* v. *Austin*, 8 Mod. 309; *Reg.* v. *Totness*, 11 Q. B. 80; *Reg.* v. *St. George, Bloomsbury*, 4 E. & B. 520; 24 L. J., M. C. 49; *Reg.* v. *Newton Ferrers*, 9 Q. B. 32.

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A court must take notice that a city mentioned in a conviction or order is a county of a city, if it be so; and an order has been held valid when the justices who made it were justices of a county of a city, but described themselves in it as "in and for the said city" (*a*).

Of the allegation of venue.

The mention of the county in the margin or venue only shows in what county the conviction was made, and does not supply the want of an allegation of the fact being committed in the county (*b*); nor does the venue in the margin amount even to a statement that the order was made within the place mentioned, for where the name of a borough was inserted in the margin of an order which purported to be made upon a complaint made to A. B. and C. D., "being two of her Majesty's justices of the peace having jurisdiction within and for the said borough," the office and place of act being not otherwise shown on the document, it was held, that there was nothing to show that the order was made within the jurisdiction, and it was therefore held bad (*c*). And the order must allege that they were in the county, &c. referred to in the body of the conviction (*d*); but the venue is so far part of the conviction that it may be incorporated into the body of it by words of reference, as by saying that it was made by "justice of the peace in and for the said county," referring to the venue (*e*).

If a particular locality within a county or diocese, or the distance of one place from another, be an ingredient in the offence charged, it must be defined by express allegation (*f*). Subsequent evidence of matters of fact existing at the hearing cannot supply any defect in the previous charge in the information (*g*); and, as the latter is the foundation on which all the subsequent proceedings must be founded, precision in the description of locality there becomes of primary importance. If the statute, on which the prosecution is founded, be a local one like those for regulating the sale of hay and coals within the bills of mortality, or the Building Act, or that for the improvement of the streets of the metropolis, the place *where* the fact charged was committed is, in importance, at least the second ingredient in describing the alleged offence.

The decisions mentioned hereafter with reference to the requirements of a conviction on this point will apply to an information not within the 11 & 12 Vict. c. 43, or any similar enactment (*h*).

(*a*) *Reg.* v. *St. Maurice*, 16 Q. B. 908.
(*b*) *R.* v. *Austin*, 8 Mod. 309.
(*c*) *Reg.* v. *Newton Ferrers*, 9 Q. B. 32.
(*d*) *Reg.* v. *Totness*, 11 Q. B. 80; *Reg.* v. *St. George, Bloomsbury*, 4 E. & B. 520; 24 L. J., M. C. 49.
(*e*) *Reg.* v. *Casterton (Inh.)*, 6 Q. B. 507.
(*f*) *Deybel's case*, 4 B. & Ald. 247, 248; *Brune* v. *Thompson*, 2 Q. B. 788, *acc.*
(*g*) But defects and variances are cured by 11 & 12 Vict. c. 43, ss. 1, 9, *ante*, pp. 1058, 1059; but see *post*, p. 1082.
(*h*) See *post*, p. 1067.

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Upon the information the name and style of the justices, &c. before whom the information was laid must be set forth, in order to show on the face of the proceedings that he has that authority which he claims; viz. not only that he has been appointed for the purpose, but that he has acted within his jurisdiction (*i*); *Ex. gr.* it is not sufficient to style a man "justice, &c. *within* the county;" but he must be stated to be such justice, &c. "*in* and *of* (or *for*) the county" (*k*); but where jurisdiction is given to the justices of a county, and an order is made by justices of a county of a city, which county and city are co-extensive by statute, the order is valid, though the justices describe themselves as justices "in and for the said city," for the court will take judicial notice that the city is also a county (*l*). When a statute, moreover, gives cognizance of an offence to the *next* justice, he should be so described, and not merely as a justice, even *in* and *for* the county: for none but the next accessible justice can have jurisdiction under those words (*m*). But if the act only mentions "justices *in*, or *near*, the place" (*n*), or *acting for the division*, it is only directory, so that any justices of the county, or division, &c., it should seem, may act, and no such description need be given in the conviction (*o*). As to disqualification on the ground of interest, see *ante*, p. 39. A person who is a master, father, son or brother of a master in the particular manufacture, trade or business, in or in connexion with which any offence under the Criminal Law Amendment Act (*p*) is charged to have been committed, is prohibited from acting as a member even of a court of summary jurisdiction or appeal for the purposes of that act (*q*).

Of the allegation of the authority of the justices acting.

"Next justice."

Justices disqualified.

Employers of labour may not act, when.

The charge need not always be reduced to writing (*r*). Some acts *in totidem verbis* require it; others leave it unnoticed, or only to be collected by inference; but as to informations in general, it would seem to be the general opinion that they need not be in writing (*s*); but with respect to orders within the 11 & 12 Vict. c. 43, it is expressly enacted by sect. 8, that in all

The information or charge against the defendant need not be in writing.

(*i*) *R.* v. *Johnson*, Stra. 261; *Ex parte Fuller*, 13 L. J., M. C. 139. It seems that in all cases, whether judicial or coercive, or ministerial, or even voluntary, as taking recognizances, a justice can only act within the county, &c. in the commission of which he is. Paley on Conv. 5th ed. 18; Dalton, ch. 6, p. 19.

(*k*) *R.* v. *Dobbyn*, 2 Salk. 473.

(*l*) *Reg.* v. *St. Maurice*, 16 Q. B. 908.

(*m*) *Semble*, *Sanders' case*, 1 Wms. Saund. 263 c.

(*n*) Paley on Conv. 5th ed. 36.

(*o*) *R.* v. *Price*, Cald. 305; 3 Bac. Abr. 798, *tit. Justices of Peace; R.* v. *Loxdale*, 1 Burr. 447. It should, however, be considered how far it is justifiable to drag a defendant, capriciously, and without good cause, before a magistrate living at a great distance, though within the county, when there are others accessible, residing, according to the words of the act, *near*.

(*p*) 34 & 35 Vict. c. 32.

(*q*) *Ibid.* sect. 5.

(*r*) Per *Crompton*, J., *Turner* v. *Postmaster-General*, 34 L. J., M. C. 18.

(*s*) *Reg.* v. *Shaw*, 34 L. J., M. C. 169.

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cases of complaints upon which a justice or justices of the peace may make an order for the payment of money or otherwise, it shall not be necessary that such complaint shall be in writing, unless it shall be required to be so by some particular act of parliament upon which such complaint shall be framed.

Complaints need not be in writing unless specially required.

If the act requires the complaint to be *on oath*, it should be stated that the witness was sworn (*t*), and, as it seems also, that he was so sworn before the evidence was given (*u*): but not unless so required by the act (*v*). Informations or complaints within the 11 & 12 Vict. c. 43 are not required to be upon oath, except where a warrant is to be issued in the first instance, in which case another is required (*x*); but where the information is required to be on oath, the omission to take the oath goes to the jurisdiction of subsequent proceedings in a criminal matter, and would be fatal (*y*); but the appearance of the defendant to the summons or warrant granted on such a defective information, and attendance at the hearing without objection, would cure the defect and give validity to the conviction (*z*).

Oath of informant.

Of the allegation respecting the information as to the informer.

The *informer's* name should appear in all cases, that the party may know his accuser (*a*). So that if a particular person's dissent is essential to the offence, it must appear that he was the informer, or that the information was laid at his instance (*b*). And if a conviction proceeds upon an enactment framed solely and exclusively for the benefit of a particular body of persons, the information must be laid with the authority of that body (*c*). But a conviction under the Larceny Act for stealing a growing shrub of the value of a shilling, but less than a pound, may be upon the information of any other person besides the party aggrieved, notwithstanding that the justices have power to order the party convicted to pay over to the party aggrieved the value of the article stolen (*d*); and a conviction for trespassing in pursuit of game, against the 30th section of the 1 & 2 Will. 4, c. 32, need not be at the instance only of the owner or occupier of the land, but may at any rate be at the instance of the gamekeeper of the lord of the manor, of which the land was held by

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(*t*) *R.* v. *Glossop*, 4 B. & A. 615, *post*; *R.* v. *Willis*, K. B., 19 Geo. 3, Boscawen, 161.

(*u*) *R.* v. *Kiddy*, 4 D. & R. 734.

(*v*) *Basten* v. *Carew*, 3 B. & C. 649; *R.* v. *Dove*, 3 B. & A. 596. See 2 Q. B. 1011.

(*x*) 11 & 12 Vict. c. 43, s. 10.

(*y*) *Caudle* v. *Seymour*, 1 Q. B. 889; *R.* v. *Scotton*, 1 D. & L. 726.

(*z*) *Turner* v. *The Postmaster-General*, 34 L. J., M. C. 10; 5 B. & S. 821; *Reg.* v. *Berry*, 28 L. J., M. C. 86; Bell, C. C. 46.

(*a*) Burn's Just. vol. i. 30th ed. 1111; *R.* v. *Smith*, 5 M. & S. 133.

(*b*) *R.* v. *Daman*, 2 B. & A. 378; *R.* v. *Harpur*, 1 D. & R. 222; *R.* v. *Gordon*, 4 Burr 2279; per Lord *Denman*, *Fletcher* v. *Culliner*, 6 Q. B. 880.

(*c*) *Reg.* v. *Hicks*, 4 E. & B. 633; 24 L. J., M. C. 94.

(*d*) *Tarry* v. *Newman*, 15 M. & W. 645; 15 L. J., M. C. 160.

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copy of court roll (*e*). So it is no objection against a complaint made by an assistant overseer against a man for deserting his wife and children under the Vagrant Act, 5 Geo. 4, c. 83, that he was not acting under the direction of the board of guardians (*f*). And a common informer may sue for penalties under the Pawnbrokers Act, 39 & 40 Geo. 3, c. 99, ss. 26, 28, 29 (*g*). But if an act which gives authority to any one to prosecute provides that in case penalties are awarded they shall be paid to certain bodies, it means no more than this, that so long as the informer states that he claims the penalties on behalf of one of the bodies named, any person may lay the information; as where an information was laid under a local act which incorporated the Towns Police Clauses Act (*h*) for an offence against one of the clauses of the latter act, by the clerk to paving commissioners acting under the local act, and by the local act the justices were to award any penalty recovered under that act, if not otherwise directed, to be paid to the corporation of the paving commissioners, "according as the penalty is taken on behalf of either of those bodies," and the clerk had no authority, express or implied, from the commissioners to prefer the particular information in question, it was held that he was a proper person to lay the information, especially as he professed to act under the direction of the statute, to claim the penalties for the bodies entitled to them (*i*).

Who may be informer.

Every information or complaint within 11 & 12 Vict. c. 43, may be made or laid by the complainant or informant in person or by his counsel or attorney, or other person authorized in that behalf (*j*).

The information may be laid by counsel, attorney, or agent.

By 11 & 12 Vict. c. 43, s. 4, provision is made as to the sufficiency of the allegation in an information of the ownership of property in partners, and as to the description of partners or county works or buildings, or as to the goods of parish officers held for the use of the poor, and of materials and tools provided for repair of highways or turnpike roads, and property of commissioners of sewers.

Description of property in information.

The names of *each* and *every* of the *defendants* ought also to be correctly inserted, and none of them under any general title or description, as *e. g.* Messrs. H. *and company* (*k*). But the 11 & 12 Vict. c. 43, s. 4, where it is necessary in an information or complaint, or conviction, or order, to mention any

Names of defendants.

(*e*) *Morden* v. *Porter*, 29 L. J., M. C. 213; *Middleton* v. *Gale*, 8 A. & E. 155.

(*f*) *Reg.* v. *Mirehouse*, 32 L. J., M. C. 90.

(*g*) *Caswell* v. *Morgan*, 1 E. & E. 809; 28 L. J., M. C. 208.

(*h*) 10 & 11 Vict. c. 89.

(*i*) *Cole* v. *Coulton*, 2 E. & E. 695; 29 L. J., M. C. 125.

(*j*) 11 & 12 Vict. c. 43, s. 10.

(*k*) *R.* v. *Harrison & Co.*, 8 T. R. 508; see 1 G. & D. 481: but their additions need not, *R.* v. *Burnaby*, 2 Ld. Raym. 200; 1 Salk. 181. Exceptions in cases of proceedings under the Turnpike and Highway Acts against drivers misbehaving, are made legal by 3 Geo. 4, c. 126, s. 132; 6 & 7 Will. 4, c. 50, s. 78.

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Description of partners, &c.

partners, joint parceners, tenants in common, it is sufficient to name one of such persons, and add another and others to make up the description. And it seems no exception to this rule that one of the defendants is a woman, and a *feme covert;* for it has been determined even in a case for selling gin, where a previous contract partly constituted the very nature of the offence that "it was not necessary to join the husband, for in every crime which a *feme covert* can commit alone, it is sufficient to charge *her* in a conviction" (*l*).

Who to be defendants.

As a general rule no one can be made criminally responsible for the acts of third persons, but nevertheless the position of the parties, such as that of master and servant, or principal and agent, or consignor and consignee, may in certain cases raise a presumption in law that the one party knew of the unlawful act of the other, or was ignorant of it, under such circumstances of negligence as to make him responsible for such act; but proof of want of actual knowledge and of sufficient diligence will rebut such presumption (*m*).

Aiders and abettors.

By 11 & 12 Vict. c. 43, s. 5, every person who shall aid, abet, counsel or procure the commission of any offence punishable on summary conviction, may be proceeded against and convicted, either together with the principal offender or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as the principal offender is by law liable.

A master or keeper of a place of public resort who intends that his servant shall so conduct his house by selling refreshments to, and knowingly suffering prostitutes to assemble as to amount to a misdemeanour if the servant does it, would be guilty as principal, and the servant as aiding and abetting (*n*). So a charter master of a coal mine who was cognizant of the fact of the banksman, who was his servant, breaking a rule of the colliery and did not interfere to prevent it, may be convicted of aiding and abetting the banksman to break the rule (*o*).

Where the act is such that several may join in it, all the offenders may be included in the same information and conviction (*p*).

Description of the offence.

The essential requisite in charging an offence is, that it contain a *direct* and *positive* charge against the defendant, specifying in express terms, and with certainty, every ingredient that is necessary to constitute the crime described by the statute

(*l*) *R.* v. *Crofts*, 2 Stra. 1120. See Paley, 5th ed. 71; *Reg.* v. *Robson*, L. & C. 93; 37 L. J., M. C. 22.

(*m*) *Hearne* v. *Garton*, 28 L. J., M. C. 206; *Wilson* v. *Stewart*, 3 B. & S. 913; 32 L. J., M. C. 198; *Howells* v. *Wynne*, 15 C. B., N. S. 3; 32 L. J., M. C. 241; *Michell* v. *Brown*, 1 E. & E. 267; 28 L. J., M. C. 53; *Reg.* v. *Brown*, 7 E. & B. 757; 26 L. J., M. C. 183; *Dickinson* v. *Fletcher*, 43 L. J., M. C. 25; L. R., 9 C. P. 1; *Mullins* v. *Collins*, L. R., 9 Q. B. 292; 43 L. J., M. C. 67.

(*n*) *Wilson v. Stewart*, 3 B. & S. 913; 32 L. J., M. C. 198.

(*o*) *Howells* v. *Wynne*, 15 C. B., N. S. 3; 32 L. J., M. C. 241.

(*p*) *Reg.* v. *Littlechild*, 40 L. J., M. C. 137; L. R., 6 Q. B. 293; *R.* v. *Clarke*, Cowp. 610.

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itself; for a statement of facts from which the imputation of an offence is to be inferred or presumed, however plainly, will not suffice, and the like of a statement by way of recital or in the disjunctive (*q*). Thus, if *knowledge*, or consciousness in the offender, be made by statute to constitute a part of the guilt of the transaction, such knowledge or consciousness must be directly averred, and nothing less will serve (*r*). So, if the day or hour *at which* the act be done, as under some of the game laws, or the place in which it be committed, as in the acts for the preservation of fish, or the age of any party mentioned in the conviction, as in the Stage Coach Regulation Act, is made a constituent part of the offence, the same precision in averment is necessary: for no intendment can be admitted in order to assist a description defective in an essential ingredient (*s*); but courts and magistrates are bound to take judicial notice of the known divisions of the kingdom, as whether such a place is within or without the bills of mortality (*t*), or that a city is a county of a city (*u*), but not of local situations and distances of different places in the counties from each other (*v*).

No intendment will be made to support a conviction.

To charge two offences always invalidated the conviction (*w*); and now, by the 11 & 12 Vict. c. 43, s. 10, every complaint within that act shall be for one matter of complaint only and not for two or more matters of complaint, and every information within that act shall be for one offence only and not for more offences.

One conviction for two offences bad;

But for the more economical recovery of poor rates, and other local rates and taxes, any number of local rates and taxes, whether of the same or different kinds, due from the same person, should be included in the same information, &c.

but the non-payment of several rates may be charged in one information.

A conviction which charged the keeping open of a licensed beer house for the sale of beer, and selling beer, and suffering the same to be drunk and consumed on the premises at an unlawful time, contrary to 11 Geo. 4 & 1 Will. 4, c. 64, s. 14, was held bad as charging more than one offence (*x*). But a conviction under 19 Geo. 2, c. 21, setting out a curse, and stating it to have been "twenty several times repeated," and adjudging 2*l.* for the penalty, was supported as importing only one offence (*y*). And so it is only one offence under 19 Geo. 2, c. 21, that the

Duplicity, what.

(*q*) See the cases collected, 1 Burn's J., 30th ed. 1115 *et seq.*; Paley on Conv. 5th ed. 196.

(*r*) See instances, Paley on Conv. 5th ed. 200. It may be necessary to aver the *mens rea*, though there are no express words of the statute requiring it; *Dickinson* v. *Fletcher*, 43 L. J., M. C. 25; L. R., 9 C. P. 1; *Local Board of Aberdare* v. *Hammett*, Hil. T. 1875, Q. B.

(*s*) *R.* v. *Trelawney*, 1 T. R. 122; 2 Ld. Raym. 791. See *R.* v. *Daman*, 1 Chit. R. 155, per *Holroyd*, J.

(*t*) *R.* v. *Vasey*, Bosc. 138.

(*u*) *Reg.* v. *St. Maurice*, 16 Q. B. 908.

(*v*) *Deybel's case*, 4 B. & A. 243; *R.* v. *Edwards*, 1 East, 279.

(*w*) *Newman* v. *Bendyshe*, 10 A. & E. 11; 2 P. & D. 341. See *Newman* v. *Earl of Hardwicke*, 8 A. & E. 124.

(*x*) *Newman* v. *Bendyshe*, 10 A. & E. 11; see also under the Lottery Act, 22 Geo. 3, c. 47, *R.* v. *Salomons*, 1 T. R. 251.

(*y*) *Reg.* v. *Scott*, 4 B. & S. 368; 33 L. J., M. C. 15.

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defendant swore one oath several times repeated on one and the same occasion (*z*). So the permitting drunkenness and other disorderly conduct, contrary to the tenor of a licence granted for the retailing of beer under 4 & 5 Will. 4, c. 85, is not a double charge, but the dismission both of drunkenness and disorderly conduct may be one and the same offence committed at the same time (*a*).

Misreciting the purview or enacting part of a statute always vitiates, but a similar error as to the *title* of it will not (*b*).

Description of the offence on which the conviction is founded.

The description of the offence must be sufficiently certain. An information charging the defendant with having on the 5th of October last, and on divers other days and times between the said 5th of October and the laying of the information the 16th of November, being the occupier of a house knowingly and wilfully opened, kept and used the same for the purpose of betting, contrary to 16 & 17 Vict. c. 119, was held sufficiently certain to support a conviction for using the house on the 8th of November (*c*).

The description of the offence must be such as to bring it clearly within the words of the act which declares or punishes it, by containing, in express terms, every ingredient required by the statute. Thus, where justices were empowered by 8 Hen. 6, c. 9, to convict on their own view for unlawful detainer, the omitting to aver or prove an *unlawful entry* as well as an *unlawful* expulsion, was held fatal (*d*). It is, in general, sufficient for the convicting justice in his description of the offence to pursue the words of the statute (*e*), or as Lord *Holt* continues, "to show such a fact as is within the description of the statute, and to describe it as the statute wills" (*f*); but though it may be sufficient to follow the words of the act creating the offence as far as the description of it goes, yet it is always necessary to add such facts as show that the party convicted was a party to the offence so described (*g*).

It is also necessary, in some cases, in pursuance of the intent of a statute, to adopt a narrower description than that conveyed in the literal terms of the act. A well-known instance is that of a conviction for "keeping a gun," which alleged the gun as

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(*z*) *Reg.* v. *Scott*, 4 B. & S. 368; 33 L. J., M. C. 15.

(*a*) *Wray* v. *Toke*, 12 Q. B. 492; 17 L. J., M. C. 183; and see *Att.-Gen.* v. *M'Lean*, 1 H. & C. 750; 32 L. J., Ex. 101. See *post*, p. 1083.

(*b*) *Chance* v. *Adams*, 1 Ld. Raym. 77, relied on *per Cur.* in *Nixon* v. *Nanny*, 1 Q. B. 747. See *post*, p. 1094.

(*c*) *Onley* v. *Gee*, 30 L. J., M. C. 222. See *ante*, p. 1058.

(*d*) *R.* v. *Wilson*, 3 A. & E. 817; 5 N. & M. 164. Where the precedent in *R.* v. *Elwell*, 2 Ld. Raym. 1514; 3 *id.* 360, is discussed.

(*e*) See per Lord *Holt*, C. J., *R.* v. *Chandler*, 1 Ld. Raym. 581; and Paley, 5th ed. 202 *et seq.*

(*f*) 1 Ld. Raym. 582.

(*g*) *Chaney* v. *Payne*, 1 Q. B. 712, 721. Thus, in a conviction under the Pilot Act, 6 Geo. 4, c. 125, for continuing in charge of a ship after a licensed pilot has offered to take charge of her, it must appear on the face of it that *defendant knew of the offer;* see *R.* v. *Chancy*, 6 Dowl. P. C. 281.

"being an engine to destroy game," within the qualification act of 5 Anne, c. 14, then in force, and was held bad, because the act was directed against things which could only be used for destroying game; whereas a gun might be kept without any unlawful design (*h*), *e. g.* to keep pigeons off its owner's grounds (*i*). And as other instances of the rule that the words of an act are not universally all that must appear on a conviction, where the charge was for fishing in a pond it was held naught for want of negation of the owner's consent (*j*), though the statute does not expressly make that part of the offence.

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Description of offence more particular than statute.

So, under 9 Geo. 4, c. 69, s. 1, a conviction ought to state that the defendant entered and was in the close for the purpose of taking game *there*, and it was not sufficient to follow the words of the statute (*k*).

So if the language of a statute creating an offence omits to qualify the act by the words wilfully or knowingly, yet if the subject-matter necessarily implies that the act must be committed wilfully or knowingly to make it an offence, a conviction should allege that it was so done (*l*).

It is the duty of magistrates in all cases, where no concise form is given by statute, to state the whole evidence of the fact on which their judgment proceeds, as nearly as possible in the words used by the witness (*m*). It has, however, been held, that a conviction merely stating the legal effect of his deposition in the words of the statute will be valid in law (*n*); though in the words of *Le Blanc*, J., "If a magistrate endeavour to shelter himself from detection, by merely stating the fact of the offence in the terms of the act as if it were the legal effect of the evidence, when the evidence itself would not warrant the conclusion, he subjects himself to a criminal information" (*o*); and in a similar case, a *mandamus* issued to amend the record of a conviction, by setting out the evidence

Stating the evidence on which the conviction is founded.

(*h*) *R.* v. *Gardner*, Andrews, 55; Stra. 1098; *Wingfield* v. *Stafford*, 1 Wils. 315, and other cases cited. Paley on Conv. 5th ed. 209.

(*i*) *R.* v. *Gardner*, as stated 1 Burr. 614.

(*j*) *Fletcher* v. *Calthrop*, 4 Burr. 2279; 6 Q. B. 880, per Lord *Denman*.

(*k*) *Re Fletcher*, 1 D. & L. 726; 13 L. J., M. C. 165; *Fletcher* v. *Calthrop*, 6 Q. B. 878.

(*l*) See *James* v. *Phelps*, 11 A. & E. 483; *Fletcher* v. *Calthrop*, 6 Q. B. 887, per Lord *Denman; Dickinson* v. *Fletcher*, 43 L. J., M. C. 25; L. R., 9 C. P. 1; *Local Board of Aberdare* v. *Hammett*, Hil. T. 1875, Q. B.

(*m*) *R.* v. *Lovet*, 7 T. R. 152.

(*n*) *R.* v. *Pearse*, 9 East, 358. But stating as the offence what is merely the legal result of certain facts not set forth, *e. g.* the profanely swearing forty oaths, and profanely cursing forty curses, without setting forth what the oaths and curses were, will not suffice, *R.* v. *Sparling*, Stra. 497. So in proceedings for gaming the game played should be averred, *Colborne* v. *Stockdale*, *id.* 493.

(*o*) *Ibid.* See also *R.* v. *Thompson*, 2 T. R. 18; *R.* v. *Lovet*, 7 T. R. 152. In *R.* v. *Clarke*, 8 T. R. 220, the particular evidence as to the fact of killing the game was set forth (*viz.* that a witness named swore to having seen defendant use a greyhound to course and kill a hare by that means); and the court recommended it as a precedent to be followed in future.

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as nearly as possible in the words used by each witness (*p*). If forms of conviction given by statute are substantially pursued, and all defects of mere form are expressly remedied by it (see 11 & 12 Vict. c. 43, s. 32), that suffices, even if the conviction is fuller than the warrant of commitment, which rests on it (*q*).

Statement of the evidence.

In convictions, it is sufficient if there were such evidence before the magistrate as in an action would be sufficient to be left to a jury: for if there be evidence before him (*r*) reasonably sufficient to prove the offence, the Court of Queen's Bench has no authority to examine further, in order to see whether the conclusion drawn by the magistrate be or be not the *inevitable* (*s*) conclusion from the evidence.

In all cases, however, where the substance of the offence consists of a simple fact, and the *place*, *time*, or *manner* of committing the act do not contribute to its guilt, it will be enough if the offence in the conviction be described in the words of the statute, declaring, describing, or punishing it (*t*); subject, however, to the cases above cited with reference to the description of the offence (*u*).

When any thing turns on particular sums or quantities they must be specified, particularly where the magistrate is called on to compensate the injury, or assess a penalty by way of damages (*x*).

Negativing exceptions if in enacting clauses of statutes and not in distinct provisoes.

The last point to be considered in the *charge* against the defendant is one of the most important, and has given occasion to more appeals than most others. It arises out of the necessity of *negativing* expressly and directly every exception, excuse or qualification which may accompany the description of the offence, in the *enacting* clauses of any act giving a summary conviction; and in distinguishing exceptions so made from exemptions introduced by *separate provisoes*. It is now settled that all circumstances of exemption and modification, whether applying to the *offence*, or the *person*, that are originally contained in the enacting clause, or incorporated by refer-

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See *Avery* v. *Hoole*, Cowp. 825. So in *R.* v. *Crowther*, 1 T. R. 125, the fact of shooting a partridge was sworn to, see *R.* v. *Kempson*, Cowp. 421. In *R.* v. *Stone*, 1 East, 640, the fact of killing a pheasant was stated. The statement of evidence in convictions on the new Game Act seems now displeased with by the form in stat. 1 & 2 Will. 4, c. 32, s. 39. Where a conviction on 5 Ann. c. 14, stated that the defendant kept and used a dog called *a lurcher*, to kill game, it was held good; for that statute has the terms keep *or* use in the disjunctive, and it must be assumed that the dogs are rightly so called, *R.* v. *Earnshaw*, 15 East, 456; *R.* v. *Filer*, Stra. 496; *R.* v. *Hartley*, Cald. Ca. 175.

(*p*) *R.* v. *Warnford*, 5 D. & R. 489. This case, perhaps, occasioned the general form in 1 & 2 Will. 4, c. 32, s. 39 (Game Act); Dick. Q. S., 6th ed. 880, n.

(*q*) See judgment of *Cresswell*, J., in *Barnes* v. *White*, 14 L. J., M. C. 65; also *Daniell* v. *Phillips*, 5 Tyr. 292; 1 C. M. & R. 662.

(*r*) *R.* v. *Smith*, 8 T. R. 588; *R.* v. *Reason*, 6 T. R. 375.

(*s*) *R.* v. *Davis*, 6 T. R. 177.

(*t*) Paley, 5th ed. 173, citing *R.* v. *Speed*, Carthew, 502; Ld. Raym. 584.

(*u*) *Supra*, p. 1068.

(*x*) Paley, 5th ed. 124, 225, collects the cases.

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ence with it, must be distinctly enumerated and negatived in the information; while such matters of excuse as are given by other distinct clauses or provisoes need not be specifically set out or negatived, but must be exhibited by the defendant, if he would bring himself within them (*y*). The *absence* of them does not form any constituent part of the offence charged, though the *existence* of them does in many cases form the defence of the person accused (*z*). One elucidation of the *former* point arose out of the qualification act of 22 & 23 Car. 2, c. 25, s. 3, respecting game, in convictions on which act it was always held (before its repeal by 1 & 2 Will. 4, c. 32), that the qualifications (being introduced by way of *exception in the section imposing the penalty*) must be severally negatived in the charge on the face of the conviction, and that, though such averment need not be proved *in support* of the charge, the want of it cannot be cured by giving evidence of it (*a*). As to the *latter* point, the early sections of 50 Geo. 3, c. 48, for regulating stage coaches, declared numerous acts to be offences, including numerous exceptions; all of which, upon the principle just insisted on, must be negatived in any conviction under that act; while by the subsequent sections there are some exceptions from the penalties *to be claimed by the defendant* under certain circumstances, which therefore need not be noticed in the conviction (*b*). So, in a conviction for retailing spirits without a licence, it was held that it need not be averred that they were not sold *to be used in medicine*, that exemption being allowed by a distinct provision of the act (*c*). And it is immaterial whether the exemptions be in the same statute which enacts the penalties or in a subsequent statute bearing reference to it (*d*).

Such is the general outline of the difference between *exceptions* and *exemptions*, but the loose manner of wording some acts occasions difficulties respecting the extent to which these rules operate. Thus, the exception in 12 Geo. 3, c. 61, s. 11, of mills "*then* used" for making gunpowder, &c., is held not to apply to the limits first mentioned in that clause, but only "to the other part of *Great Britain*," not within those limits; and therefore an information, charging the keeping more than the

(*y*) *R.* v. *Jukes*, 8 T. R. 542; Paley, 5th ed. 228 *et seq.* See *Steel* v. *Smith*, 1 B. & A. 94, per *Treby*, C. J.; *Jones* v. *Axen*, 1 Ld. Raym. 120.

(*z*) *R.* v. *Jarvis*, 1 East, 647, n. (*n*); *R.* v. *Ford*, 1 Stra. 555; but see as to this *Van Boven's case*, 9 Q. B. 669.

(*a*) *Spiers* v. *Parker*, 1 T. R. 141; 15 East, 456; *R.* v. *Turner*, 5 M. & S. 206; *R.* v. *Earnshaw*, 15 East, 456; *R.* v. *Marsh*, 2 B. & C. 717; 4 D. & R. 260 (re-stated 14 L. J., M. C. 54); *R.* v. *Crowther*, 1 T. R. 125, 127; *R.* v. *Wheatman*, Doug. 346; Ry. & M. 159; 2 M. & S. 539; 1 East, 639; Paley, 5th ed. 237; *Wisdom* v. *Hodson*, 3 Tyr. 812 (*n*). See an exception, *Chaney* v. *Payne*, 1 Q. B. 712. It is for defendant to prove that he has the qualification, *R.* v. *Stone*, 1 East, 150, per Lord *Mansfield*. See 1 Stark. Ev. 362, 2nd ed.

(*b*) See now 2 & 3 Will. 4, c. 120; 3 & 4 Will. 4, c. 48.

(*c*) 9 Geo. 2, c. 23; *R.* v. *Bryan*, 3 Stra. 1101; *R.* v. *Ford*, 1 Stra. 555.

(*d*) *R.* v. *Hall*, 1 T. R. 320.

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allowed quantity of gunpowder within the specified limits need not negative this exception (*e*). But under the 11 & 12 Vict. c. 43, s. 14, the prosecutor or informant need not prove the negative of any such exemption, exception, proviso or condition, but the defendant may prove the affirmative if he would have advantage of the same.

This is all that is considered necessary to be observed in this place respecting the first part of the conviction, viz., the information containing the charge.

The summons of defendant, or notice to him of the information.

It is against natural justice to convict a man without summoning him (*f*), accordingly in all cases, except those few in which particular acts have given justices jurisdiction to convict offenders *on view* of the offence (which, however, when exercised, must be stated accordingly on the face of the conviction), a *summons* of the defendant is a necessary step in the proceedings, that he may have time to prepare himself for defence; and unless oath be made of the personal service of the summons, the justices cannot proceed in his absence (*g*); thus an order made by justices for the payment, by the persons having the control of the funds of a railway company, of special constables appointed upon the expectation of a tumult, occasioned by the behaviour of persons employed on railway works, was quashed, because no summons had issued or notice given to the defendants of the application for the order, the statute enabling the justices to make the order, upon being satisfied by the oath of three witnesses that the appointment of the constables was occasioned by the behaviour of the railway men (*h*). So, where liquors kept for unlawful sale have been seized under sect. 15 of 33 & 34 Vict. c. 29, the justices cannot order them to be sold without giving the person upon whose premises they were found notice, and an opportunity of being heard (*i*). The service of such summons should be stated in the conviction. If the conviction or order be not within the 11 & 12 Vict. c. 43, or there is no concise form of conviction given by the statute under which the conviction takes place, it is sufficient to state that the party was "duly summoned," without further particularizing the circumstances; for the court above will always suppose a magistrate has executed his authority regularly, where nothing to the contrary appears (*k*). If, however, it be thought necessary to set out the summons, it must, on the face of it, be in all respects regular, or the conviction will be quashed (*l*); the days of making the complaint, and of issuing

Necessity for a summons.

(*e*) *R.* v. *Matters*, 1 B. & A. 362.

(*f*) *R.* v. *Cotton*, 1 Sess. Ca. 179; *R.* v. *Taylor*, 3 Burr. 1681; *R.* v. *Clegg*, Stra. 475; *R.* v. *Stafford*, 5 N. & M. 94; *R.* v. *Wilson*, 3 A. & E. 817, 826.

(*g*) *R.* v. *Allington*, Stra. 678; *R.* v. *Venables*, *id.* 630; 2 Ld. Raym. 1407; and other cases collected, Paley, 5th ed. 82; 11 & 12 Vict. c. 43, s. 13.

(*h*) *Reg.* v. *Cheshire Lines Committee*, 42 L. J., M. C. 100; L. R., 8 Q. B. 344.

(*i*) *Gill* v. *Bright*, 41 L. J., M. C. 22.

(*k*) *R.* v. *Stone*, 1 East, 639.

(*l*) *R.* v. *Venables*, 2 Ld. Raym. 1405.

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the summons to appear at a certain time and place (*m*), and the authority to summons must appear to have been correctly stated, as well as the proof of personal service of the summons on the defendant, and also that sufficient time was allowed for defence (*n*) ; but now, since 11 & 12 Vict. c. 43, it is not necessary to allege the service of the summons.

Appearance or non-appearance of defendant.

When the 11 & 12 Vict. c. 43 does not apply, or there is no concise form given, it must next be stated, that the defendant appeared, or did not appear, to the summons, as the fact was. If the appearance be regular, and subsequent to the information, it removes all objection to irregularity in the summons, or to the want of a summons (*o*), or to want of stating him to have been summoned (*p*); at least, if it is stated that he produced no evidence and did not require further time to make his defence ; and if he waive the latter point at the time of hearing, he cannot afterwards take advantage of *that* particular objection (*q*).

Adjudication need no longer be by the same justice as he who receives the information.

It is necessary to state *before whom* the defendant appeared in consequence of the summons, so as to show the authority to convict ; and it was formerly considered doubtful whether the hearing of the defence and the adjudication must not be by the same justice who received the information : but now, by 11 & 12 Vict. c. 43, in all cases of summary proceedings before a justice or justices of the peace out of sessions upon any information or complaint as aforesaid, it shall be lawful for one justice to receive such information or complaint, and to grant a summons or warrant thereon, and to issue his summons or warrant to compel the attendance of any witnesses, and to do all other necessary acts and matters preliminary to the hearing, even in cases where by the statute in that behalf such information or complaint must be heard and determined by two or more justices ; and after the case shall have been so heard and determined one justice may issue all warrants of distress or commitment thereon, and it shall not be necessary that the justice who so acts before or after such hearing shall be the justice or one of the justices by whom the said case shall be heard and determined : provided always, that in all cases where by statute it is or shall be required that any such information or complaint shall be heard and determined by two or more justices, or that a conviction or order shall be made by two or more justices, such justices must be present and acting together during the whole of the hearing and determination of the case. This

(*m*) If place is not mentioned, it will be intended to be that where the information was laid, *R.* v. *Swallow*, 8 T. R. 284.

(*n*) *R.* v. *Mallison*, 2 Burr. 679 ; Paley, 5th ed. 84 ; and see per *Holt*, C. J., *R.* v. *Dyer*, 1 Salk. 181.

(*o*) *Sanders' case*, 1 Wm. Saund. 362, n. (1).

(*p*) Cases cited, Paley on Conv. 5th ed. 97.

(*q*) *Turner* v. *The Postmaster-General*, 5 B. & S. 82 ; 34 L. J., M. C. 11 ; *Reg.* v. *Shaw*, 34 L. J., M. C. 169 ; *R.* v. *Stone*, 1 East's R. 639 ; *R.* v. *Clark*, 6 Q. B. 349; *R.* v. *Aiken*, 3 Burr. 1786.

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section does, however, seem to apply to cases where by former statutes a specified number of justices or other persons were required to receive the information or complaint (*r*).

If the party do not appear, the justice or justices, after proof of summons duly served, may proceed to judgment in his absence (*s*), and must state all these facts in their proper order in the conviction (*t*); but it is not generally necessary (unless such necessity be expressed in, or logically to be inferred from, the words of the statute on which the conviction is founded), that the defendant should appear in person; for he may appear by his attorney or counsel (*u*); and if he does so, it must be so stated in the conviction, for otherwise the record would not be a true representation of the facts as they actually occurred.

Confession or defence.

Apart from the 11 & 12 Vict. c. 43, and any concise form given by the statute on which the conviction proceeds, the next matter to be stated in the conviction is either the confession or denial of and plea to the charge, with the proof exhibited to establish the latter. The confession of the party charged with an offence appears, *ex vi termini*, to be the most decisive proof that can be exhibited; and it is so esteemed in law, if it "agrees with the charge," that is to say, admits the *facts* as charged; for whether such facts *amount to the offence* inferred as a consequence from those facts, is a mere question of law: and the defendant does not, by a confession of the mere facts, admit the legal effects of them, or compromise his right of appealing on any question of legal interpretation, or of erroneous application of the facts confessed to the information exhibited. Thus, where one was informed against, under 9 & 10 Will. 3, c. 27, then in force, for selling silk handkerchiefs without a hawker's licence, and confessed the selling, &c. *as laid* in the information, but afterwards appealed against the conviction, insisting on certain words in the act, within which his *manner* of selling did not come, the conviction was quashed (*x*). These positions have so long received the sanction of decided cases that it is needless to urge them further (*y*). It is, however, right to notice that so decisive is the effect of confession, that when a statute only gives a justice authority to convict on the testimony of "one or more witness or witnesses," the interpretation is, that the confession of the defendant is equivalent to the evidence of a witness, and sufficient to satisfy such words of the statute (*z*); that is, if it not only "agrees with the charge," but contains

(*r*) See *Reg.* v. *Griffin*, 9 Q. B. 155.
(*s*) Paley on Conv. 5th ed. 96; 11 & 12 Vict. c. 43, s. 13.
(*t*) *R.* v. *Simpson*, 1 Stra. 44; Paley, 5th ed. 96.
(*u*) 11 & 12 Vict. c. 43, ss. 12, 13.
(*x*) *R.* v. *Little*, 1 Burr. 609. See a copy of the conviction in this case, Paley on Conv. 5th ed. 101, 102.
(*y*) *R.* v. *Smith*, 3 Burr. 1475; *R.* v. *Corden*, 4 *id.* 2279; *R.* v. *Hall*, 1 T. R. 320.
(*z*) *R.* v. *Gage*, 1 Stra. 546; Paley, 5th ed. 100.

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an admission of such specific facts as amount to the complete offence complained of (*a*).

And as the confession supplies the want of evidence, so it cures any objection to the manner of taking it; as, that it was not taken in defendant's presence, or that improper evidence was admitted (*b*). But it will not extend or help out the description of the offence as laid in the conviction (*c*); or avail, if the fact confessed be penal only under certain circumstances, *e. g.*, want of consent of owner of fishery, which are omitted in the charge (*d*). The confession then makes part of the conviction.

Evidence to substantiate the charge, and statement of it in the conviction.

If the defendant appears, but denies the charge (or, as has been before observed, neglects to appear), the next step is to substantiate the information by testimony, as provided by 11 & 12 Vict. c. 43, s. 14.

Evidence should be stated to be given in the defendant's presence.

The evidence, unless the case be within 11 & 12 Vict. c. 43, or a form dispensing with such statement, should be stated to have been given on oath (*e*), or on affirmation or promise, &c. (*f*), and in the presence of the defendant (*g*), that it may appear he has had the opportunity of cross-examining (*h*); but if it be not so stated, yet if enough appear upon the conviction to show that the witness was examined upon oath in the presence of the defendant, the conviction will be supported (*i*).

Thus, if a defendant appear and plead, and it is stated that the evidence was given on the same day, it will be intended that the evidence was given in the defendant's presence, even though the conviction recite the information at K., the defendant's appearance without saying where, and that the evidence was given at another place, H. (*k*).

And where, on a conviction, the information was stated to have been laid on the 29th of May, 1805, and that the defendant appeared on the 4th of June (without mentioning the year), and it concluded by stating the conviction as *signed and sealed on this* 4th of June, 1805, it was held that the proceedings appeared to have been all one continuing transaction, from the appearance of the defendant, after the summons, to the close of

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(*a*) Paley, 5th ed. 101.
(*b*) *R.* v. *Hall*, 1 T. R. 320; Paley on Conv. 5th ed. 103.
(*c*) *R.* v. *Clarke*, Cowp. 35.
(*d*) *R.* v. *Corden*, 4 Burr. 2279, 2282. See *R.* v. *Daman*, 2 B. & Ald. 378; and *Wickes* v. *Clutterbuck*, 2 Bing. 10.
(*e*) Whether the act requires it to be so given or not, *Reg.* v. *Justices of Bucks*, 14 L. J., M. C. 45.
(*f*) Paley, 5th ed. 184; 32 & 33 Vict. c. 68, s. 4.
(*g*) *Re Tordoff*, 13 L. J., Q. B. 145; 5 Q. B. 933; *Re Gray and Blaney*, 14 L. J., M. C. 26; *Re Bailey*, 3 E. & B. 607; 23 L. J., M. C. 16; and on principle, *Reg.* v. *Justices of Bucks*, *supra*, n. (*e*).
(*h*) *R.* v. *Vipont*, 2 Burr. 1163; discussing *R.* v. *Baker*, Stra. 1240; *R.* v. *Crowther*, 1 T. R. 125; *R.* v. *Barwell*, 6 T. R. 75; Paley, 5th ed. 114; *R.* v. *Kempson*, Cowp. 241; *R.* v. *Thompson*, 2 T. R. 18, 23.
(*i*) *R.* v. *Lovett*, 7 T. R. 152.
(*k*) *R.* v. *Swallow*, 8 T. R. 284.

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the conviction; and that it therefore appeared that the evidence was given in the defendant's presence; as his departure pending the continuance of the transaction could not be presumed (*l*).

Who may be witnesses.

And now, by 11 & 12 Vict. c. 43, s. 15, every prosecutor of any information within that act, not having any pecuniary interest in the result of the same, and every complainant in any such complaint as aforesaid, whatever his interest may be in the result of the same, shall be a competent witness to support such information or complaint respectively; and every witness at any such hearing as aforesaid shall be examined upon oath or affirmation, and the justice or justices before whom such witness shall appear, for the purpose of being so examined, shall have full power and authority to administer to every such witness the usual oath or affirmation.

And see as to the competency of witnesses, *ante*, p. 274.

But a confession of the offence, as before observed, dispenses with the necessity of stating that the evidence was given in the presence of the defendant, or that the witness was re-sworn, where that would otherwise be necessary to be done in order to the defendant's having an opportunity of cross-examining (*m*). If the defendant neglects to appear, that must be shown on the face of the conviction.

The evidence must generally be set forth at length in the conviction.

Where the record of the *conviction* purports to be an exact account of all the proceedings before the magistrate, in order to show that he has acted on sufficient grounds (*n*), the whole evidence given on both sides applicable to the charge must be particularly set out, so that the superior court may judge whether there is *any* proof which in an action would be left to a jury as sustaining every material part of the charge in the information, and warranting the adjudication (*o*). Thus it will not be sufficient to state that the said offence was *fully and duly proved;* for that is to state the result of the evidence only (as may be done in *orders*) (*p*), but not the evidence itself (*q*).

In these summary convictions, the opinion of the justice being substituted for that of a jury, according to the common law process, the *weight* of the evidence on either side, if there be any essential difference, must be determined by the justice; therefore, if the whole evidence be clearly set out, and *that* on the part of the prosecution sufficiently applies to the facts alleged, and constitutes the offence charged, whatever be the

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(*l*) *R.* v. *Crisp*, 7 East, 389, 3rd resolution.

(*m*) *R.* v. *Crowther*, 1 T. R. 126; *R.* v. *Hall*, *id.* 320. See *R.* v. *Kiddy*, 4 D. & R. 734; 2 *id.* M. C. 364.

(*n*) See *R.* v. *Reason*, 6 T. R. 375.

(*o*) Paley, 5th ed. 135. So in warrants of commitment, which are in effect convictions. See *Re Gray and Blaney*, 14 L. J., M. C. 26; 1 New Sess. C. 354; *Re Tordoff*, 13 L. J., M. C. 145.

(*p*) *Ante*, p. 1055. *R.* v. *Killett*, 4 Burr. 2063; Paley on Conv. 5th ed. 135.

(*q*) *R.* v. *Theed*, Ld. Raym. 1375. See *R.* v. *Lovett*, 7 T. R. 152; *R.* v. *Reed*, Doug. 486.

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evidence brought to rebut it by the defendant, everything respecting the credit to be given to the one or the other, which would be fit to be left to a jury, must in like manner be considered as left to the opinion of the justice; and his conclusion, fairly drawn from it, cannot be disturbed, except on appeal (*s*).

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It follows, from what has been advanced, that the evidence adduced and stated in the convictions must be considered as entirely distinct from the allegations of the information, in support of which only it is exhibited; in other words, that although the information be on oath, and a sufficient *general* description of the offence be given in it, yet the proof of every *particular* which goes to establish such offence, as well as everything adduced to exempt the defendant from the consequences of it, if any, must be exhibited on the *proof*. Thus it is insufficient in most cases to say, "it appears the defendant is guilty of the premises *charged in the above information*;" for though in convictions on the game laws, while qualifications were necessary, they were negatived in the information (*t*) (in order to give the justice jurisdiction, and cannot, in all probability, in the nature of things be *separately* and individually negatived in the *evidence*) (*u*); yet in most instances the facts which contribute to the establishment of the charge in the whole or of some of its essential parts or bearings (as age, quality, numbers, &c.) are open to proof by the testimony of witnesses, and necessary to be so proved (*x*). Thus, under the statute against profane swearing (*y*), the quality of the defendant; under the Coach Regulating Act, the ages of the supernumerary passengers; and, under the Hawkers' Act, the repetitions of the fact charged, go to the essence of the respective offences, and are facts susceptible of testimony in accusation and defence (*z*). The evidence on both sides, it has already been observed, must be stated, that the court, on appeal, may judge whether the offence be sufficiently charged and supported, or whether the defence comprehend an excuse, a qualification, or an exemption, so as to ascertain whether the justice have drawn a right conclusion.

Ouster of jurisdiction by a claim of right.

There is a general rule of law implied in the construction of all statutes (*a*), that if the act complained of be done under a *bonâ fide* claim of right of property, the jurisdiction of justices

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(*s*) *R.* v. *Davis*, 6 T. R. 177; *R.* v. *Smith*, 8 T. R. 588; Paley, 5th ed. 126. Upon an information for an assault upon a woman, when the woman swore the assault amounted to a rape, her credibility is for the justices, who may, on her evidence, convict of the assault only, *Wilkinson* v. *Dutton*, 3 B. & S. 821; 32 L. J., M. C. 152; but see *Re Thomson*, 6 H. & N. 193; 30 L. J., Ex. 9.

(*t*) See cases, Paley on Conv. 5th ed. 118—136.

(*u*) *R.* v. *Davis*, 6 T. R. 177; *R.* v. *Smith*, 8 T. R. 588.

(*x*) *R.* v. *Stone*, 1 East, 639.

(*y*) 6 & 7 Will. 3; *R.* v. *Tucke*, 2 Ld. Raym. 1386.

(*z*) *R.* v. *Crisp*, 7 East, 389—397.

(*a*) See Paley on Conv. 5th ed. 137.

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is ousted (*b*); and upon the claim of right appearing on the evidence, as it must necessarily do, though the magistrate must, of necessity, determine for the time whether the claim is *bonâ fide*, because on that question depends whether he hears the case on the merits, his determination is not conclusive (*c*); but the above rule does not apply where it is of the essence of the jurisdiction of the justices to ascertain the status of the property. It then becomes part of the inquiry which is committed to their cognizance, and which they are bound and compellable to enter upon. Thus, upon a complaint by parish officers under 59 Geo. 3, c. 12, s. 24, for the purpose of obtaining possession of a parish house, the justices must inquire whether the house in question be a parish house, and they must decide that question, though the evidence adduced before them raised the question whether the house was the property of the person informed against, or of his ancestor (*d*). So, on a complaint made against a person for his share of the cost of paving a street, it was held, that the justice was to determine whether the place in question was a street or not, upon evidence which raised the question whether there had been a dedication of the road to the public (*e*). And upon an application by a landlord under 1 & 2 Vict. c. 74, to justices to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved, and its legal determination, and the tenant's refusal to quit, it was held, that the justices had jurisdiction to give the landlord possession, and it was not ousted by the tenants setting up the title of a third person (*f*).

☞ The *bonâ fide* claim of right, however, must be a reasonable and possible one in law, and if it be not so the justices are right in disregarding it (*g*); but it may not be conclusive evidence of want of *bona fides* that the party had had a verdict found against him on the same title (*h*). The distinction being a claim possible in law and one deemed not possible may be illustrated by a case where, in answer to an information for fishing in a private fishery, the *locus in quo* being a *non-navigable* river, the defendant set up a right as one of the public, which the justices were held right in disregarding, though the defendant set up his claim in the *bonâ fide* belief that he had such

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(*b*) *R.* v. *Barnaby*, 1 Salk. 181; 3 Salk. 217; 2 Ld. Raym. 900.

(*c*) *Thompson* v. *Ingham*, 14 Q. B. 717; 19 L. J., Q. B. 189; *Barker* v. *Nottingham and Grantham Railway Company*, 33 L. J., C. P. 193.

(*d*) *Ex parte Vaughan*, L. R., 2 Q. B. 114; 36 L. J., M. C. 17; *Reg.* v. *Allen*, 7 B. & S. 902.

(*e*) *Reg.* v. *Dayman*, 7 E. & B. 672.

(*f*) *Rees* v. *Davies*, 4 Com. B. 56.

(*g*) *Hudson* v. *M'Rae*, 4 B. & S. 585; 33 L. J., M. C. 65; *Leatt* v. *Vine*, 30 L. J., M. C. 207; *Cornwell* v. *Saunders*, 3 B. & S. 206; 32 L. J., M. C. 6; *Calcraft* v. *Gibbs*, 5 T. R. 19; *R.* v. *Wrottesley*, 1 B. & A. 648; *Grant* v. *Hulton*, 1 B. & A. 134.

(*h*) *Kinnersley* v. *Orpe*, Dougl. 576. See *Hart* v. *Andrews*, 3 B. & A. 341; *R.* v. *Hampshire*, 3 Dowl. 477.

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right (*i*). And in a case where, upon a similar information, the *locus in quo* was a navigable river, the justices were held wrong in proceeding after a *bonâ fide* claim of right as one of the public had been set up by the defendant, because in a navigable river, according to *Carter* v. *Murcott* (*j*), the public, *primâ facie*, have a right of fishing (*k*).

Claim of right on hearing.

In some cases the statute expressly empowers a magistrate to decide on a claim of right, as in 11 Geo. 2, c. 19, s. 4, upon which statute the justices have jurisdiction to convict a party of fraudulently removing his goods to avoid a distress, though it appeared that the title to the premises was disputed, and that the tenant had actually paid his rent to one of the claimants (*l*).

The justice cannot by deciding a fact a particular way give himself jurisdiction in a case where he otherwise would not have it. The law on this subject was much discussed in *Reg.* v. *Bolton* (*m*) and the effect of that case was stated in *Thompson* v. *Ingham* (*n*) to be, that where the charge is such as, if true, is within the magistrate's jurisdiction, the finding of the facts afterwards by the magistrate is conclusive: but where the charge is not such as, if true, would be within the magistrate's jurisdiction, no finding of facts can alter it; and it was further held in that case, that where the judge has *primâ facie* jurisdiction to try a question, as, for instance, a county court judge a plaint for use and occupation, and on the evidence the question of title arises, the jurisdiction ceases, though the judge must, of necessity, determine the question for the time, because on it depends whether he hears it on the merits, but then his determination is not to be conclusive (*o*).

Evidence to negative exemptions, &c.

Evidence to negative any exemption, exception, proviso or condition in the statute under which the information is laid is not required from the prosecutor in any information, &c. within 11 & 12 Vict. c. 43, by the express words of the 14th section of that act, "but the defendant may prove the affirmative thereof in his defence if he would have advantage of the same;" but, notwithstanding that act, upon an information against an innkeeper for opening his house for the sale of liquors during prohibited hours, otherwise than for refreshment for travellers, the onus of proof that the case was not within the exception, was held to lie on the prosecutor (*p*).

If the evidence set forth is such as might reasonably warrant the conclusion drawn by the justice, it will be sustained. Thus,

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(*i*) *Hudson* v. *M'Rae*, 4 B. & S. 585; 33 L. J., M. C. 65.
(*j*) 4 Burr. 2163.
(*k*) *Reg.* v. *Stimpson*, 4 B. & S. 301; 32 L. J., M. C. 208.
(*l*) *Coster* v. *Wilson*, 3 M. & W. 411.
(*m*) 1 Q. B. 66.
(*n*) 14 Q. B. 717; 19 L. J., Q. B. 189.
(*o*) *Thompson* v. *Ingham* is approved of in *Barker* v. *Nottingham and Grantham Railway Company*, 33 L. J., C. P. 193.
(*p*) *Taylor* v. *Humphries*, 34 L. J., M. C. 1; *Davis* v. *Scrace*, L. R., 4 C. P. 172; 38 L. J., M. C. 79; *Morgan* v. *Hedger*, 40 L. J., M. C. 13; L. R., 5 C. P. 485.

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in a conviction for causing to be acted at a place called the *Cobourg Theatre*, for gain and reward, a certain entertainment of the stage called *Richard the Third*, where the evidence set forth was, that the defendant was seen once or twice at the rehearsals of the piece, engaged an actor to perform, and gave him a cheque for the amount of his benefit, it was held that the justices were warranted in drawing the conclusion that the defendant caused the play to be acted (*q*). And in the same case it was held that, from a statement that certain witnesses came before the justices, upon their oaths to them severally and respectively administered, it substantially appeared that the oath was administered to the witnesses in the presence of the magistrates (*r*).

Adjournments.

Adjournments, if granted by the justices, should be stated to show that they were not made to a time beyond that limited by the act for the conviction to take place in (*s*).

Thus, if a statute requires that a conviction may be made within three months after the offence was committed, the adjudication must take place within that time and the laying the information is not sufficient (*t*); or that penalties should be recovered within a similar time the judgment must be given within that time (*u*).

Adjudication and form of judgment.

Every conviction must contain an adjudication of the defendant's having been convicted, whether the punishment be or be not fixed by the statute (*v*). There must also be a judgment of forfeiture (*x*); for it is said, where there is an appeal, "it is not from the judgment of the justice as to the fact, but because he has ordered a penalty to be paid, or has committed the defendant, who wants to stay execution, or be released from prison" (*y*).

The conclusion of a conviction may be, and commonly is, "the said defendant is accordingly (*z*) convicted of *the offence so charged* upon him (or against him), as aforesaid, contrary to the form of the statute, &c., and I do therefore adjudge and declare that the said defendant hath forfeited for his said offence

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(*q*) *R.* v. *Glossop*, 4 B. & A. 616; Paley, 5th ed. 128.

(*r*) See *ante*, p. 1064, Paley on Conv. 5th ed. 117.

(*s*) *R.* v. *Tolley*, 3 East, 467; *R.* v. *Bellamy*, 1 B. & C. 500.

(*t*) Paley on Conv. 5th ed. 99.

(*u*) *Reg.* v. *Mainwaring*, E. B. & E. 474; 27 L. J., M. C. 278; but the court were divided in opinion on this point.

(*v*) *R.* v. *Harris*, 7 T. R. 238; relied on *per Cur.*, *Day* v. *King*, 5 A. & E. 365; 6 Nev. & Man. 845. See *Taylor* v. *Clemson*, 3 Q. B. 1004.

(*x*) Paley, 5th ed. 251.

(*y*) Nares on Conv. 65. But where a statutory form is followed, it may not be necessary to go on to order the payment of the penalty, *Barnes* v. *White*, 14 L. J., M. C. 65.

(*z*) "Duly" held unnecessary to be added, even where the form given by the act, and intended to be followed, used that word, *R.* v. *Jefferies*, 4 T. R. 768. See *R.* v. *Thompson*, 2 T. R. 18. "*It is considered that*" is an unnecessary preface, *R.* v. *Speed*, Carth. 502; Ld. Raym. 583, Paley, 5th ed. 250.

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the sum of ——," &c. However, the justice is not restricted to these exact words; for in one case, where the conviction (after stating the evidence) concluded thus:—"and thereupon the said defendant, the said —— day of ——, &c., before me the same justice, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid, *is convicted, and for his offence aforesaid hath forfeited, &c.:*" though it was objected, that it did not appear *of what* the defendant had been convicted, the court held it to be sufficient (*a*). Magistrates should be careful, lest in awarding punishment, whether corporeal or pecuniary, they step beyond their powers, or an action of trespass will lie against them (*b*) after the conviction has been quashed on appeal or upon application to the Queen's Bench (*c*).

Conviction must be certain and precise.

The adjudication on *every point* to which it refers must be *precise* and *exact;* for a judgment for too little is as bad as a judgment for too much; and this is so, whether it respect the fine, the costs, or any other portion of the penalty which has been attached to the commission of the offence (*d*). In a case where the commitment was, that "the defendants should lie in prison *till they pay their fine;*" no precise fine being mentioned, the court quashed the conviction (*e*). Where a statute enacted that, on nonpayment of the penalty and costs, the offender shall be committed for a time certain, or *until* the penalty and *charges* shall be paid (as was the case under 6 Geo. 1, c. 16 (*f*), for cutting down timber trees), a conviction which adjudged him to be imprisoned a certain time, or *until* the forfeiture, *together with the charges* previous to, and attending the said conviction, be paid, but did not ascertain what the charges were, was held bad (*g*). So, where 7 Geo. 2, c. 11 (local), gave power to a magistrate for a borough, on a summary conviction there against that act, to levy the penalties by distress, together with the *reasonable charges* of taking and keeping such distress; a conviction returned upon *certiorari*, which did not adjudge what the defendant was to pay for those charges, was admitted to be bad, and quashed (*h*).

Magistrates having power to award damages "*not exceeding*" a certain sum stated, have not power to award that sum at all events, but are to ascertain the amount of damage in each case, and award reasonable compensation according to the amount of injury proved. They cannot go beyond the extreme sum, but

(*a*) *R.* v. *Thompson*, 2 T. R. 18. See also *R.* v. *Chandler*, 14 East, 267.

(*b*) *Groome* v. *Forrester*, 5 M. & S. 314; and see *Newman* v. *Bendyshe*, 2 P. & D. 340; 10 A. & E. 11; *Newman* v. *Earl of Hardwicke*, 8 A. & E. 124; 3 N. & P. 368.

(*c*) 11 & 12 Vict. c. 44, s. 2.

(*d*) *R.* v. *Salomons*, 1 T. R. 251.

(*e*) *R.* v. *Elwell*, Stra. 794; 2 Ld. Raym. 1514. Cited *R.* v. *Wilson*, 3 A. & E. 817. See also *Morgan* v. *Brown*, 4 A. & E. 515; 6 N. & M. 57.

(*f*) Repealed 7 & 8 Geo. 4, c. 27.

(*g*) *R.* v. *Hall*, Cowp. 60.

(*h*) *R.* v. *Symonds*, 1 East, 189; *R.* v. *Hall* being cited.

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are not to award that sum unless damage is proved to a like amount (*h*).

Where a statute gives summary proceedings for various offences specified in several sections, a conviction is bad which leaves it uncertain under which section it took place (*i*). As where the consequences of a conviction are made by different sections to differ in reference to the amount of damage done by the offender, it must be shown on the conviction what the amount of damage done was, to show within which section the offence came (*k*). And where a statute is repealed by implication, and in the repealing statute an offence under the former statute is re-enacted, but with a different form of procedure, and a different punishment, a conviction professing to be obtained under the former statute cannot be supported under the later one (*l*).

In affixing the punishment of an offence which may be proceeded against on one or other of two different statutes, care must be taken not to blend the penalties under both (*m*). If distinct offences are charged in the information, judgment that the defendant is convicted *of the said offence* will be bad, for uncertainty to which offence the single penalty inflicted was referable (*n*).

The conviction and the charge must correspond.

The conviction must be in respect of the identical charge laid, as where the charge has been made *secundum allegata et probata*, and parties have professed to proceed under one statute, as for drunkenness and riotous behaviour under 10 & 11 Vict. c. 89, s. 29, a conviction of drunkenness alone under 21 Vict. c. 7, were not supported (*o*).

As to awarding corporeal punishment.

Where magistrates are invested with discretion as to awarding corporeal punishment, their judgment must be stated on the conviction with equal certainty as if it was for paying a penalty (*p*). Where no discretion is given to magistrates, they must inflict the whole punishment provided by law (*q*).

(*h*) *R.* v. *Harpur*, 1 D. & R. 222, per *Best*, J. The conviction was set aside for not showing an offence within the act.

(*i*) *Charter* v. *Græme*, 13 Q. B. 216.

(*k*) *Ibid.*

(*l*) *Michell* v. *Brown*, 1 E. & E. 267; 28 L. J., M. C. 53.

(*m*) *R.* v. *Clarke*, Cowp. 35; *R.* v. *Hoseason*, 14 East, 605; Paley, 5th ed. 270.

(*n*) *R.* v. *Salomons*, 1 T. R. 251. Held otherwise where the particular offence for which the penalty was inflicted was stated, *R.* v. *Chandler*, 14 East, 267, 4th objection.

(*o*) *Martin* v. *Pridgeon*, 1 E. & E. 778; 28 L. J., M. C. 179. See also *Reg.* v. *Brickhall*, 33 L. J., M. C. 156.

(*p*) Thus at the time when magistrates might order incorrigible rogues to serve his majesty either by sea or land, a conviction ordering one to be employed in "his majesty's service," without adding whether by sea or land, was held bad, *R.* v. *Patchett*, 5 East, 341.

(*q*) *R.* v. *Hoseason*, 14 East, 606, on 20 Geo. 2, c. 19, inflicting, on conviction by a magistrate, the punishment of commitment to the house of correction, there to remain *and be corrected*, and held to hard labour. *Correction, i. e.*, whipping, was held a necessary part of the judgment. See *R.* v. *Salomons*, 1 T. R. 252; Paley on Conv. 5th ed., p. 269. As to mitigation of penalties, see *post*, p. 1094.

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Where a person is convicted before justices of having committed several offences punishable summarily by imprisonment for not exceeding three calendar months, they may adjudge the imprisonment for the full term for each offence, and make each term commence at the expiration of the prior imprisonment (*r*).

Several offences of the same kind, and several penalties included in the same conviction.

A defendant might formerly be convicted of several offences of the same kind, and of several penalties in one conviction; for it was the constant practice in *actions* (on the game laws), and not unfrequently in *convictions* (*s*); but now every complaint must be for one matter of complaint only, and every information for one offence only (11 & 12 Vict. c. 43, s. 10).

But whenever several acts are charged to have been committed, it must depend on the words of the statute inflicting the penalties, whether they are distinctly incurred for *distinct* offences, or whether the several acts done form only one *aggregate* offence requiring but one penalty (*t*). A conviction for having on the 5th October last, and on divers other days and times between the said 5th October and the laying of the information, which was on the 16th of November, opened, kept, and used a house for the purpose of betting with persons resorting thereto, was held good as charging a single offence (*u*). The same question often arises in regard to the acts of *joint* offenders, who may in some cases be liable to separate penalties, and in others, *e. g.*, for using greyhounds, &c., to one collective penalty (*x*).

Under the Public Health Act, 1848 (*y*), three persons were convicted separately of exposing for sale a piece of meat unfit for human food, and it was held rightly so, though it was urged that one conviction and one set of costs would have done (*z*). Acts done on different days must always be treated as distinct offences (*a*); but different acts done on one day are liable to the distinction just taken (*b*), and each particular case must be decided by the wording of the

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(*r*) *Reg.* v. *Cutbush*, 36 L. J., M. C. 70; L. R., 2 Q. B. 379; and see 11 & 12 Vict. c. 43, s. 25.

(*s*) *R.* v. *Swallow*, 8 T. R. 284, 286; 5th ed. 258, per Lord *Kenyon*.

(*t*) Paley, 5th ed. p. 257; *R.* v. *Matthews*, 10 Mod. 26; *Reg.* v. *Scott*, 4 B. & S. 368; 33 L. J., M. C. 15; *ante*, p. 1068. See also *Collins* v. *Hopwood*, 15 M. & W. 459; 16 L. J., Ex. 124; *Att.-Gen.* v. *M'Lean*, 1 H. & C. 750; 32 L. J., Ex. 101.

(*u*) *Onley* v. *Gee*, 30 L. J., M. C. 222.

(*x*) See p. 5; and Paley, 5th ed. 258; *Reg.* v. *Littlechild*, 40 L. J., M. C. 137; L. R., 6 Q. B. 293.

(*y*) 11 & 12 Vict. c. 63.

(*z*) *Re Hartley*, 31 L. J., M. C. 228. See *Reg.* v. *Cridland*, 7 E. & B. 853; 27 L. J., M. C. 28; *Mayhew* v. *Wardley*, 14 C. B., N. S. 550.

(*a*) *R.* v. *Matthews*, 10 Mod. 27.

(*b*) *Brooks* v. *Milligan*, 3 T. R. 509. Two sales of books on one day, contrary to a statute, were held to subject defendant to two penalties, the acts of sale being distinct, Bull. N. P. 189; 8 T. R. 284; Paley, 5th ed. 261.

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statute on which the conviction is founded, assisted and fortified by the analogy of similar cases (*c*).

If two commit a joint offence only one penalty accrues.

It is to be observed, that where a statute imposes a penalty on any person or persons who shall do *an act* prohibited there, if two persons do such act together, and are jointly convicted, it is deemed but one offence, and the magistrate can only inflict one penalty. Thus, where two defendants were convicted in *5l. each*, under 5 Anne, c. 14, s. 4, for using a greyhound to destroy game without being qualified, the court at once quashed the conviction; for it was only one offence, so that the magistrate should only have convicted them in one penalty (*d*). The selling rolls at different times on a Sunday, was also held to be only one offence (*e*). But if either the penalty imposed by the statute be upon *each person* convicted, or if the offence be several in its nature, so that the guilt of each of the parties is essentially distinct from that of the others, the parties ought to be convicted in several and distinct penalties (*f*). And though the information be joint the conviction may be several for using a gun to kill pheasants, under 1 & 2 Will. 4, c. 32, s. 3 (*g*). See as to not making several liable on joint conviction for the costs of each other, *Reg* v. *Cridland* (*h*). Where two were jointly convicted of an assault, under 9 Geo. 4, c. 31, s. 27, and a joint fine was imposed, it was held illegal, and the conviction bad in substance, so as to make them liable in trespass (*i*). If the penalty is ascertained by the conviction when returned to the sessions, the court above will not inquire when it was so fixed (*k*).

Where conviction to be joint or several.

A conviction must be good in all its parts, and differs from an order in not being divisible (*l*). The judgment in particular being an entire act, cannot be severed, so that if bad as to part, the whole is thereby vacated, though the parts may be in their nature distinct (*m*).

Adjudicating distribution of the penalty on conviction.

In general, the distribution of the penalty makes also a necessary part of the judgment. Where the statute itself points out the proportions to be distributed, a conviction setting forth that *the offender is convicted, and shall forfeit such a sum*

(*c*) *R.* v. *Clarke*, Cowp. 610. See cases collected, Paley, 5th ed. 258 *et seq.*

(*d*) *R.* v. *Bleasdale*, 4 T. R. 809; *R.* v. *Swallow*, 8 T. R. 286; *Marriot* v. *Shaw*, Comyn's Rep. 274.

(*e*) *Crepps* v. *Durden*, Cowp. 640.

(*f*) *R.* v. *Drake*, Stra. 489, a deer-stealing case;—*R.* v. *Clarke*, *id.* 610, cases of several killing one hare, or drawing one net for birds, or rescuing goods from custom-house officers, resisting and assaulting them;—*R.* v. *Hube*, 5 T. R. 542, joint disturbance of tolerated congregation; *Crepps* v. *Durden*, Cowp. 640; *R.* v. *Elwall*, Stra. 794; 2 Ld. Raym. 1514; see *Re Hartley*, 31 L. J., M. C. 228, *ante*, p. 1083.

(*g*) *Reg.* v. *Littlechild*, 40 L. J., M. C. 137; L. R., 6 Q. B. 293.

(*h*) *Post*, p. 1087.

(*i*) *Morgan* v. *Brown*, 4 A. & E. 575; 6 N. & M. 57.

(*k*) 2 Ld. Raym. 1514; *R.* v. *Layton*, 1 Salk. 352; Paley, 5th ed. 271.

(*l*) 1 T. R. 251; Paley, 5th ed. 273.

(*m*) *R.* v. *Catherall*, Stra. 900; Paley on Conv. 5th ed. 273.

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according to the form of the statute, without making a distribution in terms to the different parties entitled, was held to be in this sufficient (*n*); because nothing is left uncertain or discretionary. This is the usual mode wherever the act applies the penalty with such certainty that the judgment can be unequivocally carried into effect by reference to the act alone (*o*). The form of judgment in such cases usually awards the penalty to be "distributed as the act directs" (*p*): but it is better to appropriate the penalty specifically as directed by the act, for a material variance from its directions will avoid the conviction (*q*).

Distribution of the penalty.

And where the forms given in the schedule are not followed, and justices are required by a penal statute to distribute the penalty on conviction, amongst certain persons, "according to their *discretion*," or in any other indeterminate proportions, an adjudication that the forfeiture be disposed of *as the law directs* is bad, for in such case the justices should adjudge *what the several proportions* shall be (*r*). Again, where the act fixes the amount, but leaves the magistrate to select the description of objects to receive its distribution, or where the amount and description of objects are both fixed, but the individuals answering that description are uncertain, the magistrate must, at the time of the adjudication, exercise his discretion in selecting, by name, a party to receive the amount. The application and distribution of the penalty to such party should afterwards be distinctly stated on the face of the conviction (*s*).

By the 32nd section of 11 & 12 Vict. c. 43, it is enacted, "that the several forms in the schedule to this act (*t*) contained, or forms to the like effect, shall be deemed good, valid and sufficient in law." A conviction, therefore, which follows the form given by the statute, requiring the penalty to be paid and applied according to law, and applicable to the case, is valid (*u*); and, therefore, where such a form is followed, though a conviction under the Game Acts (*x*), which requires the justice to exercise a discretion as to the person who was to receive the penalty, might be bad for not selecting to which of the overseers a moiety of the penalty was to be paid, it is good under

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(*n*) *R.* v. *Barrett*, 1 Salk. 383.

(*o*) *R.* v. *Seale*, 8 East, 573.

(*p*) See *R.* v. *Priest*, 6 T. R. 538; *R.* v. *Dimpsey*, 2 T. R. 96; *R.* v. *Helps*, 3 M. & S. 331; *R.* v. *Thompson*, 2 T. R. 18.

(*q*) *Griffiths* v. *Harries*, 2 M. & W. 335.

(*r*) *R.* v. *Dimpsey*, 2 T. R. 96. See *R.* v. *Symonds*, 1 East, 189.

(*s*) *R.* v. *Seale*, 8 East, 568, 573. See *R.* v. *Chandler*, Salk. 378; *R.* v. *Smith*, 5 M. & S. 133.

(*t*) See forms, *post*, p. 1089.

(*u*) *Reg.* v. *Hyde*, 21 L. J., M. C. 94; *Eggington* v. *Mayor, &c. of Lichfield*, 5 E. & B. 100; 24 L. J., Q. B. 360; *Re Allison*, 10 Exch. 561. But see *Reg.* v. *Johnson*, 8 Q. B. 102, as to the distinction between a part of a form relating to a description of the offence and that relating to the adjudication of the penalty.

(*x*) 1 & 2 Will. 4, c. 32, and 5 & 6 Will. 4, c. 20, s. 21.

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the 11 & 12 Vict. c. 43, though it does not name the person to whom the penalty is to be paid, for that may be done by word of mouth (*y*). The distinction between cases where a discretion had to be exercised, and those where the statute fixed the mode of distribution, was there taken, as it had been in the cases of *Re Boothroyd* (*z*), and *Chaddock* v. *Wilbraham* (*a*), before the 11 & 12 Vict. c. 43.

Distribution of the penalty.

Where the distribution directed by the statute was part to the party aggrieved, and the remainder to "the overseers of the poor of the *parish*," a distribution to "the poor of the *township*" was held bad, because there may be many townships in the same parish, and it was not stated which, or that it maintained its own poor; so that there was uncertainty; but it was admitted that, if it had been general, *viz.*, "to be distributed as the *law directs*," it would have been sufficient, for there would not then necessarily have been any uncertainty (*b*); but an adjudication of a penalty to be paid to a wrong person is invalid as being a clear excess of jurisdiction, as, for instance, where the statute requires a moiety to be paid to the overseers of the parish and a moiety to the informer, the conviction is bad if it order the whole to be paid to the overseers (*c*); or where a moiety is required by the statute to be paid to the overseer to be applied to the county rate, and the conviction order it to be paid to the treasurer of the county (*d*).

Costs should form part of the adjudication in the conviction.

Costs also form a constituent part of the adjudication, every part of which must be precise and exact. Where a statute did not mention costs, the convicting magistrate had no power of awarding them till 18 Geo. 3, c. 19. This act is repealed, and 11 & 12 Vict. c. 43, s. 18, enacts that, in all cases of summary convictions or orders within 11 & 12 Vict. c. 43, the justice or justices making the same in his or their discretion are to be at liberty, in and by such conviction or order, to order

General power to give costs.

the defendant to pay to the prosecutor or complainant such costs as shall seem just and reasonable to him or them, or in cases of dismissal of the complaint the prosecutor or complainant to pay costs, and the sums so allowed for costs shall be specified in such conviction or order, or order of dismissal.

Form of adjudication as to costs.

Independently of that statute, a conviction of four persons for a joint offence, adjudicating each to pay a certain fine, or a certain sum for costs, and until payment of such several sums each was to be imprisoned, was held bad, as it made each liable

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(*y*) *Reg.* v. *Hyde*, 21 L. J., M. C. 94.
(*z*) 15 M. & W. 1.
(*a*) 5 C. B. 645.
(*b*) *R.* v. *Priest*, 6 T. R. 538. "Vill" is presumed to be co-extensive with "parish." See *R.* v. *Wyatt*, 2 Ld. Raym. 1478. "Lambeth" in evidence in conviction; "St. Mary, Lambeth," in adjudication of penalty in conviction; held no variance, it not appearing that these were two distinct parishes, *R.* v. *Glossop*, 4 B. & A. 616.
(*c*) *Griffiths* v. *Harries*, 2 M. & W. 335, *ante*, p. 1085.
(*d*) *Chaddock* v. *Wilbraham*, 5 C. B. 645.

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for the other (*e*). And again, a conviction under 29 Car. 2, c. 7, for selling fruit on the Lord's days, which adjudged the defendant to pay five shillings and eleven shillings costs, and if the several sums should not be paid forthwith, to be levied by distress, and in default of sufficient distress adjudged the defendant to be set publicly in the stocks for the space of two hours, unless the said several sums, and all costs and charges of the distress shall be sooner paid, was quashed on the ground that the putting the defendant in the stocks was clearly unauthorized as respects the costs; for by 29 Car. 2, c. 7, the punishment of the stocks was intended to be in the place of a penalty, and not as a mode of recovery of it: and by 11 & 12 Vict. c. 43, the costs are to be recoverable in the same manner as the penalty was recoverable, and that would be in this case by distress (*f*).

Form of adjudication as to costs

It follows, therefore, that *where any particular act directs costs* to be paid with their distribution, and the mode of compelling payment of *them*, as well as of the fine, it must be precisely complied with in the adjudicatory portion of the conviction: but *where the act* inflicting a penalty on the offence *is silent as to costs*, then, if awarded at all, the sum, &c. is to be adjudicated with similar precision, according to the act just set forth. The adjudication must ascertain the precise sum of the fine to be paid, the costs, the charges of levying or obtaining the same, as well as the duration of any alternative discretionary imprisonment for nonpayment of fine, or costs, or both (*g*); nor can the justice delegate the duty of ascertaining any one of these matters, or ought not to defer that of awarding the penalty or costs beyond the time limited by the particular act; for under such circumstances, an award "of such costs as to certain other persons (named) shall seem reasonable" vitiates the conviction (*h*); but where a conviction was drawn up and signed by the justices with a blank space left for the amount of costs which was inserted by the magistrate's clerk at a subsequent time, this was held to be a mere irregularity, but not an excess of jurisdiction (*i*).

The costs *of the appeal* against a conviction are noticed *post*, p. 1104.

Conclusion of adjudication.

The adjudication is perfected by the convicting justice or justices (as the statute by which it is authorized may require) subscribing and sealing it. By this act it becomes a record, and without it it cannot be produced before any court for any ulterior purpose, as for appeal, &c. (*k*). It is usual to add the

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(*e*) *Reg.* v. *Cridland*, 7 E. & B. 853; 27 L. J., M. C. 28.
(*f*) *Reg.* v. *Barton*, 13 Q. B. 389; 18 L. J., M. C. 56.
(*g*) *R.* v. *Symonds*, 1 East, 189; *R.* v. *Payne*, 4 D. & R. 72.
(*h*) *R.* v. *St. Mary, Nottingham*, 13 East, 57, n.; *Selwood* v. *Mount*, 1 Q. B. 726; *R.* v. *Clark*, 5 Q. B. 887. See as to this, *ante*, p. 1085.
(*i*) *Bott* v. *Ackroyd*, 28 L. J., M. C. 207.
(*k*) Dalt. c. 115; *R.* v. *Elwell*, Stra. 794; 2 Ld. Raym. 1514.

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date of the adjudication, taking care to bring it within the time limited by statute for the conviction to be made in (*l*).

Where forms are given by statute.

Where a form of conviction is prescribed by a statute, it is safest, *in general*, strictly to adhere to it by adopting the very words (*m*), and imperative to do so if the statute says, "the conviction *shall be* in the form following" (*n*), without adding "or to the like effect" (*o*): but if the justice vary therefrom in point of phrase, he must at least frame it according to the precise intent and purpose of the act (*p*). There are cases in which the description in the conviction shall be *more particular* than the words inserted in the statute itself; *viz.*, sometimes by pursuing a narrower description than the literal terms convey, at other times by enlarging upon the general terms prescribed in the statutable form of conviction. So a conviction under 9 Geo. 4, c. 61, s. 1, for entering upon land with a net for the purpose of taking game, must go on to allege that the purpose was to take game there, and it was not enough to follow the words of the statute (*q*). An example of each will sufficiently illustrate this. A conviction under the 5 Ann. c. 14 (now repealed), for "*keeping a gun*," alleged it to be "*an instrument for destroying the game*" (in the very words of the act): and it was held, that though the act prohibited the "keeping or using any *engine* to destroy the game," yet, as a gun may be kept for self-defence, or other lawful purposes not intended to be prohibited, it would be to set the words of the act at war with its meaning and object, if the conviction were not to narrow them so as to meet that object, by confining the description of the offence to the keeping the gun for the special purpose prohibited; which special purpose must therefore be alleged, though it produce the effect of narrowing the description in the statute (*r*). A case of the other description, *viz.*, where the statutable form of conviction was *insufficient* for expressing the purpose of the act, and the description of the offence required to be *enlarged*, has been already referred to for a different purpose (*s*). It was the case of a conviction under 35 Geo. 3, c. 6, the enacting part of which directed, in the case

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(*l*) See *R.* v. *Peckham*, Comberb. 439; *R.* v. *Bellamy*, 1 B. & C. 500; 2 D. & R. 727; Paley, 5th ed. 286. Month in an act of parliament now means calendar month (13 & 14 Vict. c. 21, s. 4).

(*m*) Per Lord *Kenyon*, *R.* v. *Priest*, 6 T. R. 538. See *Nixon* v. *Nanney*, 1 Q. B. 747, and *ante*, p. 1085.

(*n*) *R.* v. *Jefferies*, 4 T. R. 769. See 1 East, 72; 3 Esp. 198, and this though the form given does not set out the evidence. See *Nixon* v. *Nanney*, 1 Q. B. 747.

(*o*) The words "to the like effect," or "the effect thereof," authorize a convicting justice to insert other particulars not indicated by the statute itself, *post*, p. 1092.

(*p*) See *ante*, p. 1068.

(*q*) *Re Fletcher*, 13 L. J., M. C. 16.

(*r*) *R.* v. *Gardiner*, 2 Stra. 1098; Andrews, 55. See also *S. P.*, *Wingfield* v. *Stafford*, 1 Wils. 315.

(*s*) *R.* v. *Priest*, 6 T. R. 538; as also 1 Wilson, 215; 1 Chit. 147.

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sub judice, that the convicting magistrate "shall ascertain the sum to be given to the party aggrieved;" whereas the form annexed to it directed that the penalty should be "distributed *as the law directs, according to the statute in that case* made and provided." As it was clear, that a judgment exactly pursuing the general form could not be executed, for want of that sum being first ascertained, it was held necessary and right to enlarge upon the description in the general form, in order to meet the purpose not comprised in it, but clearly pointed out in the enacting part (*t*).

If a charge falls short of the necessary legal description of the offence, the omission is not cured by any allegations of its being done unlawfully or fraudulently, or the like, or by stating it was against the form of the statute, for the last allegation is no more than a legal inference which must be supported by the premises (*u*). The word "duly," to fill up the description of the offence itself, is of no avail, except in an allegation of mere inducement (*x*).

As to general form of conviction.

By 11 & 12 Vict. c. 43, s. 17, in all cases of conviction where no particular form of such conviction is or shall be given by statute creating the offence, or regulating the prosecution for the same, and in all cases of convictions upon statutes hitherto passed, whether any particular form of conviction have been therein given or not, it shall be lawful for the justices or justice who shall so convict, to draw up his or their conviction on parchment, or on paper, in such one of the forms of conviction in the schedule to this act contained, as shall be applicable to such case, or to the like effect. And validity is given to these forms by the 32nd section of the same act, *ante*, p. 1085.

Conviction for a Penalty to be levied by Distress, and in default of sufficient Distress, Imprisonment.

Forms in schedule to 11 & 12 Vict. c. 43.

——— } Be it remembered, that on the ——— day of ———, in the year
to wit. } of our Lord ———, at ———, in the said [*county*], A. B. is convicted before the undersigned, [*one*] of her Majesty's justices of the peace for the said county, for that [he the said A. B. &c., *stating the offence, and the time and place when and where committed*]; and I adjudge the said A. B. for his said offence to forfeit and pay the sum of ——— [*stating the penalty, and also the compensation, if any,*] to be paid and applied according to law, and also to pay to the said C. D. the sum of ———, for his costs on this behalf; and if the said several sums be not paid forthwith [*or* on or before ——— next] *I order that the same be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress* I adjudge the said A. B. to be imprisoned in the [*house of correction*] at ———, in the said county, [*there to be kept to hard labour*] for the space of ———, unless the said several sums, and all costs and charges of the said distress [*and of the commit-*

(*t*) *R.* v. *Dimpsey*, 2 T. R. 96; *R.* v. *Helps*, 3 M. & S. 331.

(*u*) *Anon.* Dy. 363; *Colborne* v. *Stockdale*, 1 Stra. 493; and see *Ex parte Aldridge*, 4 D. & R. 83; *Re Geswood*, 2 E. & B. 952; 23 L. J., M. C. 38; *Fletcher* v. *Calthrop*, 6 Q. B. 880; *Re Fletcher*, 13 L. J., M. C. 16; *R.* v. *Lewis*, 8 A. & E. 888; *R.* v. *Martin*, 8 A. & E. 481; *R.* v. *Seward*, 1 *id.* 706; *R.* v. *Rowlands*, 17 Q. B. 671; 21 L. J., M. C. 81.

(*x*) *R.* v. *Bidwell*, 1 Den. C. C. 222; *Reg.* v. *Keighley*, 15 L. J., M. C. 102.

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ment and conveying of the said A. B. to the said house of correction], shall be sooner paid.

Given under my hand and seal, the day and year first above mentioned, at ———, in the [*county*] aforesaid.

J. S. (L.S.)

* *Or, where the issuing of a distress warrant would be ruinous to the defendant or his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks* * *, *say*, "then, inasmuch as it hath now been made to appear to me [that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," *or*, "that the said A. B. hath no goods or chattels whereon to levy the said sums by distress], I adjudge," &c., *as above, to the end.*

Conviction for a Penalty, and in default of Payment, Imprisonment.

——— } Be it remembered, that on the ——— day of ———, in the year to wit. } of our Lord ———, at ———, in the said [*county*], A. B. is convicted before the undersigned, [*one*] of her Majesty's justices of the peace for the said county, for that [he the said A. B., &c., *stating the offence, and the time and place when and where it was committed*]; and I adjudge the said A. B. for his said offence to forfeit and pay the sum of ——— [*stating the penalty and the compensation, if any*], to be paid and applied according to law, and also to pay to the said C. D. the sum of ———, for his costs in this behalf; and if the said several sums be not paid forthwith [*or* on or before ——— next], I adjudge the said A. B. to be imprisoned in the [*house of correction*] at ———, in the said [*county*], [*and there to be kept to hard labour*] for the space of ———, unless the said several sums [and the costs and charges of conveying the said A. B. to the said house of correction] shall be sooner paid.

Given under my hand and seal, the day and year first above mentioned, at ———, in the [*county*] aforesaid.

J. S. (L.S.)

Conviction when the Punishment is by Imprisonment, &c.

——— } Be it remembered, that on the ——— day of ———, in the year to wit. } of our Lord ———, at ———, in the said [*county*], A. B. is convicted before the undersigned, [*one*] of her Majesty's justices of the peace for the said county, for that [he the said A. B., &c., *stating the offence, and the time and place when and where committed*]; and I adjudge the said A. B. for his said offence to be imprisoned in the [*house of correction*] at ———, in the said [*county*], [*and there kept to hard labour*] for the space of ———; and I also adjudge the said A. B. to pay to the said C. D. the sum of ———, for his costs in this behalf; and if the said sum for costs be not paid forthwith [*or* on or before ——— next] then *I order that the said sum be levied by distress and sale of the goods and chattels of the said A. B.; and in default of sufficient distress in that behalf * I adjudge the said A. B. to be imprisoned in the said house of correction [*and there kept to hard labour*] for the space of ———, to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs shall be sooner paid.

Given under my hand and seal, the day and year first above mentioned, at ———, in the [*county*] aforesaid.

J. S. (L.S.)

* *Or where the issuing of a distress warrant would be ruinous to the defendant or his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks* * *, *say*, "inasmuch as it hath now been made to appear to me [that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," *or* "that the said A. B. hath no goods or chattels whereon to levy the said sum for costs by distress], I adjudge," &c.

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Order for Payment of Money to be levied by Distress, and in default of Distress, Imprisonment.

——— } Be it remembered, that on ——— complaint was made before
to wit. } the undersigned, [*one*] of her Majesty's justices of the peace in and for the said [*county*] of ———, for that [*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*]; and now at this day, to wit, on ———, at ———, the parties aforesaid appear before me the said justice, [*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, doth not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me on oath that the said A. B. has been duly served with the summons in this behalf which required him to be and appear here at this day before such justices of the peace for this said county as should now be here, to answer the said complaint, and to be further dealt with according to law]; and now, having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of ——— forthwith, [*or*, on or before ——— next, *or as the statute may require*], and also to pay to the said C. D. the sum of ——— for his costs in this behalf; and if the said several sums be not paid forthwith [*or* on or before ——— next] *I hereby order that the same be levied by distress and sale of the goods and chattels of the said A. B.; and in default of sufficient distress in that behalf* I adjudge the said A. B. to be imprisoned in the [*house of correction*] at ———, in the said [*county*], [*and there kept to hard labour*] for the space of ———, unless the said several sums, and all costs and charges of the said distress [*and of the commitment and conveying of the said A. B. to the said house of correction*], shall be sooner paid.

Given under my hand and seal, this ——— day of ———, in the year of our Lord ———, at ———, in the [*county*] aforesaid.

J. S. (L.S.)

* *Or, where the issuing of a distress warrant would be ruinous to the defendant or his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks* * *, *say*, "then, inasmuch as it hath now been made to appear to me [that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," *or* "that the said A. B. hath no goods or chattels whereon to levy the said sums by distress], I adjudge," &c.

Order for Payment of Money, and in default of Payment, Imprisonment.

——— } Be it remembered, that on ——— complaint was made before the
to wit. } undersigned, [*one*] of her Majesty's justices of the peace in and for the said [*county*] of ———, for that [*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*]; and now at this day, to wit, on ———, at ———, the parties aforesaid appear before me the said justice, [*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, doth not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me on oath that the said A. B. has been duly served with the summons in this behalf which required him to be and appear here on this day before such justices of the peace for the said county as should now be here, to answer the said complaint, and to be further dealt with according to law]; and now, having heard the matter of the said complaint, I do adjudge the said A. B. [to pay to the said C. D. the sum of ——— forthwith, *or* on or before ——— next, *or as the statute may require*], and also to pay to the said C. D. the sum of ——— for his costs in this behalf; and if the said several sums be not paid forthwith [*or* on or before ——— next], I adjudge the said A. B. to be imprisoned in the [*house of correction*] at ——— in the said county, [*there to be kept to hard labour*] for the space

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of ———, unless the said several sums [*and the costs and charges of conveying the said A. B. to the said house of correction*] shall be sooner paid.

Given under my hand and seal, this ——— day of ———, in the year of our Lord ———, at ———, in the [*county*] aforesaid.

J. S. (L.S.)

11 & 12 Vict. c. 43.

Order for any other Matter where the disobeying of it is punishable with Imprisonment.

——— } to wit. } Be it remembered, that on ——— complaint was made before the undersigned, [*one*] of her Majesty's justices of the peace in and for the said [*county*] of ———, for that [*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*], and now at this day, to wit, on ———, at ———, the parties aforesaid appear before me, the said justice, [*or* the said C. D. appears before me, the said justice, but the said A. B., although duly called, doth not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me upon oath that the said A. B. has been duly served with the summons in this behalf, which required him to be and appear here at this day, before such justices of the peace for the said county as should now be here, to answer to the said complaint, and to be further dealt with according to law]; and now, having heard the matter of the said complaint, I do therefore adjudge the said A. B. to [*here state the matter required to be done*], and if upon a copy of a minute of this order being served upon the said A. B., either personally or by leaving the same for him at his last or most usual place of abode, he shall neglect or refuse to obey the same, in that case I adjudge the said A. B. for such his disobedience to be imprisoned in the [*house of correction*] at ———, in the said county, [*there to be kept to hard labour*] for the space of ——— [unless the said order be sooner obeyed, *if the statute authorize this*]; and I do also adjudge the said A. B. to pay to the said C. D. the sum of ——— for his costs in this behalf; and if the said sum for costs be not paid forthwith [*or* on or before ——— next], I order the same to be levied by distress and sale of the goods and chattels of the said A. B., [and in default of sufficient distress in that behalf, I adjudge the said A. B. to be imprisoned in the said *house of correction* [*and there kept to hard labour*] for the space of ———, to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs shall be sooner paid].

Given under my hand and seal, this ——— day of ———, in the year of our Lord ———, at ———, in the [*county*] aforesaid.

J. S. (L.S.)

As to statutory forms of conviction.

As to superfluous matter, commonly denominated surplusage, if a statute direct the conviction of any offence under it to be drawn up according to an annexed form, or to the effect thereof, and the convicting justice insert other particulars besides all the requisites indicated by the statute itself, they do not invalidate the instrument or its effect (*y*). Therefore, if unnecessary particulars be inserted, and are incorrect as to fact, the incorrect item in that surplusage cannot vitiate that part of the conviction which is correct and good (*z*): thus, an impossible or incongruous date, if not material, may be rejected as surplusage (*a*).

Surplusage.

Impossible date.

(*y*) *R.* v. *Jefferies*, 4 T. R. 768; *Massey* v. *Johnson*, 12 East, 67; *R.* v. *Drake*, 2 Show. 489; *Charter* v. *Græme*, 13 Q. B. 227; *Stamp* v. *Sweetland*, 8 Q. B. 23; and see cases cited, Paley on Conv. 5th ed. 168.

(*z*) *R.* v. *Hall*, 1 T. R. 320.

(*a*) *R.* v. *Picton*, 2 East, 196.

Of Statutory Forms.

The difficulty of fixing absolutely any definite criterion for determining what are words of surplusage is not to be entirely removed, because every case must stand on its own peculiar circumstances, but may be assisted by analogy to the law of indictments (*b*).

Of statutory forms of summary convictions considered.

In convictions directed by statutes, wherein summary forms are given (omitting the information, summons and evidence), the material part begins at the word "*convicted*." It is equally necessary in these, as it is in common law convictions, that certain essential ingredients should appear on the face of the instruments, *viz.*, the jurisdiction of the convicting magistrate, the time, the place and the charge, in such terms as to bring the whole within the description given of the offence in the act; also, that the defendant had not any such defence as his then observing these particulars might have afforded him; for, without these being evident upon the inspection of the record, the court cannot say that he has incurred the penalty, or subjected himself to the forfeiture annexed. Thus, under the old bread acts, if the offence was laid where an assize had been set, it was necessary to set forth what the assize was in that place, in order to show what was the deficiency of weight; to state the time of purchasing and of weighing, in order to show that the article was found deficient within the then limited terms for trial, and the species of bread, to show that the object of the complaint did not fall within the exception (*c*).

"Here state the offence."

It is very common in the summary forms inserted in statutes to find the words "(*here state the offence*)." When they occur, they are to be explained by the foregoing rule of construction, *i. e.*, the offence must be described as fully as is there insisted on; *ex. gr.*, the statute against combinations and among journeymen manufacturers (*d*) gave a summary form, in which, by way of a parenthesis, these words were inserted. On them it was decided, that agreements among these workmen *for certain specified purposes* being the offence to be punished, it was necessary that the agreement itself should be set out in the conviction, in order to show, on the face of it, that it was an agreement *for the special purposes* denounced by the statute *in the very terms used therein;* so that it might appear that the magistrate had authority to convict, and that the defendants had incurred the penalty (*e*); but a variation from the precise words of the statute is not fatal if the words used are such as to bring the case within the plain meaning of the act of parliament (*f*).

(*b*) See *ante*, p. 163.
(*c*) 55 Geo. 3, c. 99, &c.
(*d*) 39 & 40 Geo. 3, c. 106.
(*e*) *R.* v. *Nield*, 6 East, 417.
(*f*) *R.* v. *Ridgway*, 5 B. & A. 527; 1 D. & R. 123; *R.* v. *Hazell*, 13 East, 139, *ante*.

Of Summary Convictions and Orders.

In some of these statutable forms, *titles* of acts are ordered to be set forth thus, "(*here set forth the title of the act*)." Wherever these directions occur, they should be strictly complied with; but any insignificant variation will not be fatal if the title is stated with sufficient clearness and accuracy as to leave no reasonable doubt as to the statute intended (*g*).

Adjudication of penalty.

The forms given by the 11 & 12 Vict. c. 43, of conviction, state that the penalty is "to be paid and applied according to law." If this form be followed, it is sufficient, though it does not name the person to whom it is to be paid (*h*); while, on the other hand, if a person is named who is not the right person, the conviction is invalid, as being a clear excess of jurisdiction (*i*).

Discretion of mitigating penalties—alternative punishments.

A judgment for too small a penalty is as bad as a judgment for too much (*k*); but it is common to entrust the convicting magistrates with a discretionary power of mitigating penalties. The extent to which this authority may be exercised, in any instance, must depend entirely on the power given in each particular case by statute; but, whatever it be, if exercised, it ought to be so stated in the conviction (*l*); for, otherwise, it cannot appear to the court, upon appeal, how or in what degree the magistrate has exercised the authority with which he was invested; thus, the conviction must first adjudicate the whole penalty inflicted by the statute, and then, in a separate sentence, state to what inferior sum he has mitigated it; for, otherwise, it could not appear that he had exercised his authority in both points, according to the terms of the statute.

Power of mitigating penalties limited.

The power of mitigating penalties is limited by the Limited Penalties Act, 1864 (*m*), which enacts, that where any public act of parliament provides that in respect of any offence therein mentioned a penalty is to be imposed of not less than a particular sum of money or of not less than a certain term of imprisonment or other punishment therein specified, it shall not be lawful for the justices or court having cognizance of such offence to limit such penalty below the limit specified in that act of parliament, in pursuance of any power of mitigating penalties conferred on such justices or court by any local or private act of parliament.

Convictions should be returned to sessions.

The duty of *returning* a conviction under hand and seal of the convicting justice to the next quarter sessions is clear, where a penalty or forfeiture accrues in order to prevent the crown from being deprived of it (*n*). It may be returned to the

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(*g*) *Reg.* v. *Westley*, Bell, C. C. 193; 29 L. J., M. C. 35. See *Nixon* v. *Nanney*, 1 Q. B. 747; *Chance* v. *Adams*, 1 Ld. Raym. 77; *R.* v. *Wilcock*, 7 Q. B. 317; *Re Boothroyd*, 15 M. & W. 1.

(*h*) *Reg.* v. *Hyde*, 21 L. J., M. C. 94. See *Barnes* v. *White*, 14 L. J., M. C. 65.

(*i*) *Griffiths* v. *Harries*, 2 M. & W. 325; *Chaddock* v. *Wilbraham*, 5 C. B. 645.

(*k*) *R.* v. *Salomons*, 1 T. R. 252.

(*l*) Paley on Conv. 5th ed. 272.

(*m*) 27 & 28 Vict. c. 110.

(*n*) See per *Buller*, J., in *R.* v. *Eaton*, 2 T. R. 285. See *ante*, p. 679.

sessions on paper or parchment; if to the Queen's Bench on a *certiorari*, on parchment only.

Return of Conviction to Sessions.

In some statutes, the return of the conviction is particularly directed, *e. g.*, in the statutes consolidating the law of larceny, and punishing malicious injuries to property (*o*), in cases where a *second* conviction is to be visited by a severer judgment; because, in such cases, the first conviction, or a true copy thereof, as returned to, and filed by the clerk of the peace, is usually declared (*p*) to be sufficient evidence of the former conviction. And under 11 & 12 Vict. c. 43, s. 14, if the justice or justices convict or make an order against the defendant, "a minute or memorandum thereof shall be made for which no fee shall be paid, and the conviction or order shall be afterwards drawn up by the said justice or justices in proper form under his or their hand and seal or hands and seals, and he or they shall cause the same to be lodged with the clerk of the peace, to be by him filed among the records of the general quarter sessions of the peace; or if the said justice or justices shall dismiss such information or complaint, it shall be lawful for such justice or justices, if he or they shall think fit, being required so to do, to make an order of dismissal of the same, and shall give the defendant in that behalf a certificate thereof, which said certificate afterwards, upon being produced without further proof, shall be a bar to any subsequent information or complaint for the same matters respectively against the same party.

Evidence of summary conviction.

The conviction ought to be lodged with the clerk of the peace, and in case of default an indictment or rule would be the remedy, but not a mandamus to their clerk (*q*).

Conviction to be lodged with the clerk of the peace.

In all cases where a conviction is necessary, if the convicting justice, after receiving due notice of appeal, neglects to return the conviction to the sessions, whereby the party is prevented from prosecuting his appeal, independently of any other punishment for such misbehaviour in his office, he is liable to an action on the case for special damages (*r*). Subject to the above duty, and to that of certifying to the clerk of the peace any fine which may be imposed (*s*), magistrates are not bound by the conviction, as first drawn up, whether it is merely a note of the conviction, or drawn up in a formal manner as the conviction itself; and when they return the conviction to the quarter sessions (*t*), or are called on by *certiorari* to do so into the Queen's Bench (*u*), they are at liberty to draw up and return a

(*o*) 24 & 25 Vict. c. 96, s. 112.
(*p*) *E. g.*, 24 & 25 Vict. c. 96, s. 112.
(*q*) *Ex parte Hayward*, 3 B. & S. 546; 32 L. J., M. C. 89, *per Cur.*
(*r*) *Proser* v. *Hyde*, 1 T. R. 414.
(*s*) See *ante*, p. 59.
(*t*) *E. g.*, on appeal against it, *post*, p. 1102.
(*u*) It is sufficient answer to a *certiorari* that the justice has returned the conviction to the quarter sessions, *R.* v. *Eaton*, 2 T. R. 285.

Of Summary Convictions and Orders.

Return of amended conviction.

more formal conviction correcting any errors which may have existed in that first drawn up, provided the latter conviction accords with the truth, and with the facts of the case as proved before them (*u*). This course may be taken before issue joined in an action against them grounded on an error in the original conviction (*x*) though it has been acted on, and execution actually executed by commitment of the defendant or levy of the penalty (*y*). It is immaterial for this purpose that the party has been induced to appeal by having received a copy of a bad conviction from the clerk to the convicting magistrates (*z*). And further, now upon the trial of an appeal, or upon a return to a writ of *certiorari*, objections to orders for omissions and mistakes may be rectified under 12 & 13 Vict. c. 45, s. 7 (*a*). But after a conviction has been quashed on appeal or *certiorari* for defects on the face of it, it is not competent for the convicting justice to protect himself from an action by drawing up another more formal one for the same offence: nor can he do so after the defendant who was taken under a warrant founded on and reciting a *defective* conviction has been discharged by *habeas corpus*, though the conviction itself has not been removed or quashed (*b*).

Defendant has a right to a copy of his conviction.

A defendant ought, on application, to receive a copy of his conviction from the convicting justice; for it is a record, and he is entitled to any advantage that may arise from it (*c*). But if, without fraud or intention to mislead, a copy be given to the party demanding it, which is not correct, and a correct one be returned to the quarter sessions, the copy so returned is the only proper record of which that court can take cognizance (*d*). It being argued that the defendant was taken by surprise at the sessions, by the production of a conviction returned there different from that of which he had received a copy, and against which he had given notice of appeal, *Bayley*, J., answered, that if that was the case, he should have then applied to the sessions for further time, *viz.*, to grant an adjournment, so that he might be prepared to answer the conviction as it then stood (*e*).

(*u*) *Per Cur.* in *Chaney* v. *Payne*, 1 Q. B. 712, 722, relying on *R.* v. *Barker*, 1 East, 186; *R.* v. *Allen*, 15 East, 333; *Basten* v. *Carew*, 3 B. & C. 649; *R.* v. *Justices of Huntingdon*, 5 D. & R. 588.

(*x*) See *Chaney* v. *Payne*, 1 Q. B. 718; *Wilkins* v. *Hemsworth*, 7 A. & E. 807 (case of an order); *Gray* v. *Cookson*, 16 East, 13 (case of a *conviction* not returned to sessions).

(*y*) *Massey* v. *Johnson*, 12 East, 67; *Gray* v. *Cookson*, *ubi sup.*; *Bott* v. *Ackroyd*, 28 L. J., M. C. 207. See per Lord *Kenyon* in *R.* v. *Barker*, 1 East, 188.

(*z*) *R.* v. *Allen*, 15 East, 333.

(*a*) See *ante*, p. 687.

(*b*) *Chaney* v. *Payne*, 1 Q. B. 712.

(*c*) *R.* v. *Midlam*, 3 Burr. 1720. See 1 Q. B. 717.

(*d*) *R.* v. *Allen*, 15 East, 333, 346, *ante*, p. 679.

(*e*) *Ibid.*

Section 2.

Appeals against summary convictions and orders.

As to appeals against convictions.

An appeal from a conviction of justices out of sessions to the justices in quarter sessions is not a matter of common right, but must be conferred by express enactment (*f*), which cannot be extended by equitable construction to cases not distinctly enumerated, even where former acts gave an appeal, and "all the powers, matters and things contained" in them are extended to the subsequent act on which the conviction takes place (*g*). So that the express exclusion of an appeal contained in some acts is quite needless.

However, a general power of appeal given by statute cannot be excluded by mere inference without positive enactment in the particular instance (*h*), unless the same instrument should comprise distinct matters, one of which may, while the other may not, be appealed against, *e. g.*, where a conviction against which an appeal was allowed was stated in the same document with the *commitment* which had been excepted from the appeal clause (*i*); but under the Highway Act (*k*), when any highway board consider any highway unnecessary for public use, they may direct the district surveyor to apply to two justices to view the same, and thereupon "the like proceedings shall be had" as where application is made under the Highway Act, 1835, to procure the stopping-up of a highway, and this was held to give an appeal against the certificate or order of the justices declaring it to be unnecessary (*l*). Some statutes confer the appeal with reference to the amount of penalty imposed by the conviction; see as to this, *post*, pp. 1105, 1106.

Unless the statute giving the appeal makes the appeal operate to stay execution pending the appeal, it has not that effect, for the appeal is like a writ of error which, at common law, is no *supersedeas* of execution in criminal cases (*m*); but whether

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(*f*) For, per Lord *Ellenborough*, in *R.* v. *Skene*, 6 East, 514, "if there be no words which bear reference to any appeal, the court cannot supply the want of them;" and see 1 M. & S. 448; 6 East, 514; 2 T. R. 509, 510; 3 D. & R. 35; *R.* v. *Hanson*, 4 B. & A. 521. See *ante*, p. 648.

(*g*) *R.* v. *Justices of Surrey*, 2 T. R. 504, 510. Relied on *per Cur.* (with 2 Inst. 287) in *Reg.* v. *Taunton Market Trustees*, 14 L. J., M. C. 58, 63; 1 New Sess. C. 543. See *Barnes* v. *White*, 14 L. J., M. C. 65; 1 New Sess. C. 504, *ante*, p. 648; also *R.* v. *Skene*, 6 East, 514, 518. As to appeals in general, *ante*, Part II. Ch. 1. As to *certiorari*, *ante*, p. 716.

(*h*) *R.* v. *Justices of Cumberland*, 1 B. & C. 64; *Reg.* v. *Bedwell*, 4 E. & B. 213; 24 L. J., M. C. 17.

(*i*) *R.* v. *Justices of Staffordshire*, 12 East, 572.

(*k*) 27 & 28 Vict. c. 101, s. 21.

(*l*) *Reg.* v. *Justices of Surrey*, 39 L. J., M. C. 49; L. R., 5 Q. B. 87.

(*m*) *Kendall* v. *Wilkinson*, 4 E. & B. 680; 24 L. J., M. C. 89; *R.* v. *Brook*, 2 T. R. 190.

Of Summary Convictions and Orders.

Appeal is no stay of execution.

the effect of the 27th section of the 11 & 12 Vict. c. 43, be not to make the appeal a stay of execution in the case of orders or convictions within that statute, may be open to argument (*n*), for that section authorizes the convicting or other justice to issue a warrant of distress or commitment to enforce the conviction "after an appeal against it shall be decided, if the same shall be decided in favour of the respondents, as if no such appeal had been brought;" but it was said, in the above case, that in the vast majority of cases it would be exceedingly improper in the justice to grant a warrant after the notice of appeal, and before the hearing had expired, unless, indeed, he had reason to believe that the giving of the notice of appeal was not *bonâ fide*, or for the purpose of evading payment (*o*). The effect, however, of the 24 & 25 Vict. c. 96, s. 110, *post*, p. 1105, seems to be to make the appeal a stay of execution.

Parties to appeal against conviction to or against whom costs may be given.

By 4 Geo. 4, c. 95, s. 87 (Turnpike Act), persons thinking themselves aggrieved may appeal against convictions under that act to the sessions, who are to hear and finally determine the appeal, and award such costs to the *parties appealing* or *appealed against* as they think fit, to be levied by distress and sale of goods of *the person against whom such determination shall be given*. A toll-gate keeper was convicted in a penalty for taking too much toll. He appealed: the sessions quashed the conviction, and ordered the *informer* (or prosecutor) to pay 10*l.* costs to the toll-keeper. It was held, that "the party appealing" was, in this case, manifestly the party convicted, and that, consequently, the informer was the only person who could satisfy the terms "party appealed against." For the convicting justice was compellable to act on the coming forward of the informer, and could not be visited with costs while acting *bonâ fide* in the discharge of his judicial duty (*p*). See, however, as to who are parties to an appeal, with respect to whom payment of costs can be ordered under 12 & 13 Vict. c. 45, *ante*, pp. 652, 697.

No appeal from an acquittal of a defendant.

Justices before whom an information on a penal statute is laid are in the situation of jurymen, so that if a defendant be acquitted by them, the Court of Queen's Bench cannot reverse the judgment; and that is so, even though the justices state, in return to a *certiorari*, evidence which *primâ facie* is sufficient to convict; for the evidence given is entirely and exclusively for the consideration of the justices below, who are placed in the situation of a jury; and if they acquit a defendant, the court cannot substitute themselves in the place of the justices, acting as jury-

(*n*) *Kendall* v. *Wilkinson, ubi sup.*

(*o*) *Ibid.*

(*p*) *R.* v. *Justices of Hants*, 1 B. & Ad. 654. As to giving notice of appeal to the convicting justices, treating them as the aggrieving parties, see *ante*, pp. 652, 653.

Notices of Appeal.

men, and convict him; for they cannot judge of the credit due to the witnesses, whom they did not hear examined; all that they can do is, to look to the form of the conviction, and see that the party, if convicted, has been convicted by legal evidence (*q*). If any question of law arising on the evidence is intended to be submitted to the court, a case must be stated by the justices, under the 20 & 21 Vict. c. 43.

The justices' judgment is conclusive as to the credibility of the evidence.

In many acts, every commitment of a defendant thereby directed is meant to be an absolute irrevocable commitment in execution, and all appeal from such commitment is excepted by some words to the following effect: "that if any person shall think himself *aggrieved* by such determination, order, or warrant of any justice as aforesaid, except an order of commitment, every such person may appeal to the next (or other) session, &c." In such cases no appeal lies to get rid of the commitment: for though in truth an appeal from the commitment alone was excepted out of the appeal clause, yet its having said that there shall be no appeal against such an order, the conviction and commitment must for this purpose be understood to be one and the same thing (*s*).

Where no appeal is given from a commitment in execution (*r*) there can be no appeal against the conviction.

Statutes, as we have already shown, commonly allow appeals upon certain conditions, *viz.*, in general, that notice be given to the magistrate, whose judgment is to be the subject of appeal (*t*), and that a recognizance be entered into, either generally, or in some specific sum, for prosecuting the intended appeal. This notice is either to be a *reasonable* one in general terms, or must be given within a specific time *after* the conviction, and *before* the session (*u*). But the provisions of the 12 & 13 Vict. c. 45, s. 1, with reference to notices of appeal are, by sect. 2, expressly enacted not to be construed to affect or alter the law as to notice of appeal against a summary conviction. Notices of appeals are necessary in common justice, to give informers an opportunity of defending themselves by supporting the conviction. But it has long been decided that, whenever the statute, which gave the power of appeal, requires the recognizance to be entered into *immediately upon* (*x*) con-

Notices of appeal against convictions, and recognizances to prosecute appeals.

(*q*) *R.* v. *Reason*, 6 T. R. 375.

(*r*) Distinguished from commitment for *safe custody*, 7 B. & C. 669; 8 T. R. 26, 542; 1 Ld. Raym. 213.

(*s*) *R.* v. *Justices of Staffordshire*, 12 East, 572. See *Re Gray*, 2 D. & L. 539, *ante;* see *Lindsay* v. *Leigh*, 11 Q. B. 455; *Re Geswood*, 2 E. & B. 952; *Re Bailey*, 3 E. & B. 607; *Re Hammond*, 9 Q. B. 92.

(*t*) If *two* justices convict, each must in general have a notice of appeal, *Reg.* v. *Justices of Cheshire*, 11 A. & E. 139; *Reg.* v. *Justices of Bedfordshire*, *id.* 134.

(*u*) See *ante*, p. 665 *et seq.*

(*x*) Distinguished from *forthwith*, which only means "in reasonable time," *Reg.* v. *Justices of Worcestershire*, 7 Dowl. P. C. 789, *ante*, p. 667. Though on an act requiring *immediate* notice of appeal against a conviction it was held too late to give such notice seven days after, it need not be given *forthwith* on conviction, *R.* v. *Huntingdonshire*, 5 D. & R. 538, *ante*, p. 667. See Ca. t. Hard. 113; 8 M. & W. 287. "Forthwith" is now taken

Of Summary Convictions and Orders.

Duty of justices to inform party of his right to appeal.

viction, the informant being necessarily present, such recognizance should of itself be deemed sufficient notice. Sometimes the statute requires the justices convicting to give the party convicted notice of his right to appeal, in such a case it must be taken to mean that the justices should inform him of the necessary steps to be taken for that purpose; therefore, where such a statute required notice in writing to be given to the justices, and a recognizance to be entered into, and they only required the defendant to enter into the recognizance, the necessity of notice was dispensed with (*y*). When many hours, or even days, might, according to the terms of the statute elapse before such recognizance must be entered into, notice of appeal to the informant was considered requisite to be proved before the matter could be called on in court, or the justices could take cognizance of the appeal.

Notice of appeal should however be given even in cases where they are not specially directed by statute (*z*).

Separate notice of appeal should be given to each justice who has joined in the conviction (*a*). Three persons were summoned in pursuance of a single warrant for so doing, to answer a complaint for unlawful fishing under 7 & 8 Geo. 4, c. 29, s. 34; at the hearing there was no written information, but each pleaded not guilty to the charge as read from the warrant. Each was convicted in a separate penalty. A single notice of appeal signed by the three was then served on the complainant. Each entered into a separate recognizance. The magistrate's clerk when applied to for a copy of the conviction refused to give one before the next sessions. On the second day of them, three separate convictions, one against each defendant, were returned. On objection that each defendant should have given a separate notice of appeal; the sessions dismissed the appeal without

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to mean "in reasonable time," but excludes the intervention of delay, *R.* v. *Lord of Hundred of Milverton*, 3 A. & E. 284. See *Hancock* v. *Somes*, 1 E. & E. 795; 28 L. J., M. C. 196, *ante*, p. 477, reflecting upon *Reg.* v. *Robinson*, 12 A. & E. 672. As to a judge certifying immediately after a verdict, see *Grace* v. *Clinch*, 4 Q. B. 606; *Holmes* v. *Hedges*, 12 L. J., Q. B. 100; *Page* v. *Pearce*, 8 M. & W. 677; *Thompson* v. *Gibson*, *id.* 381; *Gillett* v. *Green*, 7 M. & W. 347. "Ten days *at the least*" between service of summons and the day of hearing, means ten *clear* days, *viz.*, excluding the act and the event, *Reg.* v. *Justices of Shropshire*, in *Tibberton* v. *Newport*, 8 A. & E. 173; *Young* v. *Higgon*, 6 M. & W. 49. Thus, if service is on 20th and hearing on 30th, the proceeding is without jurisdiction, *Mitchell* v. *Foster*, 12 A. & E. 472; *Ex parte Prangley*, 4 A. & E. 781; see 4 Burr. 2525; see *ante*, p. 667; *Reg.* v. *Brownlow and others*, 11 A. & E. 119. As to "within the space of twenty-one days from" or "of" and "after the expiration of twenty-one days next after," see *Williams* v. *Burgess*, 12 A. & E. 635. Also 5 T. R. 283.

(*y*) *R.* v. *Recorder of Leeds*, 4 T. R. 583; see *ante*, p. 663.

(*z*) *Re Blues*, 5 E. & B. 291, 299; 24 L. J., M. C. 138, *ante*, p. 664.

(*a*) *Reg.* v. *Justices of Bedfordshire* (on Highway Act, 5 & 6 Will. 4, c. 50), 11 A. & E. 134; 3 P. & D. 21. So *R.* v. *Justices of Cheshire* (on Alehouse Act, 9 Geo. 4, c. 61), *id.* 23, n., whether more than one justice was required or not in order to the conviction.

Notices of Appeal.

hearing the merits, but a *mandamus* issued to compel them to hear (*b*).

Service of notice of appeal would probably be deemed process within the Lord's Day Act (*c*), and be void if made on a Sunday (*d*); but transmission by post is not such service (*e*). If the notice is allowed to be sent by post by the statute, it is deemed to be sent, where, according to the regular and usual course of the post, it would reach the other party (*f*). Service of notice of appeal.

A service of notice on the justices' clerk in open court, the justices being present, is a good service on the justices (*g*); but service on a clerk at the excise office is not good service at the place of abode of the adverse party, on an appeal against a conviction under the excise act (*h*). The admission of due service of notice of appeal is evidence for the justices that it was served in due time, but the respondent is not precluded from disputing the fact of due notice, and the justices may find the fact or not as the evidence leads them (*i*). Unless the statute implies that the giving of notice should be a personal act, it may be given by an agent or attorney (*k*).

Grounds of appeal are sometimes required to be given, and a notice of appeal against a conviction of a rogue and vagabond, under the Vagrant Act (*l*), for exposing his person in a public place, with intent to insult a female, stating as the grounds of such appeal that the appellant was not guilty of the said offence, was held sufficient notice that the appeal was to be tried on the merits and facts (*m*). As to grounds of appeal.

If justices refuse to hear an appeal on a preliminary objection, which the court can see to be a matter of law and not of fact, as on the ground of a misdescription of the conviction appealed against, they will be compelled by mandamus to hear, if there has been no variance, or, at all events, one which could not be a material one or calculated to mislead (*n*). Refusal of sessions to hear appeal.

Defects in form on grounds of appeal shall not be allowed,

(*b*) For the variance (if any such existed) could not mislead. *Reg.* v. *Justices of Oxfordshire, In re Jemmett*, 4 Q. B. 177; 12 L. J., M. C. 40.

(*c*) 29 Car. 2, c. 7, s. 6.

(*d*) See *Reg.* v. *Justices of Middlesex*, 5 D. & L. 580; 17 L. J., M. C. 111.

(*e*) *Reg.* v. *Leominster* (*Inh.*), 2 B. & S. 391; 31 L. J., M. C. 95.

(*f*) *Reg.* v. *Slawstone*, 18 Q. B. 388; 21 L. J., M. C. 145.

(*g*) *Reg.* v. *Eaves*, 39 L. J., M. C. 70.

(*h*) *Ibid.*

(*i*) *Reg.* v. *Justices of Gloucester*, 16 L. J., M. C. 57.

(*k*) *Reg.* v. *Justices of Middlesex*, 20 L. J., M. C. 42; *Reg.* v. *Carew*, *id.* 44; *Reg.* v. *Justices of Huntingdonshire*, 4 New Sess. C. 101; 19 L. J., M. C. 127.

(*l*) 6 Geo. 4, c. 83.

(*m*) *R.* v. *Justices of Newcastle-on-Tyne*, 1 B. & Ad. 933. See *ante*, p. 673.

(*n*) *Reg.* v. *Justices of Oxfordshire*, 4 Q. B. 177; 12 L. J., M. C. 40. See also *Reg.* v. *Recorder of Liverpool*, 20 L. J., M. C. 35; *Reg.* v. *Justices of Bucks*, 4 E. & B. 259; 24 L. J., M. C. 15.

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and no objection to the reception of evidence offered in support of any ground of appeal shall prevail, unless the court shall be of opinion that such ground of appeal is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement and prepare for trial, and power is given to the court, if it thinks the objection should prevail, to amend the grounds upon terms (*o*). In case of frivolous grounds of appeals, a power over the costs is given by 11 & 12 Vict. c. 45, s. 4.

Defects in grounds of appeal.

As to recognizances.

Where recognizances are required to be entered into, it is sufficient if they are verbally acknowledged within the time allowed by the statute, for they may be perfected afterwards (*p*). Where the statute required notice of appeal to be given within twenty-four hours after the order made, and also a recognizance to be made within seven days, the justice before whom the recognizance is sought to be taken cannot decide upon the validity of the notice, but must take the recognizance irrespective of the notice (*q*). Where, within two days of giving notice of appeal, the appellant had to enter into recognizances, and the notice was given on the Friday, it was held that Sunday must be counted, and, therefore, that the recognizance was too late on the Monday following (*r*). Where recognizances have been entered into within the time required by law, and they appear to be defective or invalid, the court has a power to substitute new and sufficient recognizances upon such terms as appear just and reasonable (*s*).

Proceedings at the hearing.

On the appeal being called on, the conviction returned to the sessions is produced by the clerk of the peace, and the counsel for the appellant may then object, if he can, to any technical errors in it, *e.g.*, to any of the irregularities already adverted to. It was a rule at common law that after a summary conviction on a particular statute had taken place, nothing should be intended so as to get rid of any defect in form, and that everything necessary to support it must appear on the face of the proceedings (*t*).

Defects in form.

"If upon the trial of any appeal to any court of general or quarter sessions of the peace against any order or judgment made or given by any justice or justices of the peace, or if upon the return to any writ of certiorari any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorized the drawing up thereof, free from the

(*o*) 12 & 13 Vict. c. 45, s. 34, *ante*, p. 672 *et seq.*
(*p*) *Reg.* v. *Justices of St. Albans*, 8 A. & E. 932.
(*q*) *Re Carter*, 24 L. J., M. C. 72, per *Crompton*, J., *ante*, p. 675.
(*r*) *Ex parte Simpkin*, 2 E. & E. 392; 29 L. J., M. C. 23.
(*s*) 12 & 13 Vict. c. 45, s. 8, *ante*, p. 676.
(*t*) *R.* v. *Daman*, 2 B. & A. 378.

Power of Amendment on Appeal.

said omission or mistake, it shall be lawful for the court, upon such terms as to the payment of costs as it shall think fit, to amend such order or judgment and to adjudicate thereupon, as if no such omission or mistake had existed: provided always, that no omission or mistake in any such order or judgment brought up upon a return to a writ of certiorari shall be allowed, unless such omission or mistake shall have been specified in the rule for issuing such certiorari" (*u*). Under the Larceny Act (*x*), no conviction or adjudication made on appeal therefrom under that act shall be quashed for want of form, or be removed by certiorari. A similar enactment is contained in the Injuries to Property Act (*y*), and the offences against the Person Act (*z*).

Clerical errors.

Where a clerical error is manifest on the face of the document, it will be read as it ought to have stood (*a*).

Evidence on the hearing of an appeal.

If no such objections be taken to the conviction itself, the case is open for the respondent, and supported by the witnesses. Where a statute does not provide to the contrary, as the statutes relating to inland revenue do, it is competent for the parties on appeal to adduce all the admissible evidence they desire without regard to whether they have been called or examined on the hearing before the justices below, for the appeal is in this respect like a new trial (*b*). If the party convicted does not appear according to his recognizance and notice of appeal, the court cannot enter and hear it at the instance of respondent, but it may give costs under 12 & 13 Vict. c. 45, s. 6 (*c*). If the parties appear, after the evidence in support of the conviction is gone through, the appellant enters upon his case, and shows, if he can, the insufficiency of the evidence to bring him within the description or penalties of the statute. The course of proceeding in appeals has been already considered; and all the usual rules apply to appeals against convictions (*d*).

Judgments on appeals against convictions, and awarding costs.

Whatever judgment the justices give must be the act of the court itself, and not by any delegation of its authority (*e*). Even the few instances which may be produced as exceptions to this rule will, on examination, be found not to operate as such, but in effect to confirm it. Thus, where the justices in session appointed a committee from their own body to institute an inquiry, and make an examination, relative to the propriety of repairing or rebuilding a bridge which had become a nuisance, the Court of King's Bench were of opinion that they were right in so doing, in order to receive their report and in-

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(*u*) 12 & 13 Vict. c. 45, s. 7, *ante*, pp. 687, 688.
(*x*) 24 & 25 Vict. c. 96, s. 111.
(*y*) 24 & 25 Vict. c. 97, s. 29.
(*z*) 24 & 25 Vict. c. 100, s. 72.
(*a*) *Reg.* v. *Williams*, 21 L. J., M. C. 150.
(*b*) *Reg.* v. *Hall*, 35 L. J., M. C. 251; L. R., 1 Q. B. 632; *Reg.* v. *Pilgrim*, 40 L. J., M. C. 3; *R.* v. *Commissioners of Excise*, 3 M. & S. 133.
(*c*) See *ante*, p. 697.
(*d*) *Ante*, pp. 697, 698.
(*e*) *Ante*, p. 689 *et seq.*

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formation relative to facts; for, after all, the judgment was the judgment of the session; however, such session might adopt the opinion of the individual justices who had made their report (*e*). As to their award of costs after consulting the clerk of the peace, see *ante*, pp. 694—698.

Costs of appeal.

By 12 & 13 Vict. c. 45, s. 5, upon any appeal to any court of quarter sessions, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable, such costs to be recoverable as costs upon an appeal made under 11 & 12 Vict. c. 43. See *ante*, p. 694. These costs are still enforceable by imprisonment, notwithstanding the Debtors Act, 1869 (*f*).

This section is cumulative, and applies to appeals in which a recognizance has been entered into for the payment of costs (*g*); but does not apply when the crown is a party, as upon an information for penalties under an Excise Act (*h*).

Second appeal after first dismissed for informality.

Enough has been said respecting an appeal proceeding on the *merits*, in the regular course, to judgment. But an appeal may also be dismissed for informality, *e. g.*, for not giving the notice or entering into the recognizance which are made the conditions of the appeal by the act which gives it; and as such dismissal is conclusive, the conviction will be confirmed, and no second appeal can be lodged against it, though within six months next after it (*i*).

In the case of appeals limited to the *next* session, if the appellant rely on an objection of form, and, independent of the merits, procures the conviction to be quashed on that ground, he cannot (even though the court above shall have set aside the order of session, and set up the conviction again) go to the sessions again, and have the question heard there upon the merits (*k*).

Power of adjourning appeals regularly entered.

But an appeal may be adjourned by the court for future hearing, by adjourning the sessions to a day not later than that on which the next quarter sessions, original or adjourned (*l*), is held. This power of adjournment, being incident to the court for attaining the ends of justice, is not superseded by words in a statute, giving an appeal to the sessions within four months after the cause of complaint shall arise, and directing that "the justices of the said session shall determine the

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(*e*) *R.* v. *Justices of Glamorganshire*, 5 T. R. 279; *Reg.* v. *Justices of Westmoreland*, 37 L. J., M. C. 115; L. R., 3 Q. B. 457; see *ante*, p. 690.

(*f*) *Reg.* v. *Pratt*, 39 L. J., M. C. 73; L. R., 5 Q. B. 176.

(*g*) *Freeman* v. *Read*, 9 C. B., N. S. 301; 30 L. J., M. C. 123; *Reg.* v. *Huntley*, 3 E. & B. 179; 23 L. J., M. C. 106; *Reg.* v. *Justices of Ely*, 5 E. & B. 489; 25 L. J., M. C. 1.

(*h*) *Reg.* v. *Beadle*, 7 E. & B. 492; 26 L. J., M. C. 111.

(*i*) *R.* v. *Justices of Yorkshire* (*West Riding*), 3 T. R. 776.

(*k*) *R.* v. *Allen*, 15 East, 346, *ante*.

(*l*) See *ante*, p. 28.

matter" (*m*). Unavoidable surprise of any kind upon the party as to part of the subject appealed against, the absence of witnesses, necessity for inquiry suggested either by the counsel for the parties, or for the information of the court, may all be sufficient reasons for adjournment; and it is to be understood that an adjournment *ex vi termini* implies that everything during the time of such adjournment remains *in statu quo;* viz., that no advantage or disadvantage to the parties, as to notices or other matters generally affected by efflux of time, is worked by such postponement of hearing. But as, where the sessions is adjourned, the style of it must not run "at such session held by adjournment," the original meeting of the session ought to be set forth, and that it was "continued by them from thence to such further time by adjournment;" and that it was then holden accordingly by such adjournment (*n*). The record of proceedings had at it must follow the same course.

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But the power of adjournment can only be exercised on appeals brought regularly before them, by every previous condition having been complied with. Thus, if for want of any notice, or other preliminary step, made a condition by the statute, the appeal could not be entered, the court cannot by adjourning acquire a jurisdiction to try it at a future time; for the right of appeal is gone for ever (*o*).

Appeals in particular cases—appeal against summary convictions under Larceny Act.

By 24 & 25 Vict. c. 96, s. 110, in all cases where the sum adjudged to be paid on any summary conviction shall exceed 5*l.*, or the imprisonment adjudged shall exceed one month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction, for the county or place wherein the cause of complaint shall have arisen: provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or shall enter into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions and try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; or if such appeal shall be against any conviction, whereby only a penalty or other sum of money shall be adjudged to be paid, shall deposit with the clerk of the

(*m*) *R.* v. *Justices of Wiltshire*, 13 East, 352.

(*n*) See the cases cited *ante*, pp. 26, 27; also *R.* v. *Harrowby*, Burr. S. C. 102.

(*o*) *R.* v. *Justices of Oxfordshire*, 1 M. & S. 448. See *R.* v. *Justices of Lincolnshire*, 3 B. & C. 548.

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convicting justice such a sum of money as such justice shall deem to be sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction and the costs of the appeal, and upon such notice being given and such recognizance being entered into, or such deposit being made, the justice before whom such recognizance shall be entered into, or such deposit shall be made, shall liberate such person if in custody:

Judgment of court on appeal.

and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment; and in any case where after any such deposit shall have been made as aforesaid the conviction shall be affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction and the costs of the appeal, to be paid out of the money deposited, and the residue thereof, if any, to be repaid to the party convicted; and in every case where any conviction shall be quashed on appeal as aforesaid, the clerk of the peace or other proper officer shall forthwith indorse on the conviction a memorandum that the same has been so quashed: and whenever any copy of such conviction shall be made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence that the conviction has been quashed in every case where such copy or certificate would be sufficient evidence of such conviction.

By sect. 111, no such conviction or adjudication made on appeal therefrom shall be quashed for want of form, or be removed by *certiorari* into any of her Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

An appeal clause in precisely similar language is given in the 24 & 25 Vict. c. 97, s. 68, and sects. 69 and 70 correspond to sects. 111 and 112 of the Larceny Act.

When appeal lies.

With reference to the amount of the judgment giving the appeal, it has been decided on 12 & 13 Vict. c. 92, on similar words that the sum adjudged to be paid means the penalty only, irrespective of the amount of costs also imposed (*p*).

And where imprisonment is ordered only in default of payment of the penalty, that does not give an appeal if the sum adjudged by way of penalty is under the requisite amount (*q*).

Under the act to amend the criminal law relating to violence, threats, &c., by which the act relating to the combinations of

(*p*) *Reg.* v. *Justices of Warwickshire*, 6 E. & B. 837; 25 L. J., M. C. 119.

(*q*) *Ibid.*

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workmen was repealed, viz., the 34 & 35 Vict. c. 32, an appeal is given by sect. 3 to any party who feels aggrieved by any order or conviction made by a court of summary jurisdiction—(1) To the quarter sessions for the county or place where the cause of appeal has arisen, holden not less than fifteen days nor more than four months after the decision; (2) The appellant must, within seven days of cause of appeal, give notice to the other party and to the court of summary jurisdiction of his intention to appeal and of the ground thereof; (3) The appellant shall, immediately after such notice, enter into a recognizance in 10*l.* before a justice, with two sureties in 10*l.*, conditioned to try and pay costs; (5) The court of appeal may adjourn the appeal, and upon the hearing confirm, reverse or modify the decision or remit the matter to the court of summary jurisdiction, with the opinion of the court thereon, or make such other order in the matter as the court thinks just; and if the matter be remitted, the court of summary jurisdiction shall thereupon rehear and decide the information or complaint in accordance with the opinion of the said court of appeal; (6) The court of appeal may make such order as to costs to be paid by either party as the court thinks just.

Appeal against convictions for threats, molestation and violence.

Two justices by a conviction sentenced defendant to pay a penalty of 20*l.* or be imprisoned for one month. The conviction was quashed on appeal, subject to a case, and on being removed by *certiorari*, was confirmed in Queen's Bench; whereupon a *levari facias* issued; to which the return was *nulla bona*. The Queen's Bench doubted its authority to enforce the judgment of imprisonment in default of payment, and granted a *procedendo* to carry back the record of the conviction to sessions, commanding *them* to proceed to award execution against the defendant (*r*).

Ultimate remedy on conviction affirmed in Queen's Bench after case argued.

(*r*) *Reg.* v. *Rushworth*, 1 New Sess. C. 415.

CHAPTER XI.

OF FORFEITED RECOGNIZANCES AND ESTREATS.

Object of recognizances.

Breach of recognizances, when.

RECOGNIZANCES are only the means pointed out by the law to secure *the performance of certain conditions* imposed by it (*a*), and their estreat is the consequence of the failure of those conditions. A breach, therefore, of them, *while the court continues sitting*, can only be considered, as it were, *incipient;* to be completed and confirmed by a continuance of default, or to be superseded and avoided by compliance before the expiration of the session (*b*). So that, though the moment a recognizance is taken it becomes a record, yet it had always been the practice, that upon the party bound by recognizance appearing in court, or doing any other act imposed by the conditions, exhibiting a satisfactory affidavit of any sufficient reason for his non-compliance with the terms, for the court, on motion being made for that purpose, to *take off* (as it is termed) *the estreat* in that particular instance. Supposing the authority of the court to have been thus exercised, what is to follow must depend on the circumstances of each particular case. If appearance in court were the only object to be obtained, that appearance may be attended with all the consequences in contemplation; or a respite of the question to be discussed may be granted by the same authority which has superseded the estreat; or a new recognizance may be required in open court; or, lastly, if the affidavit be insufficient to procure these consequences, the estreat will be confirmed.

Recognizances at sessions not to be estreated in certain cases without order of the court.

Sect. 31 of 7 Geo. 4, c. 64, after reciting that the practice of *indiscriminately estreating* recognizances for the appearance of persons to prosecute or give evidence, or to answer for a common assault, or in the other cases hereinafter specified, has been found in many instances productive of hardship to persons who have entered into the same, enacts, that in every case where any person bound by recognizance for his or her appearance, or for whose appearance any other person shall be so bound, to prosecute or give evidence, in any case of felony

(*a*) See *R.* v. *Mayor, &c. of Dover*, 5 Tyr. 279; 1 Cromp. & M. 726.
(*b*) See *Reg.* v. *Justices of Ely*, 5 E. & B. 489; 25 L. J., M. C. 1.

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or misdemeanour, or to answer for any common assault, or to articles of the peace (*b*), or to abide an order in bastardy, shall therein make default, the officer of the court by whom the estreats are made out shall and is hereby required to prepare a list in writing, specifying the name of every person so making default, and the nature of the offence in respect of which every such person, or his or her surety, was so bound, together with the residence, trade, profession or calling of every such person and surety; and shall in such list distinguish the principal from the sureties; and shall state the cause, if known, why each such person has not appeared; and whether by reason of the non-appearance of such person, the ends of justice have been defeated or delayed; and every such officer shall and is hereby required, before any such recognizance shall be estreated, to lay such list, if at a court wherein a recorder or other corporate officer is the judge, or one of the judges, before such recorder or other corporate officer; and if at a session of the peace, before the chairman or two other justices of the peace who shall have attended such court, who are respectively authorized and required to examine such list, and to make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the recorder, chairman or justices of the peace before whom such list shall have been made.

List of defaulters to be made out.

Order of estreat to be put in writing.

The mode of estreating and putting in process such forfeited recognizances as shall be ordered by the court to be so dealt with, is prescribed by 3 Geo. 4, c. 46, s. 2, which enacts, all fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them (save and except the same shall by virtue of any act or acts of parliament made or to be made be otherwise directed), to be levied, recovered, appropriated or disposed of, which already are or hereafter shall be set, imposed, lost or forfeited by or before any justice or justices of the peace in England, shall be and are hereby required to be certified by the justice or justices of the peace by and before whom any such fines, issues and amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them, shall be set, imposed, lost or forfeited, to the clerk of the peace of the county or city (*c*), borough or place, in writing, containing the names and residences, trade, profession or calling of the parties, the amount of the sum forfeited by each respectively, and the cause of each forfeiture, signed by such justice or justices of the peace, on or before

3 Geo. 4, c. 46, s. 2.

See Act

Forfeited recognizances, &c. to be certified by justices out of sessions to the clerk of the peace at the next quarter sessions.

(*b*) See *ante*, pp. 627 *et seq.*
(*c*) 20 & 21 Vict. c. 50, s. 5.

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Roll to be made at the same quarter sessions as forfeited recognizances, &c. certified.

Copy of roll to be sent to sheriff.

the ensuing general or quarter sessions of such county, city, borough or place, respectively: and such clerk of the peace shall copy on a roll such fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them, together with all fines, issues, amerciaments, forfeited recognizances, sum or sums of money, paid or to be paid in lieu or satisfaction of them, or any of them, imposed or forfeited at such court of general or quarter sessions, and shall within such time as shall be fixed and determined by such court, not exceeding twenty-one days after the adjournment of such court, send a copy of such roll, with a writ of *distringas* and *capias* or *fi. fa.* and *capias*, according to the form and effect in the schedule annexed to the act, to the sheriff of such county, or the sheriff, bailiff or officer of such city, borough or place having execution of process therein respectively, as the case may be, which shall be the authority to the sheriff of such county or the sheriff, bailiff or officer, as the case may be, for proceeding to the immediate levying and recovering of such fines, issues, amerciaments, forfeited recognizances, sum or sums of money, &c., on the goods and chattels of such several persons, or for taking into custody the bodies of such persons, in case sufficient goods and chattels shall not be found whereon distress can be made for recovery thereof; and every person so taken shall be lodged in the common gaol until the next general or quarter sessions of the peace, there to abide the judgment of the said court.

Order of estreat when to be made.

Under the 3 Geo. 4, c. 46, where a party, appealing against a refusal to grant him a licence, entered into a recognizance to abide the order of the court of quarter sessions, and pay such costs as might be awarded at the Michaelmas sessions, and at such sessions judgment was given against him, and an order made that he should pay the costs, which he failed to do, the following Epiphany sessions had jurisdiction to order the entreat (*d*).

Oath of clerk of the peace.

By sect. 3, the clerk of the peace has to make an oath before he delivers the roll to the sheriff in the form given by the section; see *ante*, p. 59.

Form of recognizance before justice of the peace.

By sect. 4, every justice of the peace before whom any recognizance shall be entered into or taken, is required to give or cause to be given at the time of entering into such recognizance to the person or person's surety or sureties so entering into the same, and to each of them, a written or printed paper or notice in the form or to the effect stated in the schedule to the act, adapting the same to the particular circumstances of the case. And each and every such justice shall, in such recognizance, state and particularly specify not only the profession, art, mystery or trade, of every person so entering into

(*d*) *Reg.* v. *Justices of Ely*, 5 E. & B. 489; 25 L. J., M. C. 1.

such recognizance, together with their christian name and names and surnames, but also the parish, township or place of his, her or their residence, and, in case such residence shall be in any city, town or borough, shall also state and particularly specify the name of the street and number of the house (if any) in which such persons shall reside, and also whether owner or tenant thereof or lodger therein.

Continuance of Process from Sessions to Sessions.

And by sect. 5, it is provided that, if any person on whose goods and chattels such sheriff, bailiff or officer, shall be authorized to levy any such forfeited recognizance or sum of money to be paid in lieu or in satisfaction thereof, shall give security to the said sheriff, bailiff or officer, for his appearance at the next general or quarter sessions, then and there to abide the decision of the court, and also to pay such forfeited recognizance or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as shall be ordered and adjudged by the court, it shall be lawful for such sheriff, bailiff or officer, and he is hereby required to discharge such person so giving security out of custody: provided also, that in case such party so giving security shall not appear in pursuance of his undertaking, it shall be lawful for the court forthwith to issue a writ of *distringas* and *capias*, or *fieri facias* and *capias*, against the surety or sureties of the person so bound as aforesaid.

Party to be discharged out of custody on giving security to sheriff.

And by sect. 6, the court of general and quarter sessions, before whom any person so committed to gaol or bound to appear shall be brought, is hereby required to inquire into the circumstances of the case, and shall, at its discretion, be empowered to order the discharge of the whole of the forfeited recognizance or sum of money paid or to be paid in lieu or satisfaction thereof; and such order shall be made in the form or to the effect of the schedule to the act, and shall be signed by the clerk of the peace, which said order shall be a discharge to such sheriff, bailiff, or officer on the passing of his accounts at the exchequer, or before any auditor or other proper officer duly authorized to pass the same; and in all cases where the party shall have been lodged in the common gaol by such sheriff, bailiff or other officer, the justices of the peace so assembled are hereby empowered either to remand such party to the custody of the sheriff, &c., or upon the release of such party from the whole of such forfeited recognizance, to order such party to be discharged from custody; and such order shall be a full and sufficient discharge to the said sheriff, &c., on the passing of his account at the exchequer, &c.; and it shall be lawful to and for the said court of general or quarter sessions to award such costs, charges and expenses, to be paid by either party to the other, as to the said court shall seem just and reasonable.

Sessions may order the discharge of the forfeited recognizance.

And by sect. 8, the said sheriff, &c. shall, at the opening of the court, return the said writ, and shall state on the back of

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the said roll what shall have been done in the execution of such process.

By the 4 Geo. 4, c. 37, passed to amend the 3 Geo. 4, c. 46, it shall be lawful for the justices assembled at any general or quarter sessions of the peace, and they are required at the following or any subsequent general or quarter sessions held after the return of the writ and roll issued from any preceding general or quarter sessions at the opening of the court, to insert or cause to be inserted in any following roll all such fines, issues, amerciaments, forfeited recognizances, sum or sums of money, to be paid in lieu or satisfaction of them or any of them, which have not been duly levied or recovered, or properly accounted for by the sheriff, &c., or have not been discharged on appeal before the general or quarter sessions, or by sign manual, warrant or authority of three commissioners of the treasury, and so to continue such process from sessions to sessions, till it shall be duly ascertained to the satisfaction of the said commissioners of the treasury that the party in default has not any goods or chattels, lands or tenements, in the county, division, city, borough or place on which a levy can be made, nor in any other county, &c.; and that he is not to be found, or that his body cannot be lodged in gaol.

And by 4 Geo. 4, c. 37, s. 3, where the party has removed from the county, &c. of the sheriff to whom the writ is issued, he may issue his warrant with a copy of the writ to another sheriff, &c. to be executed.

Formerly, if, after entering into a recognizance for keeping the peace before a single justice or in petty sessions, the conusor was convicted of an assault or breach of the peace within the time limited, the return of a record of that conviction to the quarter sessions would not authorize *that court* to order an estreat of the recognizance, for they cannot in a summary way try the fact of misbehaviour committed out of their own court. The recognizance must in such cases have been removed into the exchequer, and a *scire facias* sued out thereon and a breach of the recognizance assigned, so as to enable the party pleading to show cause against the alleged forfeiture of his recognizance (*e*); but the 3 Geo. 4, c. 46, has been substituted for 22 & 23 Car. 2, c. 22, by the repeal of the latter act, and the Court of Exchequer no longer retains any jurisdiction over two sorts of forfeited recognizances, *viz.*, those taken before justices out of sessions, and those at the quarter sessions (*f*). It seems imperative on the court of quarter sessions, by the clerk of the peace, to put the law in motion, to

(*e*) *Reg.* v. *Justices of Yorkshire* (*West Riding*), *In re Dr. Thornton*, 7 A. & E. 583. See *R.* v. *Tomb*, 10 Mod. 278.

(*f*) *R.* v. *Hankins*, M'Clell. & Y. 27, as stated *per Cur.*, 7 A. & E. 590.

Recognizances to keep the Peace or be of Good Behaviour.

levy the amount of *all* recognizances forfeited *at* the *quarter sessions* (*g*), that is, if ordered by them to be estreated (*h*); and now, by 16 & 17 Vict. c. 30, s. 2, where any recognizance to keep the peace or be of good behaviour, is entered into by any person as principal or surety before the court of general or quarter sessions of the peace of any county, riding, division, city, borough or place, or before any justice or justices of any county, riding, division, city, borough or place, it shall be lawful for any such court of general or quarter sessions of the peace as aforesaid, upon application made to such court to declare such recognizance to be forfeited, upon proof of a conviction of the party bound by such recognizance of any offence which is in law a breach of the condition of the same; and upon further proof that a notice in writing, signed by the person seeking to put such recognizance in force, has, seven clear days before the commencement of such sessions, been personally served upon or left at the usual place of abode of the party or each of the parties, if more than one, who entered into such recognizances, that an application will be made to the said general or quarter sessions that the said recognizance shall be declared forfeited; and if such recognizance shall be declared forfeited, all such proceedings shall be had thereon as in the case of a recognizance forfeited at such court of general or quarter sessions; and all the provisions of 3 Geo. 4, c. 46, and 4 Geo. 4, c. 37, applicable to a recognizance so forfeited at such court shall apply to a recognizance which shall, upon such application and proof as is hereinbefore mentioned, be declared to be forfeited; and upon notice in writing of such intended application to the said general or quarter sessions being given to any justice or justices before whom any such recognizance shall have been taken, four clear days before the commencement of the said sessions the said justice or justices shall transmit the said recognizance to the clerk of the peace of the county, riding, division, city, borough or place within which the said recognizance shall have been taken, with a certificate that the said recognizance is sent to him by reason of such last-mentioned notice having been so given as aforesaid (*i*).

Recognizances to keep the peace or be of good behaviour may be declared forfeited on proof of a fresh conviction of party bound.

And see, further, as to the recognizance to keep the peace and be of good behaviour, *ante*, pp. 627 *et seq.*

With respect to the duties of the clerk of the peace as to estreating recognizances see further, *ante*, pp. 59 *et seq.*; and with respect to the duties of the sheriff in the same matter, *ante*, p. 48.

With the ulterior proceedings in the Court of Exchequer on

(*g*) *Reg.* v. *Justices of Yorkshire* (*West Riding*), *In re Thornton*, 7 A. & E. 591.

(*h*) 7 Geo. 4, c. 64, s. 31, not cited in *Reg.* v. *Justices of Yorkshire* (*West Riding*).

(*i*) See *ante*, p. 636.

Of forfeited Recognizances and Estreats.

estreated recognizances we have nothing here to do, except to observe, that, till they are so estreated, that court will exercise no jurisdiction (*k*), and that a motion to discharge a defendant from estreated recognizances, must be preceded by a notice to the solicitor of the treasury (*l*). If a party taken in execution on a recognizance so estreated denies its existence, he must traverse it in the exchequer (*m*).

(*k*) *R.* v. *Thompson*, 3 Tyr. 87, and other cases cited, *ante*, p. 61.
(*l*) *Ex parte Stowell*, 13 L. J., Exch. 328.
(*m*) *Re Tipton*, 3 Dowl. P. C. 177. A *constat* from the estreat office is also requisite, *R.* v. *Holden*, 3 Tyr. 580.

CHAPTER XII.

OF APPEALS AGAINST THE COUNTY RATE.

The statutes relating to the assessing and collection of county rates are consolidated and amended by the 15 & 16 Vict. c. 81, after repealing a large number of prior acts.

Justices at sessions to appoint committees for preparing a basis or standard for assessing county rates.

By 15 & 16 Vict. c. 81, s. 2, it shall be lawful for her Majesty's justices of the peace of every county in England and Wales, assembled at their general or quarter sessions of the peace or at any adjournment thereof, from time to time, as often as they may deem it necessary, to appoint any number of justices, not exceeding eleven in number nor less than five, to be a committee for the purpose of preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared rateably and equally according to the full and fair annual value of the property, messuages, lands, tenements and hereditaments rateable to the relief of the poor in every parish, township, borough or place, whether parochial or extra-parochial, within the respective limits of the said justices' commissions, or which in any place within such limits not maintaining its own poor would be liable to be rated for the relief of the poor if such last-mentioned place were a parish, or of altering and amending such basis or standard from time to time as circumstances may require; provided that in counties containing or which may hereafter contain more than eleven petty sessional districts or divisions, the committee so appointed may be extended to a number equal to the number of petty sessional divisions, in order that one justice may be selected from the justices usually acting in each such petty sessional division, if the same shall appear convenient in the opinion of the justices appointing such committee.

What property rateable.

Unoccupied houses are rateable to the county rate as being rateable to the poor (*a*). The assessment under this section by this committee is not affected by anything in the Union Assessment Committee Act, 1862 (*b*).

Meetings of committee.

By sect. 3, the committee meetings are provided for.

Committees may require

By sect. 5, for the purpose of preparing such basis or standard for fair and equal county rates, powers are given to the com-

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(*a*) *Reg.* v. *Hammersmith*, 33 L. T. 183; *Malden Overseers* v. *Reg.*, 38 L. J., M. C. 125; L. R., 4 Q. B. 326, *ante*, p. 825.

(*b*) 28 & 29 Vict. c. 78, s. 1.

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returns of the annual value of the property in any parish liable to be assessed, with the date of the last valuation.

mittee to direct the overseers of the poor, and various other officials, to make returns in writing to the committee of the amount of the full and fair annual value of the property within the parish, township or place liable to be assessed toward the county rate.

Meaning of "full and fair annual value."

By 15 & 16 Vict. c. 81, s. 6, for the purposes of preparing any such basis or standard for assessing any county rate, the words "full and fair annual value" shall be taken to mean the net annual value of any property as the same is or may be required by law to be estimated for the purpose of assessing the rates for the relief of the poor.

Committees empowered to inspect rates, assessments, valuations, &c.

By sect. 7, the said committee may order the production of all parochial and other rates, &c., and all other documents relating to the value of property assessed, whether in the hands of private individuals or public officers (*c*), except income tax collectors (*d*).

Notice to be given when basis will be taken into consideration by court of general or quarter sessions.

By sect. 15, when any proposed basis or standard for a county rate has been finally corrected and approved of by the said committee, they shall lay the same before the court of general or quarter sessions holden next thereafter, and such court shall thereupon order public notice to be given, in one or more of the newspapers usually circulated within the county, that such basis or standard will be taken into consideration at the then next general or quarter sessions of the peace to be held for the said county; and at such last-mentioned general or quarter session of the peace the court shall proceed to take the same into consideration, and to alter and amend the same as to them may seem proper, and, if they think fit, to allow and confirm the said basis or standard, or, instead of making any alteration in the said basis or standard, or of allowing and confirming the same, to refer back the said basis or standard for amendment to the said committee, and to adjourn the consideration thereof to some future general or quarter session of the peace, or any adjourned quarter session; and in such last-mentioned case the said committee shall have the same powers and authorities for requiring returns and ascertaining the value of property liable to be assessed toward the county rate, in order to the revising or amending of the said basis or standard so referred, as are hereinbefore given to them for preparing the same; and all the clauses and provisions hereinbefore contained for preparing any basis or standard shall be applicable in every respect to the revision or amendment of the same; and any amendment or alteration by the said committee of such basis or standard so referred shall be reported and taken into consideration at the general or quarter session of the peace, or any adjourned quarter session to which the consideration thereof was adjourned; but before any such alteration or amendment

(*c*) *Dickson* v. *Doubleday*, 30 L. J., M. C. 99.
(*d*) 26 & 27 Vict. c. 34, s. 22.

Of the Basis or Standard for the County Rate.

made by the said committee of the said basis or standard so referred be allowed or confirmed by the court of general or quarter session of the peace, or adjourned quarter sessions, the said committee shall send at least fourteen days' previous notice thereof, by post or otherwise, to every parish and place with respect to which such alteration or amendment is made.

Basis to be deemed valid after confirmation by court of general or quarter sessions.

By 15 & 16 Vict. c. 81, s. 16, when the court of general or quarter session or adjourned quarter session of the peace have so allowed and confirmed any basis or standard for a county rate, the same shall be taken to be made and established, and shall be valid, legal and effectual, to all intents and purposes, notwithstanding any irregularity may have arisen in the making thereof, and notwithstanding the officers of any parish or place may have omitted to make the returns hereinbefore mentioned, subject nevertheless at all times to appeals against the same, as hereinafter provided; and the said court shall cause copies of the said basis or standard, after allowance and confirmation, to be printed, and shall direct one of such copies to be sent to every acting justice of the peace for the county, and one copy to the overseers of the poor, constable, or other person charged with the collection and levy of the county rate in every parish and place within the said county; and such basis or standard, so confirmed, shall be deemed and taken to be the basis or standard and the proportion in which all assessments of the county rate shall thenceforth be made, subject to such alterations as may be necessary in consequence of any appeal, or the recommendation of the county rate committee, as hereinafter enacted: provided always, that any basis or standard now in force or hereafter to be allowed and confirmed shall continue to be in force and to be acted upon, subject to any alteration to be made by reason of any appeal or otherwise, as in this act provided for such alteration, until a new basis or standard for a county rate shall have been made and established under this act.

Appeal against basis.

By sect. 17, if at any time after the said basis or standard has been allowed, confirmed and made as aforesaid, any overseer or overseers of the poor, or other person charged with the collection and levy of county rate in any parish or place, or inhabitant or inhabitants thereof, have reason to think that such parish, township or place is aggrieved by any such basis or standard, whether it be on account of some one or more of such parishes, townships or places being without sufficient cause omitted altogether from the said basis or standard, or on account of such parish, township or place being rated on a sum beyond the full and fair annual value of the property therein liable to be assessed toward the county rate, or on account of some other parish or parishes, township or townships, place or places, being rated on a sum less than the full and fair annual value of the property therein liable to be assessed towards the county rate, such overseer or overseers of the poor, constable, or other person, or inhabitant or inhabitants, may appeal to the

Of the County Rate.

justices of the peace for the county at any quarter sessions to be holden after the sessions at which such basis or standard was allowed and confirmed, against such part only of the said basis or standard as may affect the parish or parishes, township or townships, place or places which appear to be over-rated or under-rated, or omitted altogether from the said basis or standard as aforesaid (subject to the provisions hereinafter contained); and if in any case where any overseer or overseers, constable, or other person as aforesaid of one parish or place appeals against the basis or standard of rate on any other parish or place, on account of the same being altogether omitted from such basis or standard, or on account of the same being rated at less than the full and fair annual value thereof as aforesaid, such overseer or overseers, constable, or other person shall give twenty-one days' notice in writing previous to the first day of the said session at which such appeal shall be made, of the intention to appeal, and of the cause and matter thereof, to the overseers of the poor; or where there are no such overseers to the person charged with the collection and levy of county rate in such other parish or place; and if in any case where any such overseer or overseers, constable, or other person appeal against the said basis or standard on the ground that any parish, township or place is rated on a sum beyond the full and fair annual value of the rateable property therein, such overseer or overseers, constable, or other person shall give twenty-one days' notice thereof in writing, with the cause and matter thereof, to the clerk of the peace of the county, the said justices shall be empowered to hear and determine such appeal in manner by this act directed, and either to confirm such parts of the basis or standard as have been appealed against, or to correct such inequalities or omissions as shall be proved to exist therein, in such manner as to them the said justices may appear fair, just and equitable; but no such basis or standard shall upon any appeal be quashed or destroyed, in regard to any other parish, township or place, unless in cases where the justices of the peace in quarter sessions assembled, or the major part of them, deem it necessary to proceed to the making of an entire new basis or standard, and where they proceed therein according to the provisions of this act.

Notice of appeal.

Hearing and determining appeals.

By 15 & 16 Vict. c. 81, s. 18, it shall be lawful for the court of quarter sessions of the peace, upon any such appeal, instead of hearing the said appeal, to adjourn the same, and to order, upon the application of the appellant or respondent in such appeal, a survey and valuation of any of the parishes, townships or places, or any parts thereof, in respect of or relating to which any such appeal shall be made, and to fix the next or some subsequent session for receiving such survey and valuation, and for hearing and determining the said appeal, and such court shall also thereupon appoint a proper person or persons to make such survey and valuation; and the person or persons so appointed shall for that purpose have full power, with or without assistants, to

enter upon, view and examine, survey, measure and value all and any lands, houses and property liable to be assessed toward the county rate within the parishes, townships and places mentioned in such order; and such survey and valuation shall be reported to the quarter session, or adjournment, fixed as aforesaid for receiving the same; and the court then and there assembled shall hear and determine the said appeal in the manner hereinbefore set forth.

Appeal against the Basis or Standard.

By 15 & 16 Vict. c. 81, s. 19, the charges and expenses of and attending any survey and valuation ordered to be made by any court of quarter sessions in such appeal as aforesaid shall be deemed costs in such appeal, and abide the event thereof; and the court before which any such appeal is heard and determined may order the costs in and about such appeal to be paid by either party, appellant or respondent, as they in their discretion may think fit; but where any appeal is made on the ground that any parish, township or place is rated on a sum beyond the full and fair annual value of the property therein, if the court before which such appeal is heard determine in favour of the appellants, such court shall ascertain the costs and charges incurred by such appellants in and about such appeal, and shall order the treasurer of the county rates to pay the same to such appellants out of the public stock of the county in his hands.

Sessions to determine costs of appeal and of valuation ordered by sessions.

By sect. 20, although no appeal shall be made as aforesaid, it shall be competent to any committee appointed as hereinbefore provided, and upon being so required by the court of general or quarter sessions, from time to time to revise any such basis or standard for a county rate being then in force in any county, for the purpose of meeting any partial changes that may have occurred in the rateable value of portions of the property liable to be assessed, and to call for information, and to exercise all the powers hereinbefore authorized, and if, after due inquiry and investigation, it shall seem fit to such committee to alter such basis or standard, they shall forthwith give notice in writing of such alteration to any parish or place whose basis or standard they propose to alter, whether by diminishing or increasing it, and shall, upon some day to be named in such notice, hear and decide upon any objection that may be made by any person on behalf of such parish or place; and upon the decision of such committee as aforesaid to alter such basis or standard, they shall report such alteration to the next or some subsequent general or quarter sessions, having given to each parish or place whose basis or standard is altered by such report notice thereof in writing not less than ten days previous to such sessions, and the justices assembled thereat, after hearing the objections, if any, that may be made by any person duly authorized to represent any such parish or place, may make such order as to them shall appear just, for ascertaining and deciding upon such proposed alteration, and any order so made shall be binding upon all parties concerned.

Committee may revise basis or rate from time to time.

By sect. 21, from and after the passing of this act, it shall be

Justices in

Of the County Rate.

general or quarter sessions to make a fair and equal county rate, whenever circumstances appear to require it.

lawful for the justices of the peace of the several counties or divisions of counties in England and Wales, assembled at their general or quarter sessions, or at any adjournment or adjournments thereof, and they are hereby authorized and empowered whenever circumstances shall appear to require it, to order and direct a fair and equal county rate to be made, for all the purposes to which the county stock or rate is now or shall hereafter be made liable by law, according to the basis or standard for the time being in force in such county or division of a county; and for that purpose to assess and tax every parish, township and other place, whether parochial or extra-parochial, within the respective limits of their commissions, or within such divisions, rateably and equally, according to a certain pound rate (to be from time to time fixed and publicly declared by such justices), upon the basis or standard hereinbefore mentioned, of the full and fair annual value of the property, messuages, lands, tenements and hereditaments rateable to the relief of the poor therein, or which in any place not maintaining its poor would be liable to be rated for the relief of the poor if the said last-mentioned place were a parish, any law or statute to the contrary thereof notwithstanding; and the justices of the peace shall in all cases where the same may be necessary appoint proper persons within such extra-parochial or other places for the assessing, taxing and rating such extra-parochial property, messuages, lands, tenements and hereditaments, and levying, collecting, and paying over such assessment, taxes or rates.

See *ante*, Chapter IV., Sections 3, 4, 5, pp. 818 *et seq.*, as to what property is rateable to the relief of the poor.

Tenants in ancient demesne not exempt from the rate.

Tenants of a manor in ancient demesne are not exempt by reason of their tenure (*e*). Land rated under the above section is to be deemed rated to a parliamentary and parochial tax and assessment within the meaning of a canal company's act with respect to the rating of lands taken for the canal (*f*).

Parishes, &c. aggrieved may appeal.

By 15 & 16 Vict. c. 81, s. 22, if the churchwarden or churchwardens, overseer or overseers of the poor, or other inhabitant or inhabitants of any parish, township or place, whether parochial or otherwise, where there is no churchwarden or overseer, or person appointed to act as such, shall at any time thereafter have reason to think that such parish, township or place is aggrieved by any rate or assessment now existing, or hereafter to be made upon the basis or standard hereinbefore mentioned, either in pursuance of this act or of any act or acts now in force, whether it be on account of the proportions assessed upon the respective parishes, townships or places being unequal, or on account of some one or more of them being without sufficient cause omitted altogether from the rate, or on account of such parish, township or place

(*e*) *Reg.* v. *Aylesford* (*Inh.*), 29 L. J., M. C. 87.

(*f*) *Reg.* v. *Aylesbury*, 9 Q. B. 261; *Grand Junction Canal* v. *Overseers of Hemel Hempstead*, 40 L. J., M. C. 25; L. R., 6 Q. B. 173.

Appeal against the Rate.

being rated at a higher proportion of the pound sterling according to the fair annual value of the rateable property therein, or on account of some other parish or parishes, township or townships, place or places being rated at a lower proportion of the pound sterling according to the fair annual value of the rateable property therein than has been fixed and declared by the justices of the peace of the said county in sessions assembled as the basis of the rate of the said county, or on account of the altered state of the value of the property assessed, or any part thereof, or shall have any other just cause of complaint whatsoever, it shall be lawful for such churchwarden or churchwardens, overseer or overseers of the poor, or other inhabitant or inhabitants where there is no churchwarden or overseer, or person appointed to act as such, to appeal to the justices of the peace for the county at the next quarter sessions of the peace after such cause of appeal shall have arisen, against such part of the rate only as may affect the parish or parishes, township or townships, place or places which are unequally rated, or which shall appear to be over-rated or under-rated, or omitted altogether from the rate: provided always, that fourteen clear days' notice in writing previous to the first day of such last-mentioned quarter sessions shall be given by the parties intending to appeal to the parties against whose rate the appeal is to be made, also to the clerk of the peace of the county, and the hundred constable, of the grounds of such appeal and the intention to try such appeal at such quarter sessions of the peace; and the said justices are hereby empowered to hear and finally determine the same, and either to confirm such parts of the rate as have been appealed against, or to correct such inequalities, disproportions or omissions as shall be proved to exist therein, as well in respect of the basis or standard as in the assessment of the rate made thereon, in such manner as to them the said justices shall appear fair, just and equitable, anything in this act, or any former act or acts, or any law, usage or custom, to the contrary thereof notwithstanding: provided nevertheless, that upon such appeal no such rate shall be quashed or destroyed in regard to any other parish, township or place, unless in cases where the justices of the peace of any county in quarter sessions assembled, or the major part of them, shall deem it necessary to proceed to the making of an entire new rate, and shall proceed therein, according to the provisions of this act.

Grounds of appeal against a county rate.

Notice of appeal.

Judgment of the sessions on appeal.

The party appealing under this section must show that the appellant parish, township or place is rated in a higher proportion with reference to some other parish than it ought to be (*g*).

By 15 & 16 Vict. c. 81, s. 23, from and after the passing of this act, the county rate or rates made upon any parish, township or place (whether extra-parochial or otherwise) shall be paid, and

Rate to be raised, notwithstanding appeals, until

(*g*) *R.* v. *Westmoreland*, 10 B. & C. 226.

Of the County Rate.

determination of justices.

57 Geo. 3, c. 94, s. 2. In case justices order rate to be set aside, decreased or lowered;

Money paid subsequent to the time of appeal to be returned out of the general county rate.

shall and may be levied, recovered and received, notwithstanding any appeal or appeals may have been made to the quarter sessions of the peace against any such rate or rates, and such rate or rates shall continue to be raised, levied and received until the decision of the justices shall be made upon such appeal or appeals: provided always, that if upon the hearing of any such appeal or appeals the court of quarter sessions of the peace shall order any rate or assessment to be set aside, decreased or lowered, and it shall appear to the said court that any parish, township or place have or hath, previously to the determination of such appeal or appeals, paid any sum or sums of money in consequence of such rates or assessments which ought not to have been paid or charged therein, then and in every such case the said court shall order such proportion of such sum or sums of money as shall have been so paid by any person or persons, parish, township or place, subsequently to the notice which shall have been given of such last-mentioned appeal or appeals, to be repaid and returned to the person or persons, parish, township or place which have or hath paid the same respectively, out of the general rate of the county in which the cause of appeal shall have arisen.

Expenses of appeals or proceedings at law shall be paid in such proportions as the justices or courts of law shall award.

By 15 & 16 Vict. c. 81, s. 24, save as hereinbefore otherwise provided, in case of any appeals, actions, suits or proceedings at law respecting anything done in pursuance of this act, or any other act or acts relating to the county rate, the expenses of all such appeals, actions, suits or proceedings at law shall be borne and paid by such respective parishes, townships, places and persons, or such of them, and in such proportions, as the said justices shall, as they are hereby authorized to do, upon any appeal, in their quarter sessions award and order, or as such courts wherein such actions, suits or proceedings shall be instituted shall, as they are hereby authorized to do, adjudge and order.

Costs may be awarded upon notices of appeal not prosecuted.

By sect. 25, and for the more effectual preventing of frivolous appeals, be it enacted, that the justices of the peace in their quarter sessions assembled, upon proof before them there to be made of notice of any appeal having been given as hereinbefore authorized by any churchwarden or churchwardens, overseer or overseers, or other person or persons (though he or they did not afterwards prosecute such appeal), shall and may at the same sessions award and order to the party to whom such notice shall appear to have been given, such costs and charges as by the said justices in their discretion shall be thought reasonable and just to be paid by the churchwardens, overseers or any other person by whom such notice shall have been given.

By sect. 31, whereas there are several parishes, townships, hamlets and places situated in and extending into two or more counties, ridings or divisions having separate and distinct commissions of the peace, part of such parishes, townships, hamlets and other places being situated in one county, riding or

Of Levying the Rate.

division, and other part or parts thereof in another county or other counties, riding or ridings, division or divisions, and the messuages, lands, tenements and hereditaments situated in such parishes, townships, hamlets or other places are rateable to the relief of the poor therein, and to the county rates of the respective counties, ridings or divisions in which such messuages, lands, tenements and hereditaments are respectively situated, but the constables, churchwardens and overseers are appointed for the whole of such parishes, townships, hamlets or places, and it frequently happens that such constables, churchwardens and overseers are resident in one division of such parishes, townships, hamlets or other places, and that there are no constables, churchwardens or overseers residing in the other division thereof, or within the limits of the jurisdiction of the justices making such county rate or rates, whereby considerable difficulties have in such cases arisen in raising the county rates in such divisions: for remedy whereof, be it enacted, that from and after the passing of this act all and every the powers and provisions, clauses, pains, penalties and forfeitures, given, granted, provided, made or imposed by this act, shall extend, and be deemed, construed, and taken to extend, to all cases and places as aforesaid where there are no separate churchwardens or overseers of the poor, or where no separate or distinct rate is made and collected for the relief of the poor of any such division or part of any parish, township or place situated in and extending to two or more counties, ridings or divisions as aforesaid; and that all and every the constables, churchwardens and overseers of any such parishes, townships, hamlets or other places as are situated in and extend into two or more counties, ridings or divisions having separate and distinct commissions of the peace as aforesaid, shall be subject to the precepts, warrants, orders and directions of the several justices of the peace for the respective divisions or parts of such parishes, townships, hamlets or other places, so far as the same may relate to the making of the returns hereinbefore required, and the assessing, levying and collecting of the proportion of the county rate for such respective divisions or parts of such parishes, townships, hamlets or other places, or otherwise to the execution of this act, within the parts of such parishes, townships, hamlets or other places as shall be situated within the limits of the jurisdiction of the justices making and issuing such precepts, orders, warrants and directions, and shall be subject to the same fines, penalties and forfeitures for neglect and disobedience of the precepts, warrants, orders and directions of such justices, so far as the same shall relate to the matters aforesaid or any of them, or otherwise to the execution of this act as such constables, churchwardens and overseers, or other officers would by the laws now in force be subject and liable to if such constables, churchwardens, overseers or other officers had resided within the limits of the jurisdiction of the justices making and issuing such precepts, warrants, orders and

Where parishes, &c. extend into two or more counties.

Powers of act to extend to places where there are no separate churchwardens, &c., or where no separate or distinct poor rate is made for any place extending into two or more counties, &c.

Of the County Rate.

directions: provided always, that nothing herein contained shall extend, or be construed, deemed, or taken to extend, to authorize any justice or justices of the peace to act in the cases aforesaid or any of them beyond the limits of the jurisdiction within which he or they shall be generally appointed and authorized to act as such justices.

Justices not to act beyond their jurisdiction.

The overseers of parishes situated partly within boroughs and partly without to collect the county rates leviable on the part of the parish not comprised within the borough.

By 15 & 16 Vict. c. 81, s. 32, that where any parish or place separately maintaining its own poor shall be divided, so that a part is comprised in a borough not subject to contribute to the county rate, while the part out of the borough is liable to contribute thereto, and any county rate shall be assessable upon the part of the parish or place which is comprised within the county and excluded from the borough, the overseers of such parish or place shall, on receipt of any precept or other lawful demand from the justices of the county, or other due authority in that behalf, demanding the payment of any sum of money as the contribution of the part of such parish or place out of the borough towards any such rate as aforesaid, with all convenient speed assess the sum so required upon the persons liable within such part of the parish or place to pay the poor rate therein, by means of a separate rate, to be made, allowed and published in like manner as the poor rate, and either by themselves or by the collector of poor rates for the time being appointed for the said parish or place shall collect the same separately or with the poor rate payable by the parties assessed thereto, and for the purposes of assessing and collecting the same shall have all such powers, authorities, privileges, protections and incidents as belong to them in the assessing and collection of the poor rate; and all provisions of the law for enforcing the collection of the poor rate, and recovering the costs of the proceedings therein, shall be applicable to the collection of the rate or rates herein last above mentioned and provided for.

Where a parish was situate partly within the limits of a borough or town not exempt from contribution to the county rate, but governed by a local act of parliament, the quota of the parish towards the county police rate must be paid out of the general funds of the whole parish, although the part within the limits also contributes to the borough police, and they alone act within those limits (*h*).

Appeal against the rate, and audit of the accounts.

By sect. 33, that any person assessed to any rate made under the authority of the provisions last hereinbefore contained may appeal against the same, in like manner, and with the like consequences in all respects, and subject to the same provisions and regulations, as in appeals against the poor rate; and that every overseer and collector shall account for the money levied, collected and expended under the authority of this act to the auditor of the district comprising such parish or place, in like

(*h*) *Reg.* v. *Overseers of Huddersfield*, 31 L. J., M. C. 131; 1 B. & S. 961.

manner as for the poor rate, and if any balance be found to be in his hands shall apply the same towards the next county rate required for the like purpose of this act, or shall pay the same to his successor in office; and in default of his so applying the same while in office, or making payment to his successor within seven days after the balance shall have been found, such auditor shall proceed to recover the same from the person holding the same, in like manner as sums certified by him to be due from persons accounting shall from time to time be recoverable, and he shall be paid his costs and expenses, when not recovered from the defendant, by the then overseers of the parish or place, who shall be reimbursed out of the balance of such rate, or, if need be, out of the next rate.

Appeal against the Rate.

By 15 & 16 Vict. c. 81, s. 47, and whereas several acts have passed and are now in force empowering the justices of the peace of certain counties to make fair and equal county rates within their respective counties; be it hereby enacted, that it shall and may be lawful to and for the said justices respectively, and they are thereby empowered, at any time and at all times after the passing of this act, to proceed in the assessing, levying and collecting and enforcing the payment of the county rate, and in all matters relating to the equalizing the same, either under the authority and according to the provisions and enactments of this act, or under the authority and according to the provisions and enactments of the particular acts affecting their respective counties, as to them shall seem fit and proper, in all cases in which the provisions and enactments of this act are not inconsistent with the provisions and enactments of such particular acts.

Counties where rates have been regulated by particular acts authorized to make use of the provisions of this act.

By sect. 48, that from and after the passing of this act all business appertaining to the assessment, application or management of the county stock or rate, or of any fund or funds used or applied in aid thereof or contributory thereto, or to any matter or things whereby or in respect whereof the said county stock or rate is or may be chargeable by law, which by any statute or statutes now in force the justices of the peace for that part of Great Britain called England are authorized and directed to do and transact at the general or quarter sessions, or at any adjournment thereof, shall be done and transacted publicly and in open court at such general or quarter sessions, or adjournment thereof, and not otherwise; and that no order of such justices relating to the matters aforesaid shall be binding or effectual unless the said order shall have been made and the business relating thereto shall have been done and transacted publicly and in open court as aforesaid.

All business relating to the assessment and application of county rate shall be transacted in open court.

No ratepayer or person other than a member of the court is entitled in any way to interfere with the jurisdiction of the justices, or to take any part in the proceedings (*i*).

(*i*) *R.* v. *Justices of Nottingham*, 3 A. & E. 500.

Of the County Rate.

Notice thereof to be given.

By 15 & 16 Vict. c. 81, s. 49, that public notice shall be given, in two newspapers generally circulating in the county, of the time of holding the general or quarter sessions, or any adjournment thereof, at least two weeks before the time of holding the same, and also of the day and hour at which the business relating to the assessment, application or management of the county stock or rate will commence at such sessions.

The act extended to all places having separate commission of the peace, and to all rates of the nature of county rates.

By sect. 51, in the construction of this act the word "county" shall mean and include any riding or division having a separate commission of the peace or separate county treasurer, and any liberty, franchise or other place in which rates in the nature of county rates may be levied, having a separate commission of the peace, and not subject to the jurisdiction of the county or counties at large in which such liberty, franchise or place may lie, nor contributing or paying to the county rates made for such county or counties at large; and that the words "county rate" shall mean and include every rate or tax assessed in any county or any division of a county as aforesaid for all or any of the purposes to which county rate or stock is or may hereafter be made liable.

A liberty, franchise or place has a separate commission of the peace, as well where its justices have a general commission, as where they have a permanent commission under a charter giving a corporate jurisdiction to the borough, as the borough of Derby was held to have under its charter (*k*). Boroughs which have a separate commission of the peace, with a non-intromittant clause as to the county justices, and levy their own county rates, are within the above definition (*l*); but, in the absence of such a non-intromittant clause, are subject to the county justices' rate (*m*); and so a town made into a county of a city is a county for the above purpose (*n*), and a liberty may be within the section though it may lie without the body of an English county (*o*).

See further, as to boroughs contributing to the county rate, 5 & 6 Will. 4, c. 76, ss. 108, 111, 112, and 12 & 13 Vict. c. 82.

Counties divided into divisions.

By 21 & 22 Vict. c. 33, s. 1, in any county having one commission of the peace, and being divided into separate divisions, having each a separate county treasurer, the provisions of the act 15 & 16 Vict. c. 81, for the purpose of preparing the basis or standard as aforesaid, may be taken and considered to apply to the whole of such county generally, and not to separate divisions thereof particularly, notwithstanding any provision contained in the 51st section of the said act.

(*k*) *Weatherhead* v. *Drewry*, 11 East, 168.

(*l*) *Weatherhead* v. *Drewry*, *ubi sup.*; *Mercer* v. *Davis*, 10 B. & C. 617; *R.* v. *Shepherd*, 2 A. & E. 298; *Reg.* v. *Mayor, &c. of East Looe*, 31 L. J., M. C. 245.

(*m*) *Were* v. *Clerk of the Peace of Devon*, 34 L. J., M. C. 47; 6 B. & S. 7; *R.* v. *Hayward*, 6 A. & E. 590.

(*n*) *James* v. *Green*, 6 T. R. 228.

(*o*) *R.* v. *Berwick-on-Tweed*, 8 B. & C. 327.

Of Counties divided into separate Divisions.

By sect. 2, the justices of such divisions shall, nevertheless, at their general or quarter sessions of the peace, or at any adjournments thereof, raise all county rates and administer all disbursement thereout in respect of expenses incurred in and for such divisions in like manner as they may have heretofore been accustomed to raise and administer the same in such divisions: provided always, that the justices usually acting in two or more of such divisions may, if they shall think fit, at any general or quarter sessions of the peace to be held in each of such divisions by an order of such several sessions, agree to raise and administer such disbursements jointly, and such divisions shall, on and after the making of such orders as aforesaid, be considered for the purposes aforesaid as one division only, and not separate divisions: provided also, that any sum heretofore levied, or which may be levied hereafter, for expenses incurred generally for the whole of any such county, shall be levied and paid by the divisions of such county, in proportion to the total assessment of such divisions respectively, as ascertained by the basis or standard aforesaid.

Construction of the words "parish," "union," "guardians."

By 15 & 16 Vict. c. 81, s. 52, the word "parish" shall be construed to include any township, vill or other place maintaining its own poor, whether parochial or extra-parochial, or any part of a parish, township, vill or other place for which a separate poor rate may be made; the word "union" shall be construed to mean and include any number of parishes united under the act passed in the fifth year of the reign of his late Majesty King William the Fourth, "for the Amendment and better Administration of the Laws relating to the Poor in England," or under an act passed in the twenty-second year of the reign of his late Majesty King George the Third, "for the better Relief and Employment of the Poor," or under any local act; and the word "guardians" shall mean and include any board of guardians acting under the provisions of the said act passed in the fifth year of his late Majesty King William the Fourth, and empowered to relieve the poor of any parish or union, and the visitors, guardians, directors, managers, acting guardians, vestrymen or other officers in a union appointed to act in the ordering of relief of the poor from the poor rate under any general or local act of parliament; and the word "hundred" shall mean and include any hundred, wapentake, ward or other district in the nature of a hundred, by whatever name denominated.

Questions as to what are legitimate charges upon the county rate are not the subject of appeal, and therefore do not come within the scope of this chapter, but arise upon the allowance or disallowance of items in the treasurer's accounts, under sect. 50, which may be made the subject of a *certiorari* in the Queen's Bench (*p*). Such subjects are treated on in Burn's Justice, 30th ed., vol. 1, tit. "County Rate."

(*p*) See *Reg.* v. *Saunders*, 3 E. & B. 763; 24 L. J., M. C. 45.

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